APPEAL NO. 950451

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 February 16, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury and disability. The hearing officer found that the appellant (claimant herein) did not suffer a compensable injury on (date of injury), and consequently had no disability from this alleged injury. The claimant appeals this decision contending factual findings of the hearing officer were contrary to the evidence. The respondent (carrier herein) replies that the findings of the hearing officer are supported by sufficient evidence.

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 he was injured on (date of injury), when he was searching for equipment at the employer's warehouse pursuant to a call from a client. Claimant describes his injury as losing his balance while lifting an object over 100 pounds and falling forward injuring his back and right shoulder. The claimant testified that prior to going to the warehouse he had informed his supervisor, (Mr. W), by E-mail that he was going to the warehouse and after the injury he reported the injury to Mr. W.

Mr. W testified that on (date of injury), he discussed a job performance problem with the claimant. The main issue in this discussion was that Mr. W had reason to believe that on occasion the claimant was not where he claimed to be. The claimant testified that this discussion with Mr. W was one reason that he informed Mr. W through E-mail he was going to the warehouse on (date of injury). Mr. W denied ever having received this E-mail message or that on (date of injury), the claimant reported an injury to him. Mr. W testified that on (date of injury), he requested that the claimant be present at a meeting on (date), at 3:00 p.m. and that the claimant requested that the meeting be rescheduled so that he could go the warehouse. Mr. W testified that he refused to reschedule the meeting.

The claimant testified that after his injury on (date of injury), he returned to the employer's main offices. The claimant testified that he continued to have pain that day and evening and took medication for the pain. The claimant testified that he did not want to come in on (date), because of pain, but did because he had been told by Mr. W that he needed to attend a meeting. The claimant testified that prior to the meeting he was unaware of its nature. Present at the (date), meeting were the claimant, Mr. W and Mr. W's supervisor, (Mr. S). All witnesses agreed that at the meeting Mr. S suspended the claimant with pay pending the outcome of an investigation of the allegations that the claimant had on occasion misrepresented his whereabouts to his supervisor. The witnesses agreed that there was no discussion of the claimant's injury at this meeting and that at the end of the meeting the claimant was escorted out of the building.

The claimant testified that on the evening of (date), his pain continued to worsen and he went to an emergency room early on the morning of (date). Mr. W testified that the first he heard about the claimant's injury was on (date), when the claimant's doctor's office called for claim information.

(Ms. M), the carrier's handling adjustor, testified that she initially received information that the claimant was alleging an injury on (date). She testified that her investigation indicated that on (date), the claimant had worked all day in the employer's offices and had not gone to the warehouse. Ms. M testified that when she told the claimant this was her reason for denying the claim, he stated that the actual date of his injury was (date of injury). The claimant testified that his conversation concerning his claim with Ms. M caused him to realize that (date), was a Tuesday. Since he definitely remembered that he was injured on Monday, he realized he was injured on (date).

Ms. M testified that the employer's warehouse manager told her that he did not recall if the claimant was at the warehouse on (date of injury). Ms. M was informed that a co-worker of the claimant's stated that the claimant was at the employers's main officer all day on (date of injury), except during lunch. Ms. M, Mr. W and Mr. S testified that a check of the claimant's outgoing E-mail log showed no message from the claimant to Mr. M that he was going to the warehouse on (date of 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 CCH 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. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). 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 there was sufficient evidence to support her in that. 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. This is so even though, were we fact finders, we 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.).

Applying this standard of review in the present case, we certainly cannot overturn the decision of the hearing officer regarding injury. The evidence was hotly contested as to whether the claimant was injured in the course and scope of employment. Weighing this conflicting evidence was the province of the hearing officer and we do not find that the great weight and preponderance of the evidence was against her decision on this issue.

Finally, with no compensable injury found, there is no basis 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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge