APPEAL NO. 000628

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 February 29, 2000. The issues at the CCH were whether the appellant (claimant herein) sustained a compensable injury and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury and did not have disability. The claimant appeals, requesting that we reverse the hearing officer=s decision and render a decision in his favor. The respondent (carrier herein) responds, urging affirmance.

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 rationale for her decision as follows in the portion of her decision entitled, "Statement of the Evidence":

> Claimant had the burden to prove by a preponderance of the evidence that he sustained a compensable low back injury on _____ and had resulting disability. Claimant failed to meet his burden of proof. The credible evidence established that Claimant had been having work performance problems, including failing to properly use equipment, failing to follow company policies and procedures, and insubordination, for approximately two years leading to his termination on September 9, 1999. The credible evidence further established that Claimant did not allege a work-related injury until after his termination was made final. There was evidence that established that his representations of the manner in which he sustained his alleged injury was suspiciously similar to a prior work-related injury sustained in 1997. Ultimately, Claimant=s case depended upon his credibility, which was lacking.
>
> Although all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

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

FINDINGS OF FACT

4. Claimant was terminated by his supervisor on September 9, 1999.

5. When he was informed of his termination, Claimant requested that he be given another opportunity, and his supervisor agreed to discuss the matter with [Mr. C].

6. [Mr. C] made the ultimate decision that Claimant would not receive another opportunity and that the termination was final and Claimant was advised of this on September 9, 1999.

7. On September 10, 1999, Claimant returned to Employer and began working at his workstation as if he was still employed.

8. When he was asked to leave, Claimant threatened Employer with legal action and then reported that he had sustained a work-related injury on _____.

1. Claimant did not report a work-related injury to Employer before his termination.

9. On September 10, 1999, Claimant sought chiropractic treatment at [clinic], for back pain suffered as the result of an alleged work-related injury sustained on _____.

10. On September 10, 1999, clinical findings of Claimant=s condition included normal motor function and sensation of his lower extremities, paraspinal muscle spasm, and edema.

11. Claimant provided to the examiner a history of lifting a box of tools, of approximately 70-80 pounds, and feeling low back pain upon setting the box down.

12. A [clinic] Diagnosis Code sheet indicated the following diagnoses of Claimant=s condition: lumbar sprain/strain, sacroiliitis, lumbalgia, lumbago and low back syndrome, and intervertebral disc disorder-lumbar region.

13. On September 16, 1999, Claimant filed his [Employee=s] Notice of Injury [or Occupational Disease] and Claim for Compensation (TWCC-41) form, claiming back injury as a result of moving a box on _____ [sic, 7], and that his first day of missed work was September 9, 1999.

14. On September 21, 1999, [Dr. G], examined Claimant and diagnosed his injuries as nonspecific disc displacement, multiple joint stiffness, and muscle spasm based on clinical findings of positive lumbar joint stiffness, negative straight leg raise, and mild paresthesia to the left hip, without motor deficit.

15. [Dr. G] excused Claimant from work beginning with his initial treatment on September 21, 1999, through January 5, 2000 as a result of his low back complaints.

16. Claimant testified that he had never been advised of poor job performance by any supervisor until the end of his shift, approximately 5:00 p.m., on September 9, 1999.

17. Claimant had been advised of poor job performance at least ten times prior to September 9, 1999, dating back to September 12, 1999, for matters including failure to use proper equipment, failure to adhere to company policies and procedures, and insubordination and creating disturbances in the workplace.

18. Claimant=s description of the manner in which he sustained his alleged injury on _____, is virtually identical to the manner in which it was reported he sustained a work-related injury with this Employer in 1997.

19. A Texas Workforce Commission determination was made that Claimant was fired by Employer due to Claimant=s failure to perform to the

Employer=s standards although he was capable of doing adequate work.

20. Claimant did not sustain a low back injury in the course and scope of his employment on _____.

21. Claimant=s inability to obtain or retain employment at his preinjury wage beginning September 10, 1999 was due to his termination, not due to a low back injury.

CONCLUSIONS OF LAW

2. Claimant did not sustain a compensable injury.

3. Claimant did not have disability.

The claimant in his appeal argues that his testimony as well as medical evidence support that he had an injury and disability. The claimant contends that he reported the injury prior to his termination and argued that reports of poor job performance were based on animosity from his supervisor, as opposed to any actual problems with his job performance. The carrier responds that there was sufficient evidence in the record to support the findings and the decision of the hearing officer.

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 which found some support in the medical evidence. 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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge