APPEAL NO. 000814

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 March 15, 2000. The issues at the CCH were injury, timely report of injury, disability and average weekly wage (AWW). The parties stipulated during the CCH that the appellant's (claimant herein) AWW was $255.10. The hearing officer found that the claimant timely reported her injury and, as neither party has appealed this determination, it has become final under Section 410.169. The hearing officer concluded that the claimant did not suffer a compensable injury and consequently did not have disability. The claimant appeals these conclusions, arguing that the evidence showed that she suffered an occupational disease due to repetitive trauma. The claimant also contends the hearing officer committed error in two of his evidentiary rulings. The respondent (carrier herein) replies that the decision of the hearing officer 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 summarizes the evidence in his decision and we adopt his statement of the evidence. We will only briefly discuss the evidence most germane to the appeal. This includes testimony by the claimant that while working for the employer her job duties included handling "coolies"--insulated containers used to keep canned beverages cold. The claimant testified that she had do a lot of bending and twisting while handling these coolies and began to develop back pain. The claimant sought medical attention for this back pain on August 31, 1999. The claimant testified that she was told by Dr. L and Dr. P, both of whom treated her, that her back problems were the result of repetitive traumatic activity at work. Medical reports from Dr. L and Dr. P are in evidence.

There was testimony concerning whether the claimant's job duties could have caused her injury. Ms. D testified that she was a supervisor with employer and that she had suffered back pain from handling coolies but did not suffer an injury from handling them. She testified that other employees had not complained of back pain resulting from handling coolies. When the ombudsman asked Ms. D if she had testified at the benefit review conference (BRC) that other employees had reported back pain from doing this, the hearing officer cut off further examination concerning statements made at the BRC because such statements were not made under oath. Mr. C, the employer's plant manager, also testified. The hearing officer cut short cross-examination of Mr. C by the ombudsman several times. The first time the hearing officer stated that Mr. C need not be examined concerning the medical reports as the documents spoke for themselves. The second time the hearing officer stated that the ombudsman was arguing with the witness. Finally, the hearing officer stated that the ombudsman should move on from this line of questioning because the question had been asked and answered. The claimant complains

that the hearing officer's cutting off cross-examination of Ms. D and Mr. C constituted reversible error.

We will initially address the claimant's evidentiary points. Our review of a hearing officer's rulings regarding evidentiary matters is one of an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92411, decided September 28, 1992. Regarding the relevancy of the testimony, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must show that the admission or exclusion was an abuse of discretion and that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 992078, decided November 5, 1999; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In this particular case, we find any error in the hearing officer's cutting short cross-examination to be harmless. We understand the need for a hearing officer to maintain control of the hearing and to control the length of the hearing. We do caution that a hearing officer has an obligation to allow the parties to fully develop their case and that when cutting short examination of a witness, especially as here when there was no objection from the opposing party, that a hearing officer should exercise caution and discretion.

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 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:

Tommy W. Lueders
Appeals Judge

CONCUR IN RESULT:

Thomas A. Knapp
Appeals Judge