APPEAL NO. 990139

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 December 11, 1998. The issue at the CCH was whether the respondent (claimant herein) sustained a compensable injury on _____. The hearing officer concluded that the claimant did. The appellant (carrier herein) files a request for review contending that this determination was contrary to the evidence. The claimant responds that there is sufficient evidence to support the hearing officer's finding of a compensable injury.

DECISION

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

The hearing officer summarized the evidence as follows in his decision:

> Claimant asserts that he injured his low back as a result of lifting a tarpaulin over the load of lumber he was hauling on _____. Testimony was taken from both sides regarding the weight, type and condition of the tarpaulin Claimant was using; however, taking the lightest weight possible, it was of sufficient weight and bulk to have caused the back injury asserted. Testimony was taken from both sides about other work Claimant had done for family members of Claimant and comments that Claimant had made about the other work, but Claimant is persuasive that the tarpaulin lifting incident caused Claimant's back injury which required surgery on somewhat of an emergency basis. Carrier's argument that no incident occurred is not convincing.

The carrier challenges the following Finding of Fact and Conclusion of Law in the hearing officer's decision:

FINDING OF FACT

2. On _____, Claimant injured his low back as a result of lifting a tarpaulin while hauling lumber for Employer.

CONCLUSION OF LAW

3. On _____, Claimant sustained a compensable injury to his low back.

The question of whether an injury occurred 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).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found an injury. This was supported by both the testimony of the claimant and by medical evidence. While the carrier argues that the claimant's testimony was not credible because it was contradicted by testimony from the carrier's witnesses, it was up to the hearing officer to weigh the credibility of the witnesses. Also on appeal, the carrier points to evidence that the claimant's physical problems predated the injury. We note that it is well-established that to defeat a claim of injury due to a prior injury the burden is on the carrier to establish that the prior injury is the sole cause of the claimant's condition. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). We find no error in the hearing officer's failing to find this given the evidence in this case.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge