APPEAL NO. 001029

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 April 5, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; and that she did not have disability. In her appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that she began working as a claims auditor for the employer on _____. She stated that on _____, she had completed her shift and was getting ready to go home; that she pushed on the button under her desk to raise her workstation; that the desk rose up quickly to a point and then became stuck; that she felt a "pinch" in her neck as she jerked back when the desk sprang up; that she twisted to lift the desk with her shoulder; and that as she forced the desk up with her shoulder she developed pain in her low back. The claimant testified that she did not report her injury on the day it happened because her supervisor was not there and she did not see any other supervisors on the floor at that time. She stated that she was scheduled to be off work on December 7, 1999, but she came in to pick up her paycheck and that although she was in pain, she did not report her injury because she was concerned with getting her young son who had a breathing problem to the doctor. In addition, she testified that she did not want to report this as a workers' compensation injury because she had just recently returned to work following a personal leave of absence while she was in rehabilitation for a substance abuse problem and did not want to miss any time from work.

Ms. T, a benefits coordinator for the employer, testified that she first learned that the claimant was alleging a workers' compensation injury on December 9, 1999, when the claimant called in and reported her injury. Ms. T testified that she advised the claimant at that time that she needed to undergo a drug test. Ms. T stated that later that same day, the claimant called from Dr. A's office and Ms. T told both the claimant and an employee from Dr. A's office that the claimant needed to undergo a drug screen. In a December 10, 1999, "To Whom it May Concern" letter, Dr. A stated that the claimant advised that she needed to pick up her children and that she would return for a drug screen; however, she did not do so. The claimant acknowledged in her testimony that she did not undergo the drug screen on December 9th because she had to pick up her children and stated that she underwent the drug test on December 14, 1999.

Dr. A diagnosed lumbosacral sprain/strain; lumbosacral neuritis/radiculitis; and lumbalgia. He took the claimant off work at the December 9, 1999, visit and continued her off work until December 23, 1999. On December 28, 1999, the Texas Workers'

Compensation Commission approved the claimant's request to change treating doctors from Dr. A to Dr. F. The claimant thereafter received her treatment either from Dr. F or from Dr. H, an associate of Dr. F's. Dr. F and Dr. H have diagnosed cervical segmental dysfunction and myofascitis, left shoulder internal derangement, lumbar segmental dysfunction and myofascitis, possible lumbar IVD syndrome with radiculopathy, and left hip and left knee internal derangement. On February 23, 2000, the claimant had a cervical and a lumbar MRI both of which were interpreted as normal.

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 her. 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 on _____. In her discussion, the hearing officer stated that the claimant's testimony was "not credible and without merit"; that Dr. A's progress notes were "not persuasive"; and that Dr. H's records "are not credible." As the claimant notes in her appeal, the hearing officer did not provide any further explanation as to why the medical evidence from Drs. A and H were not credible, but we cannot agree that she was required to do so. The hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to satisfy her burden of proving injury. The hearing officer was acting within her province as the fact finder in making that determination. 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. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant also asserts that the hearing officer erred in failing to consider a videotape, admitted as Carrier's Exhibit No. 4, which depicts the operation of the desk, which the claimant contends caused her injury. We find no merit in the assertion that the hearing officer failed to consider this evidence, despite her failure to mention the video in her discussion. The hearing officer specifically stated that she considered all of the evidence in reaching her decision. In addition, the hearing officer listed the videotape as

one of the carrier's exhibits and mentioned that it lasted for "approx. 1 minute." The reference to the length of the videotape suggests that the hearing officer reviewed and considered the videotape in resolving the issues of whether the claimant sustained a compensable injury.

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:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge