

APPEAL NO. 00439

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 January 20, 2000, with the record closing on February 3, 2000. She determined that the appellant (claimant) did not sustain a compensable occupational disease injury and there is no period of disability. The claimant appeals, arguing that these determinations were contrary to the evidence. The respondent (carrier) replies that there is sufficient evidence to support the decision of the hearing officer.

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 and the rationale of her decision as follows in the section entitled "Statement of the Evidence":

The evidence showed that the Claimant began working for (employer) at the Apartments in April 1993 as an Assistant Manager. Later, in approximately 1998, she became a Service Coordinator with duties of setting up programs and classes for residents and the community. With both of these positions, the Claimant's work station was located in the management office of the apartment complex. In the office, there was a gas heater located approximately 10 feet from the Claimant's desk. On January 28, 1999, it was discovered that this heater was leaking carbon monoxide. The Claimant asserts herein that several symptoms from which she suffered for at least a year prior to January 28, 1999 were due to the carbon monoxide leak in the workplace.

At the heart of the compensability issue was the question of the causation of the Claimant's condition. The medical evidence, from which the answer must come, does not establish within the realm of reasonable medical probability that the Claimant's symptoms were caused by the carbon monoxide leak at work. This is so for several reasons, including: 1) the evidence does not establish the duration or the amount of the leak; 2) the evidence shows that the Claimant had an abnormally high level of carbon monoxide in her blood in September 1994, and there is no indication that the leak existed during that time frame; 3) medical records in evidence note the Claimant's long-term smoking habit, and they seem to suggest that her decreased smoking in and after March 1999 explains her reduced and normal carbon monoxide level reflected by testing performed in April 1999; and 4) given the Claimant's reduced work schedule in most of 1998, the evidence does not adequately explain the connection between her symptoms and the workplace during that time frame, especially during the periods when she was not at work. For

these reasons, the Claimant did not meet her burden of proof on the compensability and disability issues.

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 was supported by some medical evidence. 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.). 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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge