APPEAL NO. 001553

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 June 1, 2000. The issues at the CCH were injury, whether an injury arose out of an act of a third person intended to injure the appellant/cross-respondent (claimant herein) because of personal reasons, waiver of compensability by the respondent/cross-appellant (carrier herein), and disability. The hearing officer determined that the claimant did not suffer a compensable injury, that the carrier did not waive its right to contest compensability, that the "personal animosity" exception was not applicable, and that the claimant did not have disability. The claimant appeals, arguing that the evidence established that the claimant suffered a compensable injury, that the carrier waived the right to contest compensability by failing to do so timely, and that the claimant had disability. The claimant also complains that the hearing officer erred in finding that the carrier had good cause for not timely exchanging the names of carrier's witnesses that the hearing officer allowed to testify over the objection of the claimant. The carrier responds that the decision of the hearing officer is supported by the evidence and that the hearing officer properly found good cause for the failure to exchange the names of the witnesses to whom the claimant objected. The carrier files a conditional request for review, contending that the hearing officer erred in making certain factual findings and in excluding the testimony of a witness. The carrier also points to a typographical error in the decision of the hearing officer. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

We reform the decision of the hearing officer. 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 as reformed.

The hearing officer summarizes the evidence in his decision and we adopt his rendition of the evidence. We will only briefly summarize the evidence germane to the appeals. This includes testimony from the claimant that he was shoved against a wall by his supervisor on _____. The claimant testified that as a result of this incident he suffered a compensable injury and sustained disability from _____, through the date of the CCH. The claimant also presented some medical evidence in support of his claim of injury. The supervisor testified that he merely brushed the claimant and the carrier contended that the claimant did not sustain an injury.

At the CCH, the carrier called some of the claimant's coworkers who witnessed the incident of _____. The claimant objected to these witnesses, arguing that the carrier did not timely exchange the identity of these witnesses. The hearing officer found good cause for the untimely exchange of the identity of these witnesses. The hearing officer did sustain the claimant's objection to the carrier's calling a witness to testify concerning the dispute of the claim in this case because of lack of timely exchange without good cause.

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 no injury contrary to the testimony of the claimant which found some support in the medical evidence. Claimant had the burden to prove he was injured in the course and scope of his 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.

Section 409.021 provides as follows, in relevant part:

> (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
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> (1) begin the payment of benefits as required by this subtitle; or
>
> (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:

(A) the right to request a benefit review conference; and

(B) the means to obtain additional information from the commission.

(b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.

(c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

(d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

In the present case, there was a factual dispute concerning when the carrier received notice of the claimant's injury and when it first filed a dispute of compensability. The hearing officer found that the claimant first filed a notice of injury with the employer on December 9, 1999, and that the carrier first disputed compensability on January 21, "1999," thus concluding that the carrier timely disputed compensability. We do not perceive these findings to be contrary to the great weight and preponderance of the evidence.

We also do not find error in the hearing officer's admission and exclusion of evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)) requires that no later than 15 days after the benefit review conference the parties shall exchange the identity and location of any witness known to have knowledge of relevant facts. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Even assuming, without deciding, that there was an abuse of discretion in the hearing officer's admission of the testimony of the coworkers, we conclude that there was no reversible error. The testimony of these witnesses was merely cumulative of other testimony concerning the incident. We conclude that the admission of this evidence was

not reasonably calculated to cause nor did it probably cause the rendition of an improper decision and order in this case. Nor do we find the hearing officer erred in excluding testimony concerning the carrier's dispute of the claim as the identity of the witness was not timely disclosed and the hearing officer found no good cause for the failure to disclose the identity of this witness.

Other than its challenge to the hearing officer's Finding of Fact No. 7, we find no merit to the carrier's appeal of the hearing officer's findings of fact as we find sufficient evidence, applying the standard of review discussed above, to support these findings. As far as Finding of Fact No. 7 is concerned, the carrier points out that it contains a typographical error in that it states that the carrier filed a dispute on January 21, 1999. This is clearly a typographical error and should read January 21, 2000, and we reform this finding to so read.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition, disability depends upon a compensable injury. *See* Section 401.011(16).

The decision and order of the hearing officer, as reformed, are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge