APPEAL NO. 041596
FILED AUGUST 23, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 26, 2004. The hearing officer determined that the appellant (claimant) did not sustain a compensable mental trauma injury on or about _____, and that she therefore did not have disability. The claimant appealed, asserting that the hearing officer applied the wrong legal standard, that the hearing officer committed evidentiary error in admitting some of the respondent's (carrier) evidence, and that the hearing officer's decision and order is against the great weight of the evidence. The carrier responded, asserting that the claimant's appeal is untimely, and otherwise seeking affirmance.

DECISION

Affirmed.

The carrier asserts that the claimant's appeal is untimely. A written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision, excluding Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code. Section 410.202(a) and (d). Texas Workers' Compensation Commission (Commission) records indicate that the decision and order was mailed to the parties on June 9, 2004, and therefore was deemed to have been received by the claimant on June 14, 2004. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 102.5(d) (Rule 102.5(d)). Rule 143.3(c) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. The last date for the claimant to timely file an appeal was July 5, 2004. The claimant's appeal is post marked July 2, 2004, and stamped as received by the Chief Clerk of Proceedings on July 6, 2004. The appeal is, therefore, timely.

The claimant asserts that the hearing officer erred in admitting Carrier's Exhibit H and allowing the testimony of one of its witnesses because neither the exhibit nor the identity of the witness in question were timely exchanged and because the admission of the complained-of evidence caused the rendition of an improper decision. To obtain a reversal for the admission of evidence, the appellant must demonstrate that the evidence was actually erroneously admitted and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In the present case, after listening to the

arguments of the parties, the hearing officer found good cause for the late exchange. Under the facts of this case, the hearing officer's admission of the complained-of evidence does not constitute reversible error.

The claimant next asserts that the hearing officer applied the wrong legal standard in deciding this matter. The claimant asserts that the hearing officer incorrectly applied a "reasonable person" standard as opposed to the proper "reasonable medical probability" standard. While we note that the hearing officer did comment that "under the objective 'reasonable person' standard, the facts established here do not support a finding of mental trauma-induced injury." However, that being said, the hearing officer also commented that the "police investigator concluded that the assault allegation was unfounded. The preponderance of the credible evidence here is to the same effect" and that the "claimant attempted to mitigate the effect of the contrary evidence to some extent, emphasizing that she was testifying to the event 'as she saw it' and arguing that her subjective perception is the controlling factor. Even under that standard, the evidence is not persuasive that the claimant in reality viewed the interchange with [the alleged assailant] as the terrifying event she now claims." In view of the evidence presented and the hearing officer's lengthy discussion of the same, we cannot conclude that the hearing officer held the claimant to an improper burden of proof.

What remains is a sufficiency of the evidence appeal. The claimant had the burden to prove that she sustained a compensable injury and had disability. There is conflicting evidence in this case. The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The finder of fact may believe that the claimant has an injury, but disbelieve that the injury occurred at work as claimed. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A fact finder is not bound by medical evidence where the credibility of that evidence is manifestly dependent upon the credibility of the information imparted to the doctor by the claimant. Rowland v. Standard Fire Ins. Co., 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. Our review of the record reveals that the hearing officer's injury and disability determinations are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Thus, no sound basis exists for us to disturb those determinations on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Margaret L. Turner
Appeals Judge