APPEAL NO. 041464
FILED AUGUST 4, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 18, 2004. The hearing officer determined that the date of injury was _____; that the appellant (claimant herein) did not sustain a repetitive trauma injury; that the respondent (carrier herein) is not relieved of liability for untimely reporting her injury as the claimant did timely report her injury to the employer; that the carrier did not waive its right to contest the compensability of the injury because its contest was based upon evidence which could not reasonably have been discovered earlier by the carrier; and that absent a compensable injury, the claimant did not have disability. The claimant appeals, arguing that the hearing officer's determinations concerning injury, carrier waiver, and disability were contrary to the evidence. The carrier responds that the evidence supports 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.

CARRIER WAIVER

The carrier initially accepted compensability of the claimant's repetitive trauma injury. After an examination by a required medical examination (RME) doctor the carrier then denied compensability. Whether or not the carrier waived its right to dispute compensability turns on whether or not the report of the RME doctor constituted newly discovered evidence because it could not have been reasonably discovered earlier. Section 409.021(d) provides that a carrier may reopen the issue of the compensability of an injury if it learns of evidence that could not reasonably have been discovered earlier. Whether evidence could have been reasonably discovered earlier was a matter within the sound discretion of the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992; Texas Workers' Compensation Commission Appeal No 022714, decided December 11, 2002. In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

INJURY

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 to 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, *supra*; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In light of the conflicting evidence concerning injury in the record, and applying this standard, we cannot say the hearing officer erred as a matter of law in finding no injury.

DISABILITY

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).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

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Veronica L. Ruberto
Appeals Judge