APPEAL NO. 000909

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 March 29, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury to the right shoulder in the course and scope of his employment on _____, and that he did not have disability. The claimant appealed, argued that the hearing officer's decision was contrary to the evidence as both his testimony and medical evidence showed he suffered an injury and had disability. The respondent (carrier) replies, 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 evidence in his decision and we adopt his rendition of the evidence. We will only briefly touch on the evidence most germane to the claimant's appeal. This includes testimony by the claimant that he suffered an injury to his right shoulder on _____, when he was adjusting sheet metal on a lift table at work. The claimant testified that he reported the injury a few days later but did nothing further until September 30, 1999, when he told a supervisor he was unable to do the work he had been assigned because of the shoulder problem. The claimant testified that he had done nothing about his shoulder from May to September 30th because, during this time, he had been working on lighter machines. The claimant later underwent surgery on his shoulder on December 3, 1999. Dr. H, the claimant's treating physician, stated as follows in a November 4, 1999, report:

> I told him he has probably had some injury to the shoulder for a period of time. I feel his work has probably contributed to his current problem, however. I cannot say that it was not caused by work.

In a January 5, 2000, note Dr. H states as follows:

> I do feel that he probably developed arthritis years ago that has become progressively worse over time and that the work he does aggravated it.

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 testimony had 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.

We agree with the claimant that timely notice of injury was not in issue and the hearing officer made no findings in regard to timely notice. The hearing officer was obviously concerned about the passage of time between the alleged injury and treatment of it. This is a factor the hearing officer may consider. The claimant provided an explanation for the delay. The hearing officer, as fact finder, was not required to accept this explanation.

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:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge