APPEAL NO. 991782

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 8, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that she did not have disability within the meaning of the 1989 Act. In her appeal, the claimant essentially argues that the injury and disability determinations are against the great weight of the evidence. In its response, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The claimant testified that she works as a sales associate in one of the self-insured's department stores and that she has been so employed for over 15 years. She stated that on _____, she was pulling boxes from a stack, that one of them was too heavy, and that when she pulled it, she felt a pop in her left arm, followed by pain. She stated that she reported her injury on the day it occurred and that she was permitted to leave work early because of pain and swelling in her left arm. She testified that she initially continued to work after her injury and thereafter began missing work on March 18 and 19, April 3 to May 24, June 5, and June 25, 1999. The claimant acknowledged that she has had prior compensable injuries to her upper extremities and that she had complained to her doctors about her hands and arms prior to _____. However, she explained that she thought she sustained a new injury on _____ because the pain was in a different location and because she had not previously had swelling up in her arm.

The claimant first sought medical treatment for her alleged _____, injury on March 11, 1999, with Dr. H, with whom she had previously treated for an alleged June 6, 1996, compensable injury. In an Initial Medical Report (TWCC-61) of that date and accompanying progress notes, Dr. H diagnoses tendinitis of the left arm and intersection syndrome. Dr. H acknowledged the claimant's prior injuries and opined that her current injury was a new injury. In a letter of April 28, 1999, Dr. H again opined that the claimant sustained a new work-related injury on _____. Dr. H stated:

> [T]his is a brand new area which is in the dorsum of the left forearm and that was not present at all prior to the injury date of _____ which she described with overuse.
>
> Thus, allowing continuation of the same injury, this is a completely different area, dorsum of the left forearm intersection syndrome.

Similarly, in a "To Whom it May Concern" letter of June 25, 1999, Dr. H opined:

> The injury was legitimate and in the way she explained it. She is consistent with the story of pulling the box down and it was too heavy causing pain on the left forearm. The pain is above the wrist right in the dorsum of the forearm. She has had swelling and pain since the injury with a diagnosis of intersection syndrome. It really has nothing to do with previous carpal tunnel and cubital syndrome in the opposite arm or shoulder tendinitis. It is a separate injury area. I just wanted to make this clear.

The self-insured had Dr. O conduct a records review. In a letter dated July 2, 1999, Dr. O stated:

> Based on the information reviewed, I believe that [claimant's] diagnosis is repetitive overuse syndrome. Her prognosis is guarded at this time. Since 1994, [claimant] has been having problems with her upper extremities due to the type of work activities she does. By the history, it seems that [claimant] has exacerbated her previous condition. It does not seem to be a new injury, but in order to be 100% sure, a new EMG/NCV would be beneficial to determine if there are any significant changes. This would help me determine for certain if this is just an exacerbation of the previous injuries or an aggravation.

The claimant has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury. A review of the hearing officer's decision demonstrates that he simply was not persuaded by the claimant's evidence. He specifically stated that "[t]he Claimant's testimony and the medical evidence do not show Claimant sustained a new compensable injury in the course and scope of her employment on _____." The hearing officer was acting within his province as the fact finder in deciding to reject the claimant's evidence and the evidence from Dr. H that the claimant sustained a new injury to her left arm on

_____. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co.,15 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse that determination on appeal. Although another fact finder could have drawn different inferences from the evidence of record, which would have supported a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge