APPEAL NO. 001269

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 10, 2000. The hearing officer determined that the appellant's (claimant herein) compensable injury does not extend to the lumbar spine and that the claimant's average weekly wage (AWW) is $105.00. The claimant appeals, arguing that the evidence established that her injury extended to her lumbar area and that her AWW should be based on the wages for full-time work, as opposed to the hearing officer's AWW finding which was based on part-time work. The respondent (carrier herein) replies that the decision of the hearing officer is 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 sets out the facts of the case and the rationale for his decision as follows in the portion of his decision labeled "Statement of the Evidence":

> Claimant injured her cervical and thoracic areas in a compensable auto accident. She testified that the accident also caused injuries to her lumbar areas. The medical evidence on this point is conflicting. The purported designated doctor, [Dr. D], wrote an extensive persuasive report on her injuries and concluded Claimant did not sustain injuries to her lumber [sic] area as a result of the auto accident.
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> Claimant terminated her employment with her Employer on June 15, 2000 [sic, 1999]. She quit so she could spend more time with her child. As of June 15, 2000 [sic, 1999] when she quit her job she believed she would seek part time employment. She communicated that intent to Employer. Sometime after June 15, 1999 on or before June 19, 1999, Employer offered Claimant part time employment for 15 hours per week maximum (Carrier's ex. Q) at $7.00 per hour. Under these circumstances, Claimant's employment with Employer was completely ended on June 15, 1999. As a result Claimant was not an employee of Employer for "at least 13 consecutive weeks immediately preceding an injury" as required under Section 408.041(a).
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> In this case Claimant quit her job and was later hired to return as a part time employee and through the process intended to completely change her fundamental work relationship and hours of employment. It is inappropriate to consider her wages as a full time employee in determining her AWW as a part time employee. As a part time employee, her reasonable and just AWW is $105 ($7.00 x 15 hours).

Even though all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

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. This is also true of the extent of an injury. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 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 lumbar injury contrary to the testimony of the claimant and some medical evidence. There was conflicting medical evidence concerning whether the claimant had a lumbar injury. The 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 erred under our standard of review in finding that the claimant failed to meet this burden in regard to proving a lumbar injury.

Section 408.041 deals with the calculation of AWW. Under 408.041(a) if an employee worked for the employer for 13 weeks prior to the injury, the AWW is computed by dividing the amount actually earned by 13. However, the claimant did not contend that her AWW should have been determined pursuant to Section 408.041(a). Instead she

argued at the CCH that her AWW should be computed under Section 408.041(c) which provides that if Section 408.041 (a) or (b) cannot be reasonably applied that the employee's AWW be determined by "any method the commission considers fair, just, and reasonable to all parties and consistent with the methods established under this section." The claimant argues that using this method the hearing officer should have divided the claimant's actual earnings during the 13 weeks prior to the injury by 13 to determine her AWW.

We will not disturb the findings of the hearing officer concerning the amounts calculated, which appear to us to be supported by sufficient evidence and internally consistent. The more critical question in this appeal is whether the methodology used by the hearing officer was proper in determining a "just and fair" AWW. As we have previously noted, when the hearing officer determines that the usual AWW calculation method cannot be applied in a given case he has discretion to apply any fair, just and reasonable method in arriving at AWW and we review the method used under an abuse of discretion standard. *See* Texas Workers' Compensation Commission Appeal No. 941292, decided November 9, 1994, and cases cited therein. Our review indicates that the hearing officer's method of calculating AWW was fair, just and reasonable and was consistent with the methods established in Section 408.041 to calculate AWW, although not the only method that could have been used in this case. Therefore, he did not abuse his discretion in so calculating AWW and we affirm the determination that the claimant's AWW is $150.00.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge