APPEAL NO. 001291

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 April 14, 2000. The record closed on May 10, 2000. The hearing officer determined that the respondent claimant suffered a new lumbar spine injury to the L5-S1 level on _____; that the claimant's disability for this injury began on _____, and continued through the date of the CCH; that the claimant's injury of _____, remains a producing cause of the lumbar spine problems at the L4-5 level; and that the injury of _____, did not extend to an injury at the L5-S1 level. The appellant (carrier 2) appeals, contending that the claimant did not suffer an injury on _____, and therefore could not have disability from such an injury. The claimant responds that the decision of the hearing officer was supported by the evidence and should be affirmed. There is no appeal or response from the respondent (carrier 1).

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.

We note that much of the evidence in this case revolved around the effects of the _____, injury vis-a-vis the alleged _____, injury. As there was no issue of sole cause and no appeal by carrier 1 or the claimant concerning the _____, injury, the issue on appeal is simplified as to whether or not the hearing officer erred in finding that the claimant suffered an injury on _____. While carrier 2 does take issue with the hearing officer's finding of disability, its challenge of the hearing officer's finding is based entirely on its contention that the hearing officer erred in finding the claimant suffered an injury on _____. Thus, in light of the scope of the appeal, we will focus on the evidence bearing on the issue concerning whether there was an injury on _____.

The claimant testified through a translator that he was a seven-year employee who performed maintenance and groundskeeping. The claimant, who had previously suffered a back injury in _____, testified that he reinjured his back on _____, while trying to dislodge a garbage bag which was partially underneath a dumpster. It is undisputed that the claimant reported the injury the same day. The claimant sought medical treatment with Dr. S, who took him off work and ordered an MRI. An MRI performed in December 1999, showed a disc protrusion at L5-S1, which was not indicated on a previous MRI which was done on October 30, 1998. Carrier 2 presented testimony that the claimant had received a reprimand for his work performance the day before his alleged injury.

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). In the present case, the hearing officer found an injury and this finding was supported by the testimony of the claimant as well as medical evidence. Carrier 2 argues that the claimant's description of his injury is incredible because of the weight of the dumpster. Carrier 2 points to what it believes were inconsistencies in the claimant's testimony. Carrier 2 contends that the claimant is alleging an injury due to the reprimand and that his back problems predated his claimed injury. The credibility of the claimant, as well as the other witnesses, was a matter for the hearing officer. A prior injury is not a defense to a proven subsequent injury unless there is an issue of sole cause. *See* Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993. Carrier 2 and the hearing officer obviously interpret the claimant's testimony differently in regard to exactly how the injury took place. The hearing officer was the finder of fact and we will defer to his judgment regarding the evidence. We noted above that a hearing officer may accept part of the testimony of a witness while rejecting other parts of that witness' testimony. We do not find that the claimant's injury was a physical impossibility as a matter of law as carrier 2 seems to argue we should.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge