APPEAL NO. 94355

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 19, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, disability and average weekly wage (AWW). The parties stipulated that the AWW was $313.34. The hearing officer ruled that the respondent (claimant herein) was injured in the course and scope of his employment on (date of injury), and that this injury resulted in disability from February 18, 1993, through November 12, 1993. The appellant (carrier herein) files a request for review disputing the ruling of the hearing officer as to injury and disability. The claimant does not respond.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The hearing officer provided a detailed discussion of the facts of this case in his decision, and we adopt his statement of evidence herein. To briefly summarize the facts, the claimant was employed by (employer) to drive a truck and collect garbage on a residential route. It is undisputed that the claimant suffered a compensable back injury on (date of injury). The claimant returned to work on February 15, 1993, and alleged that on (date of injury), while lifting a roll of chain link fencing, weighing approximately 100 pounds, he sustained a second back injury. The claimant's position was that the (date of injury), incident constituted an aggravation of his previous condition; the carrier asserted that it was merely a continuation of his (previous date of injury).

Medical reports were introduced into evidence from (Dr. S) and (Dr. T). Both Dr. S and Dr. T expressed the opinion that claimant aggravated his pre-existing condition on (date of injury). Dr. T stated in part in a letter dated March 1, 1993, as follows:

> I think that the likelihood of him being able to return to the same sort of work that he has been doing in the past is not great. If he could be retrained for something in which he did not have to do twisting in the lumbar spine, I think he would be able to do that work. He is well motivated and is anxious to return to full-time work.

There is not any indication that either Dr. T or Dr. S ever released the claimant to return to his previous employment, although Dr. S did certify that on October 12, 1993, the claimant reached maximum medical impairment with zero impairment. The carrier introduced a video tape (surveillance film) of the claimant coaching a boys' basketball team and playing basketball in a practice session on March 13, 1993.

The carrier requested the record be left open so that it could provide a copy of the surveillance film to Dr. S and Dr. T and so that it could take their deposition on written

questions. The hearing officer granted this request. The carrier's attorney wrote to the hearing officer on February 28, 1994, stating as follows:

> Pursuant to our telephone conversation of this date, I have consulted with the carrier through their representative, DB. He is in agreement that since [Dr. S] and [Dr. T] have refused to view the videotape under any circumstances, and have refused to answer the written questions without advance payment, it is best that we close the record on this case and proceed from there.

The question of injury is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case 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 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, the carrier argues that the surveillance film alone shows that the claimant was not injured. The hearing officer viewed the film and still found injury. Injury may be established by the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Here the claimant's testimony as to injury is supported by the medical evidence. Applying the standard of appellate review above we cannot say that the findings of the hearing officer as to injury were against the overwhelming weight of the evidence.

As to disability, the carrier contends that the surveillance film shows that the claimant's disability had ended by the date of the film, that there was a gap between March and August in the claimant's medical treatment, and that the claimant admitted he was able to work at some types of activity. Again, the hearing officer, who, as pointed out above, is the fact finder, was not convinced that the surveillance film negated disability. Nor does the film show necessarily that the claimant could return to his prior job duties and it certainly

does not indicate he could obtain or retain employment. The carrier has not cited any authority to us for the proposition that a five-month gap in medical treatment precludes a finding of disability as a matter of law, and we are not aware of any such authority. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. In the present case, the claimant, as well as the medical evidence indicated significant doubt that the claimant was able to return to his previous employment. The carrier seems to contend that the surveillance film proves that the claimant was not restricted or contradicts the restrictions he claims. This is a matter for the fact finder, and under the standard of appellate review discussed above, we are compelled to defer to him.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge