APPEAL NO. 050031-s
FILED MARCH 3, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 29, 2004. With regard to (Docket No. 1), the hearing officer determined that the appellant (claimant) did not have disability as a result of the injury of (date of injury No. 1), from January 9, 2004, through the date of the CCH; that the first certification of maximum medical improvement (MMI) and impairment rating (IR) from (Dr. H) on January 28, 2004, became final under Section 408.123; and that the injury of (date of injury No. 1), does not extend to include a lumbar strain/sprain after (date of injury No. 2). With regard to (Docket No. 2), the hearing officer determined that the claimant did not sustain a compensable injury on (date of injury No. 2), and that the claimant did not have disability, as he did not sustain a compensable injury. The claimant appealed, disputing the determinations of the hearing officer with regards to both Docket No. 1 and Docket No. 2. The appeal file did not contain a response from the respondent (carrier).

DECISION

Affirmed in part and reversed and rendered in part.

DOCKET No. 1

The parties stipulated that the claimant sustained a compensable injury on (date of injury No. 1). At issue was whether the compensable injury included a lumbar strain/sprain after (date of injury No. 2), and whether the claimant had disability. We have held that the questions of disability and extent of injury are questions of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so

contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was simply conflicting evidence on the issues of disability and extent of injury, and it was within the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's extent-of-injury and disability determinations were sufficiently supported by the evidence in the record. We note however, that the claimant is entitled to lifetime medical benefits, pursuant to Section 408.021, which are defined as "all health care reasonably required by the nature of the injury as and when needed."

The parties stipulated that Dr. H was qualified to give the MMI and IR opinion that he gave on January 28, 2004. The claimant indicates in his appeal disagreement with this stipulation because he contends the opinion was not given on January 28, 2004. Section 410.166 provides that an oral stipulation or agreement of the parties that is preserved in the record is final and binding. Further, the Report of Medical Evaluation (TWCC-69) in evidence signed by Dr. H reflects that the date of Dr. H's certification of MMI and IR was January 28, 2004. Dr. H certified that the claimant reached clinical MMI on January 28, 2004, and that he did not have any permanent impairment as a result of the compensable injury.

Section 408.123(d) states that:

> Except as provided in Subsections (e), (f), and (g), the first valid certification of [MMI] and the first valid assignment of [IR] to an employee are final if the certification of [MMI] and/or the assigned [IR] is not disputed within 90 days after written notification of the [MMI] and/or assignment of [IR] is provided to the claimant and the carrier by verifiable means.

The carrier provided evidence at the hearing that the Notification Regarding [MMI] and/or [IR] (TWCC-28) of Dr. H's certification was mailed to the claimant on March 10, 2004, by certified mail with return receipt requested. The TWCC-28 reflected that Dr. H's MMI/IR TWCC-69 was attached. The evidence indicated that the certified letter was returned to the carrier because it was never picked up by the claimant. The claimant testified that he first learned of Dr. H's certification of MMI and IR on August 17, 2004, and disputed the certification on that date. He further testified that he never picked up the certified mail because he had no notice that it was there. However, the hearing officer was not persuaded by the claimant's testimony and specifically found that the claimant refused to pick up the letter containing notice of Dr. H's report.

In Texas Workers' Compensation Commission Appeal No. 042163-s, decided October 21, 2004, the Appeals Panel discussed whether the deemed receipt provision of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.4 (Rule 102.4) was applicable and what is meant by "verifiable means." Texas Workers' Compensation Commission Appeal No. 041985-s, decided September 28, 2004, and Appeal No. 042163-s, *supra*,

both reference the preamble to Rule 130.12. The preamble provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification."

The preamble goes on to state:

> Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. This may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile, or some other confirmed delivery to the home or business address. The goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex Reg 2331, March 5, 2004.

The preamble further stated that a party may not prevent verifiable delivery and specifically provided that a party who refuses to take personal delivery or certified mail has still been given verifiable written notice. When the notice was provided/delivered to the claimant presented a question of fact for the hearing officer to resolve. Appeal No. 042163-s, *supra*. The hearing officer found that the claimant did not dispute Dr. H's report within 90 days of March 11, 2004. However, in the instant case, there was no evidence as to what date the notifications to the claimant of the certified mail were delivered, nor was there any indication of the date the certified mail was returned to the carrier. The green card which indicated that it was sent to the claimant on March 10, 2004, at his correct address and identified the contents as the TWCC-28 was in evidence and has the word "Returned" written across it but no date of its return is indicated. No further evidence was presented by the carrier to show the dates of attempted delivery by the post office. The carrier's attorney in his opening argument indicated that the postal service did not provide the date of the return of the certified mail but claimed to have a document "from the computer" which showed the certified mail was returned to "(city) [carrier's office] on April 8." However, no such document was presented as evidence at the CCH. Under these circumstances we cannot agree that the 90 day time period begins after the date it was mailed as found by the hearing officer. Since the carrier failed to provide evidence of a date certain, sufficient to begin the 90 day period of Section 408.123(d) and Rule 130.12, the hearing officer's determination that the first certification of MMI and IR from Dr. H on January 28, 2004, became final under Section 408.123 is in error. We reverse the determination that the first certification of MMI and IR from Dr. H on January 28, 2004, became final under Section 408.123 and render a determination that the first certification of MMI and IR from Dr. H on January 28, 2004, did not become final under Section 408.123.

DOCKET No. 2

Whether or not the claimant sustained a compensable injury on (date of injury No. 2), presented a question of fact for the hearing officer to resolve. The hearing officer was not persuaded that the claimant sustained his burden of proving that he sustained an injury on (date of injury No. 2), as he claimed. Nothing in our review of the record reveals that her determination in that regard is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain, *supra*. Given our affirmance of the determination that the claimant did not sustain a compensable injury, the hearing officer did not err in determining that the claimant did not have disability in that, by definition, the existence of disability is dependent upon the existence of a compensable injury. Section 401.011(16).

We affirm the hearing officer's determinations that the claimant did not have disability as a result of the injury of (date of injury No. 1), from January 9, 2004, through November 29, 2004; that the injury of (date of injury No. 1), does not extend to include a lumbar sprain/strain after (date of injury No. 2); that the claimant did not sustain a compensable injury on (date of injury No. 2); and that the claimant did not have disability as he did not sustain a compensable injury on (date of injury No. 2). We reverse the hearing officer's determination that the first certification of MMI and IR from Dr. H on January 28, 2004, became final under Section 408.123, and render a determination that the first certification of MMI and IR from Dr. H on January 28, 2004, did not become final under Section 408.123.

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

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Veronica L. Ruberto
Appeals Judge