APPEAL NO. 001354

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 May 4, 2000. The hearing officer determined that the respondent (claimant herein) sustained a compensable injury in the form of an occupational disease and that the claimant timely reported the injury to his employer. The appellant (carrier herein) files a request for review, arguing that the hearing officer erred in finding the claimant suffered a compensable injury. The appeals file does not contain a response from the claimant.

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 claimant testified that he worked for the employer beginning in 1991 as a pizza delivery driver; that he began to experience right shoulder pain from holding two to six pizzas with his right arm while opening the car door, moving the pizzas to the passenger seat of the car, and holding pizzas while customers prepared a check to pay. He said that his pain began when the employer began using a heavier Ahot plate@ bag for delivering pizzas. He made 20 to 30 deliveries a day. The claimant testified that on _____, his feet and shoulder hurt so much that he reported his injury to his manager because he believed he needed medical help. The supervisor testified that the claimant reported the injury on February 10, 1999.

The claimant presented medical evidence from Dr. F, relating the claimant's injury to his work. The claimant continued to work for the employer until the end of May when he went to work for another pizza company. The claimant testified that he has continued to be able to play golf weekly.

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). Applying this standard, we find sufficient evidence in the testimony of the claimant and the medical reports of Dr. F to support the hearing officer's finding of a compensable injury in the form of an occupational disease on _____.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). The hearing officer found that the claimant reported his injury on _____. This finding was supported by the testimony of the claimant and his supervisor. We are, in fact, somewhat confused as to why the carrier challenges the hearing officer's resolution of the notice issue on appeal when it conceded at the hearing that, in light of the testimony of the supervisor, the only issue in the case was injury.

We also explicitly reject the carrier's argument that, absent disability, there can be no injury. While there cannot be disability absent a compensable injury, there can be an injury even without disability. Nor do we find the carrier=s argument persuasive that pizza delivery inherently involves ordinary activities of life.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts

Appeals Judge