APPEAL NO. 001402

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 18, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the course and scope of employment on _____; and that the claimant did not have disability. The claimant appeals, arguing that the hearing officer's decision is contrary to the evidence which clearly established that the claimant was involved in an incident at work that resulted in injury and disability. The respondent (carrier) responds that the hearing officer's decision was 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 summarizes the evidence in her decision as follows:

> Claimant used an electric data mobile to gather merchandise. On _____ Claimant testified that she was operating the data mobile and became trapped between two others that had stopped. Claimant was unable to get out and began pushing on hers. Claimant stated that she hit her shoulder on a beam while trying to get the mobile to inch forward so that she could get out. Claimant has been unable to work from November 17, 1999 through the present as a result of the work injury. Carrier contends that Claimant did not sustain any injury in the course and scope of her employment. Any disability Claimant has is not from a compensable injury.
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> Claimant testified that she injured her left shoulder while trapped between two data mobiles. Claimant stated that she was leaning forward pushing on the button to get the machine to move. The machine jerked and Claimant's shoulder hit a metal bar. Several co-workers testified or gave recorded statements. Most verified the incident of Claimant being trapped between two data mobiles, but none saw Claimant fall forward. About a week later Claimant was lifting totes at work and felt her shoulder pop. Claimant feels that she aggravated her left shoulder in the lifting incident. Claimant sought medical treatment after the last incident.
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> The medical records generally give a history of Claimant being trapped in the data mobile and hitting her shoulder on a metal bar. Some do mention lifting but appear to be stating that lifting increased the pain. Co-workers mention seeing Claimant at work favoring her left arm at times but also looking like she had complete range of motion at other times. Claimant has been

diagnosed with a left shoulder strain. [Dr. J] believes there may be internal derangement though the MRI was unremarkable.

Claimant's testimony regarding the two work incidents were vague and not credible. Claimant was adamant that she kept pushing while trapped on the mobile. A video tape was provided showing a data mobile which does have a bar that appears to be held while moving. However the bar is quite low. There were no other metal bars surrounding the driver on the mobile itself. It is doubtful Claimant was bending over low enough to hit the bar which was waist high. All testimony supported that Claimant was upset while trapped on the machine - but there was scant evidence of how an injury could have occurred while Claimant was trying to move it forward. Claimant may have a shoulder injury, but she did not establish that she sustained an injury in the course and scope of her employment on _____.

Claimant testified that she continued working from November 3, 1997 through November 6, 1999. Claimant stated that she was sent home on November 6, 1999 and that she returned to work on November 10, 1999. The last day Claimant worked was November 12, 1999. The hospital released Claimant to light duty. The company clinic released Claimant to light duty. Claimant was examined by [Dr. J] on November 17, 1999 who took her off work while testing was done. The MRI was done on November 21, 1999 and was unremarkable. Claimant established disability from November 17, 1999 through November 21, 1999. Claimant did not establish that she was unable to work from November 21, 1999 through the present from a left shoulder injury. However, because Claimant did not sustain a compensable injury, no temporary income benefits are owed.

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. 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). 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, contrary to the testimony of the claimant which had some support in the testimony of witnesses and in the medical evidence. 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. The hearing officer stated she did not find the testimony of the claimant credible and explained why she found the testimony of the witnesses and the medical evidence unpersuasive in proving injury.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Philip F. O'Neill
Appeals Judge