APPEAL NO. 001217

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 9, 2000. The hearing officer determined that the appellant/cross-respondent (claimant herein) sustained a compensable right shoulder injury on _____; and that the claimant had disability from December 23, 1999, through the date of the CCH. The respondent/cross-appellant (carrier herein) appeals, contending that the hearing officer erred in finding the claimant suffered a compensable injury and, absent an injury, the claimant was not entitled to disability. The claimant appeals, arguing that the hearing officer erred in determining the issue of extent of injury when the issue of extent of injury was not before her.

DECISION

We affirm in part and reverse in part.

The claimant testified that he was carrying a pipe with coworkers on _____, when the others dropped the pipe causing him to also drop the pipe, which jerked his right arm towards the ground. The claimant reported his injury to a supervisor on _____, and on December 23, 1999, he sought treatment. He was diagnosed with shoulder and neck sprains. An MRI of the claimant's right shoulder was performed on January 14, 2000, which suggested a tear of the superior rim of the glenoid labrum.

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

FINDINGS OF FACT

2. Claimant sustained an injury to his right shoulder in the course and scope of employment on _____.

3. Claimant did not sustain an injury to his neck in the course and scope of employment on _____.

4. Claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage from December 23, 1999 through the date of hearing on May 9, 2000 as a result of his right shoulder injury of _____.

CONCLUSIONS OF LAW

3. Claimant sustained a compensable right shoulder injury on _____.

4. Claimant had disability resulting from the injury sustained on _____ from December 23, 1999 to the date of hearing on May 9, 2000.

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 an injury and this finding was supported by both the testimony of the claimant as well as medical evidence. Applying our standard of review we find no error in the hearing officer's finding of a compensable injury. Further, as the only challenge on appeal of the hearing officer's disability finding was the argument of the carrier that the claimant could not have disability absent a finding of injury, we find no error in the hearing officer's disability finding. We therefore affirm the hearing officer in finding a compensable injury and the period of disability from December 23, 1999, continuing through the date of the CCH.

The claimant contends the hearing officer erred in making findings concerning the extent of injury as the only issues before her were whether the claimant suffered a compensable injury on _____, and whether the claimant had disability, and, if so, for what periods. The claimant argues that the hearing officer exceeded the scope of the issue before her by making findings regarding what the claimant's injury did not extend to

and specifically challenges the hearing officer's Finding of Fact No. 3. We agree. It is certainly desirable for a hearing officer to state the nature of an injury when finding an injury. However, to set the extent of injury in stone by making specific findings as to what the injury does not include when that issue has not been litigated by the parties is not appropriate. Section 410.151(b) provides that an issue not raised at the benefit review conference (BRC) or that was not resolved at the BRC may not be considered at the CCH unless the parties consent or good cause existed for not raising the issue at the BRC. Here, there was no consent and no finding of good cause. The hearing officer apparently decided *sua sponte* to make extent-of-injury findings. We find that she exceeded her authority in making Finding of Fact No. 3, which we reverse and strike as being beyond the issues before the hearing officer. We explicitly find no binding determination has been made regarding the extent of the claimant's injury.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge