APPEAL NO. 001810

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 July 3, 2000. The issues at the CCH were injury, disability and average weekly wage (AWW). The hearing officer concluded that the appellant (claimant herein) did not sustain an injury in the course and scope of his employment; that there was no disability; and that the claimant's AWW was $259.54. The claimant appeals arguing that he did suffer an injury, that he did have disability and that the respondent (carrier herein) never submitted a proper wage statement. The carrier replies that the evidence supported the decision of the hearing officer.

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 discusses the evidence in some detail and we adopt his rendition of the evidence. We will therefore only briefly summarize the evidence most germane to the appeal. This includes the fact the claimant testified that he injured his back at work. The claimant worked as a deliveryman and described his job as involving repetitive lifting and bending. The claimant also testified that on _____, a cart began rolling out of the back of his truck, that he caught the cart as it was about to go over the tailgate of the truck and that the weight of the cart almost pulled him out of the truck. The claimant testified that later the same day he hit a dumpster with his delivery truck. The claimant first sought medical treatment on April 24, 2000. An MRI performed on April 25, 2000, showed a herniated disc at L5-S1. The claimant presented medical evidence indicating that his herniated disc was related to an injury at work. The claimant testified that he began working for the employer as a sales trainee on February 7, 2000, making $215.00 per week. The claimant testified that he was promoted to sales representative and his salary was increased on April 16, 2000, to $794.00 per week.

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 and medical evidence. The 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.). The hearing officer stated in his decision that he did not find the claimant credible. We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet his burden. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

As far as AWW is concerned, the hearing officer computed this based upon the claimant's testimony. The hearing officer deduced from the claimant's testimony that during the 13 weeks prior to his alleged injury the claimant earned $3,374.00, based upon 12 weeks of earning $215.00 and one week of earning $794.00. The hearing officer then divided this amount by 13 to arrive at an AWW of $259.54. The claimant's only complaint on appeal regarding AWW is that neither the carrier nor the employer provided a valid wage statement. The carrier argues that the claimant proceeded at the CCH on the issue of AWW without raising the question as to wage statement. The burden was on the claimant to establish his AWW. With the evidence at the CCH in this posture, we find no legal error in the hearing officer's computation of AWW, although another fact finder might well have used another means in arriving at AWW. *See, generally,* Section 408.041.

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 are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge