APPEAL NO. 990830

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 19, 1999. The issue reported from the benefit review conference was whether the respondent, who is the claimant, sustained a compensable injury on _____, while employed by the employer (referred to herein as carrier or employer, depending upon the context of the reference). An issue as to whether the injury resulted in disability was added by the agreement of the parties.

The hearing officer determined that the claimant sustained a lumbosacral strain/ sprain injury on the date in question, with resultant disability from August 6 through 31, 1998.

The appellant (carrier) appeals, arguing facts that it believes do not support, or refute, the hearing officer's determinations. Specific findings of fact and conclusions of law are disputed. The claimant responds that the issues involved resolutions of fact by the hearing officer which cannot be set aside by the Appeals Panel because they are supported by the record.

DECISION

Affirmed.

The claimant was employed as a toll collector by the employer, and he collected tolls from cars. He worked various shifts; on _____, the date of injury, he was working from 3:30 p.m. until midnight. The claimant said he had been on break from 10:15 until 10:30 that night, and had returned to his booth. After about 15 minutes, he dropped a quarter. The claimant said he bent down, and suddenly a car approaching the booth accelerated. The claimant said he feared he would be hit and jerked himself back up. As he did, he heard and felt a snap in his back. His buttocks and left leg began to hurt, and he summoned a cashier, Mr. Z, and told him what had happened. The claimant was relieved when he told Mr. Z he could not continue. He went instead to the pedestrian booth (swapping with the person who relieved him). The claimant said he called his supervisor, Mr. E, at about 11:25 p.m. and reported the accident.

The claimant said there were two cameras that filmed cars passing by. He did not know the details about the filming. As far as the claimant knew, the accident was not actually witnessed. He recalled nothing about the car except that the driver was male. The claimant said his wife picked him up at 11:45 p.m. and drove him to the hospital emergency room, where he was evaluated for a couple of hours. The claimant said he was diagnosed with a lower back strain by Dr. C.

The next day, the claimant made an appointment with Dr. A, who took workers' compensation patients, because his family doctor did not. Dr. A prescribed medication and

recommended an MRI, which was refused by the carrier. Dr. A also opined that the claimant had a lumbar strain. The claimant said that he saw Dr. A approximately five times, and had to pay for him from his own pocket. The claimant said that prior to _____, he never had any back problems. The claimant was on light duty in the pedestrian booth at the time of the CCH.

The claimant said he was involved in an automobile accident on November 13, 1998. His automobile was struck on the left front passenger side by another car, collided with a pole, and then was hit again by the car on the driver's side. The claimant said that he injured other regions of his body but not his lower back.

The claimant was off work from August 6 through 31, 1998, and then returned to light duty. He stated that work in these booths was not as heavy and did not involve lifting of heavy coin sacks. The claimant subsequently missed 45 days of work from the automobile accident.

Mr. E testified that the claimant had been having attendance problems and was, in fact, suspended without pay for two days as a disciplinary action. Mr. E said that August 5th was the claimant's first day back after this two-day suspension. Mr. E stated that other workers among the 24 toll booth collectors had been suspended without pay for the same reason. Mr. E verified that a videotape of the claimant's toll booth in evidence was one made on August 5th.

Apparently, the dispute revolves around whether an automobile actually accelerated toward the claimant; statements in the record indicate that there is agreement that he bent over in the toll booth at the time he stated he did. Mr. Z's written statement said that the claimant reported the accident to him at around 10:20 p.m. on August 5th. There are videotapes in evidence, showing views from the inside and outside of the booth. It appears that the door of the booth is completely open to the left, and a good deal of turning and pivoting occurs to accept money and vend change. The videos are in a "stop action" style. The videotapes show that around 10:22 p.m. and 10:27 p.m., the claimant bent down twice out of the booth in an action resembling the act of picking up something from the pavement. After the second time, he reaches around several times to his back. The first picking-up incident appears to be between cars; the second was while a car is next to the booth. (The second tape is a slower version of the first; at the second occasion of bending down, the claimant's head can be seen turned toward what would be the oncoming traffic, although a car remains next to the booth.) In light of the stop-action style of the videos, it cannot be said for sure, one way or the other, whether the claimant has jerked himself up.

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, 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). 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).

Having reviewed the record, we cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence, and we affirm her decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge