

## APPEAL NO. 001465

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 12, 2000. The hearing officer determined that the respondent (claimant herein) suffered an injury to his left shoulder and gave timely notice to the employer and the appellant (carrier). The hearing officer also concluded that the claimant's claim of injury was timely filed with the Texas Workers' Compensation Commission (Commission) and that the claimant had disability beginning on May 5, 1998, and continuing through the date of the CCH. The carrier appeals, arguing that there was insufficient evidence to support the hearing officer's finding that the claimant suffered a compensable left shoulder injury on \_\_\_\_\_. The carrier also appeals the hearing officer's determinations that the claimant timely filed a claim of injury with the Commission and that the claimant had disability.

### 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 suffered an injury at work when he fell approximately six feet from a ladder on \_\_\_\_\_, landing on his left side. The claimant testified that he injured his left shoulder in this fall. The parties stipulated that later the same day the claimant suffered a compensable injury to his right knee. The knee injury required immediate hospitalization. The claimant was treated by Dr. G, who noted both knee and shoulder complaints. The carrier accepted the knee injury and denied the shoulder injury. The claimant testified that after the denial of the shoulder injury Dr. G would not treat it. The claimant testified that Dr. G later treated the claimant's shoulder under the claimant's wife's group health insurance coverage.

The parties stipulated that the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Commission on January 4, 2000. In evidence was an Employer's First Report of Injury or Illness (TWCC-1) dated June 8, 1998. There is no indication this document was filed with the Commission and the hearing officer found that it was never filed with the Commission.

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 the claimant suffered an injury and this finding was supported by the testimony of the claimant.

As far as the issue of timely filing of a claim with the Commission is concerned, Section 409.003 requires that claim be filed within one year of an injury and, pursuant to Section 409.004, the carrier is relieved from liability if this is not done. However, Section 409.008 provides that if the employer or the carrier have been given notice of the injury and the employer fails to file a TWCC-1, the period for filing the notice of claim is tolled. The carrier argues that the wording of the issue in this case only raised the question of whether the notice was timely filed and did not include the issue of tolling. We reject this contention. We note that the hearing officer found that both the employer and the carrier were notified of the shoulder injury in \_\_\_\_\_ and carrier does not appeal these findings. Under the facts of this case, the hearing officer did not err in applying the tolling provision and finding that the claimant timely filed his notice of injury with the Commission.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Alan C. Ernst  
Appeals Judge