APPEAL NO. 991673

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 14, 1999, a contested case hearing (CCH) was held. With respect to the issue before him, the hearing officer determined that the appellant (claimant) did not injure his lower back by repetitive trauma in the course and scope of the employment with the employer and that the claimant consequently did not have disability. The hearing officer also found that the claimant timely reported his injury and did not make an election of remedies. The claimant files a request for review, challenging the hearing officer's findings as to injury and disability. The claimant also argues that the hearing officer erred in admitting evidence offered by the respondent (self-insured) that was not timely exchanged with the claimant and was not relevant. The self-insured replies that the hearing officer resolved the factual dispute concerning injury and timely reporting and argues we should affirm his decision. The self-insured further asserts that the claimant failed to preserve any error in regard to the admission of evidence because he made no objection at the CCH to the admission of any of the self-insured's 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 in his decision and order and we adopt his rendition of the evidence. We will briefly summarize the evidence germane to the issues on appeal. This includes the fact that the claimant appeared by telephone and testified that he injured his low back at work by performing heavy work which included lifting books and boxes of books as well as pushing a book cart. On February 25, 1997, the claimant was told that the results of an MRI showed he had a herniated lumbar disc. The claimant presented a letter from Dr. P relating the claimant's back problems to his work, but, in another letter, Dr. P relates the claimant's back problems to degenerative disc disease. The self-insured introduced medical evidence concerning the claimant's prior history of back problems and this evidence was admitted without objection.

We first address the claimant's evidentiary point. As a general rule, where there is no objection to the admission of evidence at the hearing, we will not consider an objection first raised on appeal because any error in admitting the evidence has not been preserved and is waived. *See* Texas Workers' Compensation Commission Appeal No. 950277, decided April 5, 1995. The claimant argues that since he was not personally present at the hearing he was not able to determine that the self-insured had offered evidence it had not previously exchanged and assumed that the self-insured only presented evidence timely exchanged. However, as the self-insured points out, the claimant was assisted by an ombudsman and chose to appear by telephone. We find no basis to allow us to apply different rules of evidence and appeal in a case where a claimant appears by telephone. In light of the fact that an aggravation of a preexisting injury can be the basis of a

compensable injury, we agree that evidence of the claimant's prior back problems are of limited relevance unless the issue is one of sole cause. *See* Texas Workers' Compensation Commission Appeal No. 94217, decided March 31, 1994. However, we find that any error in the admission of the self-insured's evidence was waived because there was no objection.

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. 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. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

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.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Elaine M. Chaney
Appeals Judge