APPEAL NO. 991067

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 April 27, 1999. The issues concerned whether the appellant, who is the claimant, sustained an injury to his lumbar spine at the same time that he sustained a compensable right shoulder injury, whether he was entitled to a change of treating doctor, and whether the respondent (carrier) timely disputed the approval of the change of treating doctor.

The hearing officer agreed that the change of treating doctor was for a proper reason, and that the carrier failed to prove that it timely disputed the approval of the change. The hearing officer held that the claimant did not injure his lumbar spine when he fell at work on _____.

The claimant has appealed the hearing officer's decision as to the scope of his injury. He argues that the mechanism of a fall onto his right shoulder is consistent with a twisting injury to the lumbar spine. He argues he should not be penalized because his former doctor did not make records indicating a back injury. The claimant argues that there is no proof he had preexisting back problems. The carrier responds that the resolution of conflicting evidence by the finder of fact should not be set aside.

DECISION

Affirmed.

The claimant said that on _____, he was employed by (employer) and was "breaking freight" in a trailer. As he pulled a rug from a pallet of cargo, he slipped and landed on his right shoulder. The claimant said it was about an hour before his morning quitting time, and he felt he just had the breath knocked out of him and he would be able to shake this off. However, by that evening, he was in such pain he thought he broke his collarbone, and went to the emergency room (ER). He said he hit his entire right side. The claimant said that forklift driver, (Mr. S), witnessed his accident but there were no statements from Mr. S offered into evidence.

The claimant believed that x-rays were taken at the hospital of his right shoulder and lower back. He was referred to Dr. A, who he was able to first see on November 16, 1998. He asserted that the doctor never touched him but sent him to therapy. The claimant contended he reported pain to his lower back as well as to his shoulder. He said that therapy was not successful in relieving his symptoms. He changed doctors to Dr. M on January 5, 1999.

Dr. M had taken the claimant off work, and that was his status at the CCH. He said that an MRI showed he had three "messed up" discs in his back. It was developed on cross-examination that, at the time of his injury, the claimant was being treated by Dr. U, a chiropractor whom he had seen for over two years. He said he went to Dr. U because, as

he was in the business of lifting freight, he periodically required adjustments. The claimant referred to these as "maintenance" adjustments. The claimant said he was 48 years old and that such adjustments loosened him up from the symptoms of muscle tension. He said he did not go back to Dr. U for his injury because he needed treatment at night and Dr. U's office was not open.

The claimant said he called the workers' compensation coordinator, Ms. L, to report why he was not at work. He could not recall precisely what he told her but felt that he reported both his back and shoulder injuries. He agreed that he put something in writing for the employer's file. He agreed that this statement only reported a right shoulder injury. The claimant also agreed that Dr. A had given him a statement to return to full duty effective January 4, 1999.

Ms. L testified that the claimant reported the incident as he described at the CCH, but stated only that he hurt his right shoulder. She said he did not mention anything about hurting his back. Ms. L said she specifically asked him to identify injured regions because she needed the information to complete an injury report.

No ER records were put into evidence. A review of Dr. A's records show that there is no mention of back pain or injury. The claimant's shoulder pain was in the deltoid area. However, physical therapy records from November 25, 1998, do record a secondary symptom of low back pain. Dr. M diagnosed his back pain as a sprain and suspected disc displacement. A January 22, 1999, MRI showed small herniations at several levels of the lumbar spine. A doctor for the carrier, Dr. P, noted that the low back findings were explained by degenerative disc disease. However, Dr. P expressed some concern about "hemisensory loss" and suggested an MRI of the brain. However, he did not agree that this would arise from the injury as reported, because the loss would be accounted for in the left hemisphere of the brain.

The dispute involved resolution of conflicting evidence and assessment of the credibility of the various witnesses, rather than legal issues. While it is apparent that contrary inferences could have been drawn, the decision of the hearing officer is supported by the evidence, part of which was the claimant's own report of the extent of his injury shortly after it occurred. 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). Although the record here would lend itself to different inferences, the decision should not be set aside because different inferences and conclusions may be drawn upon review. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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). We cannot agree that the decision is against the great weight and preponderance of the evidence.

For these reasons, we affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Judy L. Stephens
Appeals Judge