APPEAL NO. 001853

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 19, 2000. The issues at the CCH were injury and disability. The hearing officer concluded that the respondent (claimant herein) suffered a compensable injury on_____, and had disability from November 1, 1999, to November 15, 1999, and from November 29, 1999, through the date of the CCH. The appellant (carrier herein) files a request for review arguing that the evidence was contrary to the hearing officer's findings. The claimant responds that the evidence sufficiently supported the findings 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 summarized the evidence in her decision and we adopt her rendition of the evidence. We will only briefly touch on the evidence germane to the appeal. This includes testimony by the claimant that on_____, while she was working part-time as a cashier/greeter for the employer she scrapped her right ring finger on a shopping cart. The claimant sought medical treatment on November 1, 1999, and was hospitalized from November 1, 1999, through November 6, 1999. An operative report in evidence showed that the both the preoperative and postoperative diagnosis was abscess and necrosis to the dorsum of the right ring finger as well as purulent flexor tenosynovitis. The claimant was released to light-duty work on November 15, 1999, and worked for the employer from November 25, 1999, through November 28, 1999. The claimant testified that when she returned to work for her next scheduled shift on November 30, 1999, she was told not to return to work until she had completed her medical treatment.

Dr. W, the claimant's treating doctor, relates the claimant's injury to the scraping incident at work. The initial medical and hospital records do not indicate the mechanism of the injury. The claimant testified that her condition upon arrival for medical treatment as well as the emergency surgery and medications she received did not lend itself to her providing much history. The claimant testified that as soon as she recovered sufficiently from surgery and the effects of medication she reported to her employer that had suffered a job-related injury. Records from the employer show that the claimant reported her injury on November 4, 1999.

The claimant testified that in addition to working for the employer she was employed full-time for another employer as a teacher's aide at the time of her injury. The claimant testified that she returned to this job when she received the light-duty release on November 15, 1999, and was continuing to perform this job at the time of the CCH.

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). The hearing officer's finding of injury is supported by both the claimant's testimony and medical evidence. The carrier points to the lack of a history of trauma in the claimant's early medical records. The claimant provided an explanation for the lack of such history. It was up to the hearing officer to determine what weight to give the lack of an initial history of trauma and the claimant's explanation.

The carrier also challenges the hearing officer's disability determination. First, the carrier argues that if the claimant had no injury the claimant could not have disability. While this is true, having affirmed the hearing officer's finding of injury, it is not relevant to the present case. Second, the carrier argues that it defies common sense that the claimant could have disability when she is able to continue to work as a teacher aide. We do not think this is the case. We have held in situations where there is concurrent employment at the time of the injury that the return to the other job does not relieve the carrier of liability. It is also well-established that if an employee is under restrictions and an employer does not accommodate the restrictions the employee is not required to seek other employment. It is the fact that the claimant is still under restrictions and the employer on whose job she was injured will not accommodate these restrictions that is the basis of the claimant's disability in the present case. We find no error in the hearing officer's finding of disability which finds support both in the claimant's testimony and in the medical evidence.

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