APPEAL NO. 991396

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 June 2, 1999. The issues at the CCH were injury and disability. The hearing officer concluded that the appellant (claimant herein) did not sustain a compensable injury on or about _____, and did not have disability. The claimant argues that these determinations were contrary to the evidence. The respondent (carrier herein) replies that the hearing officer's decision 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 summarized the evidence as follows:

> While working for the Employer as a dietary aide on _____, the Claimant, who was six (6) months pregnant, was engaged in the performance of her employment duties of sweeping and mopping. She testified that she felt pain in her lower back which radiated down her legs, and she was forced to sit down. But the pain did not subside, and, after resting for some time, she finally completed her tasks. Later that evening at home, she was unable to rise. She consulted the physicians at [OB-GYN clinic] on December 17, 1999, and the doctor whom she saw determined that she could not work until December 22, 1998, and prescribed Tylenol No. 3 for her pain.
>
> Previously, she had arranged to take several days from work, and this time began after December 22, 1998. Pregnancy complications led to the necessity for a cesarean section which was performed on January 17, 1999. Because her back continued to bother her, the Claimant consulted [Dr. S], D.C. on February 3, 1999, who diagnosed a bilateral muscle strain and prescribed physical therapy. [Dr. A], M.D., a gynecologist with [OB-GYN clinic], stated that the claimant's back problems were not caused by her pregnancy in his report of February 23, 1999. She was released to return to work on April 19, 1999, by her treating obstetrician.
>
> The Carrier's independent medical evaluation done by [Dr. W], M.D. on May 12, 1999, contains the following comments:
>
> > After reviewing the available medical records, I seriously doubt that any injury was sustained by [Claimant] on (alleged date of injury). I feel that her symptoms were probably related to her being five months pregnant. She did not start seeing a chiropractor until February 3, 1999. She does not require

> surgery. There is no way her physician could tell that her back pain had anything to do with the pregnancy. There was apparently no specific accident. She just stated that she hurt it while mopping. Due to the fact that I don't think she sustained an injury, she would have been at mmi on _____ and would have 0% permanent physical impairment.

> The carrier offered the testimony of [Mr. G] and the oral statement of [Mr. W], the Claimant's co-worker and supervisor, respectively. Neither of them were aware of any problems that the Claimant experienced on _____, until she reported the injury. [Mr. G] was working in the kitchen area with the Claimant and stated that she had never complained to him about back pain.

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 no injury contrary to the testimony of the claimant and some medical evidence. It was the province of the hearing officer to decide what weight to give the testimony of the claimant and there was conflicting medical evidence concerning whether the claimant suffered a compensable injury. The claimant had the burden to prove she was injured in the course and scope of her employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Applying this standard,

we cannot say that the hearing officer erred 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).

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge