

APPEAL NO. 990886

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 March 18, 1999. The issues at the CCH were injury and disability. The hearing officer found that the appellant (claimant) failed to establish an injury through credible testimony or credible evidence and concluded that he did not have disability. The claimant appeals the decision of the hearing officer. The respondent (carrier) replies that the decision of the hearing officer was sufficiently supported by the evidence.

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 summarizes the evidence in her decision and we adopt her rendition of the evidence. We will only briefly set out the evidence directly germane to the appeal. The claimant testified that he worked for the employer as a delivery driver. The claimant testified that on _____, he made three delivery stops. The claimant testified that after the third stop he decided to break for lunch. The claimant deviated from the most direct route back to the employer's place of business and, while doing so, he was involved in a motor vehicle accident. The claimant alleged he suffered an injury as a result of this accident. On April 30, 1998, the claimant saw Dr. D, who diagnosed him with a cervical strain, a lumbar strain and a fracture of the pelvis. Dr. D prescribed a regimen of ultrasound, electrical stimulation, moist heat and massage. Dr. D noted that after a couple of sessions the claimant did not return for further treatment.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

9. Claimant failed to establish through credible testimony or credible evidence that he sustained damage or harm to the physical structure of his body, namely his neck, shoulders, low back as a result of a _____ motor vehicle accident.
10. At no time as a result of a _____ alleged work-related injury, was Claimant unable to obtain and retain employment at wages equivalent to preinjury wages from April 24, 1998 through February 15, 1999.

CONCLUSIONS OF LAW

3. Claimant did not sustain a compensable injury on _____.

4. Claimant did not have disability resulting from the injury allegedly sustained on _____, from April 24, 1998 through February 15, 1999.

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 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 no injury contrary to the testimony of the claimant which she stated, in her opinion, was too incoherent and inconsistent to be credible. While there was medical evidence supporting injury, the medical evidence was limited, and the radiographic studies were negative for fracture. Claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition, disability depends upon a compensable injury. See Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge