APPEAL NO. 001208

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 May 2, 2000. The hearing officer determined that the appellant (claimant herein) did not sustain a compensable occupational disease, in the form of bronchial asthma, on or about _____; that the claimant did not have disability; and that the respondent (carrier herein) is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer under Section 409.001. The claimant appeals, challenging the hearing officer's determinations as to injury and disability. The claimant argues that the evidence she presented established both injury and disability. The carrier responds that the evidence supports 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 as follows in her decision:

> Claimant testified that she was employed as a teacher for approximately 19 years and that she was working for _____ teaching ESL classes. Claimant testified that her job duties as a teacher required her to be exposed to gesso and chalk dust on a daily basis. Claimant testified that she worked in a basement that was not well ventilated and that on _____, she was working with some students on a history type project and a fan was turned on to circulate the air. Claimant testified that the fan swivelled and blew the chalk dust directly into her respiratory system. Claimant testified that she experienced immediate difficulty in breathing and left the premises. Claimant testified that she went to [clinic 1] on the way home that day but the doctor had left for the day. Claimant returned to [clinic 2] on November 4, 1997 and was examined by [Dr. G] who diagnosed allergic rhinitis. [Dr. G] took Claimant off work for "24-48 hrs." and instructed the Claimant to return in one month. Claimant continued treating with [Dr. G] and was subsequently referred to [Dr. U] for asthma diagnosis and treatment. Claimant returned to work on November 6, 1997 and continued to work until December 4, 1997 when she resigned. Claimant testified that she has been unable to return to teaching due to the exposure to gesso and chalk dust which aggravates her asthma. Claimant testified that her inability to work from December 4, 1997 through June 15, 1998[1] was due to her injury of _____.

[1]The claimant's actual testimony at the CCH was that she was unable to work from December 4, 1997, until June 15, 1999.

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 in the course and scope of employment contrary to the testimony of the claimant. 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.

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

Tommy W. Lueders
Appeals Judge