APPEAL NO. 990478

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 February 10, 1999. The issues concerned whether the respondent, who is the claimant, sustained an injury in the course and scope of employment on _____, and whether he had disability as a result of that injury.

The hearing officer found that claimant sustained an injury to his back and had disability therefrom for the period from August 19, 1998, until November 13, 1998.

The appellant (carrier) appeals, and argues that the decision is against the great weight and preponderance of the evidence. The carrier argues that this is a spite claim. The carrier further appeals disability both on the basis of a lack of a compensable injury and because the claimant was able to work, notwithstanding his claimed injury, as his application for unemployment compensation illustrated. The claimant responds that the receipt of unemployment benefits is not a bar to receipt of workers' compensation benefits, and that the hearing officer's resolution of the weight and credibility of the evidence should not be set aside.

DECISION

Affirmed.

The claimant was employed in maintenance work by (employer). He said that on _____, he felt a pull that radiated into his groin when he was stacking heavy air conditioner units in preparation for their installation. He continued to work the rest of the day. The claimant said he reported his injury to his supervisor, Mr. V. He maintained that he and Mr. V had a conversation about what the employer could do for him and he ascertained from this that there was a lack of help and he was needed. Claimant said he was assigned lighter duty the rest of the day and through the weekend (when he was assigned to work). Claimant said on Monday, the 17th, he was reprimanded for not answering his radio. Claimant said that these radios were somewhat infamous for being in various stages of functioning. He said he was sent home but not terminated at that time. Claimant said he first contacted Mr. S, the chief engineer and apparent ultimate supervisor, on the 19th, the same day he first saw his treating doctor, Dr. T.

Claimant described a game that was played by the employer, amongst the employees, called "safety bingo," where accidents would result in not being able to play. He said that there were prizes of money attached to this game. Claimant said he was terminated when asked to turn in his badge and keys, although he was not expressly told that he was "terminated" in those words. Claimant applied for and received unemployment compensation benefits through the Texas Workforce Commission and sought light-duty employment through their job offerings. He returned to work through a temporary services company in mid-November 1998. Claimant agreed he was certified to have reached

maximum medical improvement on December 28, 1998, with a zero percent impairment rating.

Mr. S agreed that the safety bingo game was in existence as a safety incentive. He said he knew nothing about claimant's accident until contacted by a doctor's office on the 19th. Mr. S said that claimant was not exactly terminated, but was sent home after he was found sleeping on the job (sometime after the 14th) and instructed to come in and meet the next day to discuss what his status would be and if he would be terminated. Mr. S said he asked Mr. V about what he knew about claimant's accident and Mr. V told him he knew nothing. Mr. S said that the employer had a policy to report accidents immediately.

Dr. T diagnosed thoracic and lumbar syndromes and sprains and returned the claimant to limited work on September 3, 1998. However, he took claimant off work the next day until further notice, and this status appears to have continued through October 28th. He was released with a 50-pound lifting restriction and some activity restrictions on October 28th.

A transcribed interview with Mr. V is in evidence. Mr. V reportedly denied that he knew about the incident. He said as far as he knew, the claimant was also moving to another apartment that same week. Mr. V said that the decision had been made to terminate the claimant for being caught sleeping in a room at the time that Dr. T's office called the employer. Mr. V said that the air conditioning units were moved on the 13th, not the 14th, and a small forklift was used. Mr. V and Mr. S made clear their belief that the claim was a false one.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). A claimant's testimony alone may establish that an injury has occurred and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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.). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

While the conflicts in this case could have been resolved a different way, the hearing officer had the opportunity to evaluate the demeanor of witnesses who testified. We will not substitute our judgment for that of the hearing officer simply to draw different inferences; the evidence in this case sufficiently supports the hearing officer's decision, which is not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

We accordingly affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge