APPEAL NO. 002307

Following a contested case hearing held on September 6, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals, contending that these determinations were against the great weight and preponderance of the evidence. The claimant also asserts that several of the hearing officer's evidentiary rulings were erroneous and require reversal. The respondent (carrier) replies that the hearing officer's resolution of the issues was sufficiently supported by the evidence and that the hearing officer did not abuse her discretion in making her evidentiary ruling.

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 she was employed by a hospital as a nurse's aide and that while so employed on _____, the nurse in charge of the floor, Ms. W, approached her, accusing her of not performing her work duties. The claimant testified that Ms. W grabbed her left arm and would not let go, forcing the claimant to pull her arm out of Ms. W's grasp. The claimant testified that she called security and later went to the hospital's emergency room (ER). The claimant was diagnosed at the ER with a left bicep contusion. The claimant later began treating with Dr. Z who placed her in an off-work status.

Ms. W testified that she did not become physical with the claimant. Mr. G testified that he was a registered nurse who worked near the area where the altercation between Ms. W and the claimant took place. Mr. G testified that he did not observe Ms. W pull the claimant's arm.

The claimant propounded interrogatories to the carrier. The carrier objected to a number of the interrogatories. The claimant sought a deposition on written questions, which was denied. The claimant later sought to obtain information by having a private investigator take statements from other employees concerning Ms. W's past behavior. The hearing officer did not admit these statements because they were not timely exchanged and she found no good cause for them not having been timely exchanged. The claimant argued that the carrier's refusal to provide this information in response to interrogatories constituted good cause.

The claimant contends the hearing officer committed reversible error by denying the claimant's request to take a deposition on written questions and in not admitting the claimant's witness statements. The claimant argues that both of these rulings rewarded the carrier for its failure to properly respond to interrogatories. We review decisions of the

hearing officer concerning evidentiary matters on an abuse of discretion standard. Applying this standard, we do not find reversible error in her evidentiary rulings in that they were not made without reference to any guiding rules or principles. *See* Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994.

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. There was conflicting evidence as to whether the claimant was physically assaulted. The 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. This is so even though another fact finder might draw other inferences and reach other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

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:

Kenneth A. Huchton
Appeals Judge

Susan M. Kelley
Appeals Judge