APPEAL NO. 000060

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 December 15, 1999. The issues concerned whether the appellant (claimant) sustained a compensable injury on _____, and whether she had disability from that injury.

The hearing officer determined that while the claimant had an onset of left heel pain at work, it was of unknown etiology, and that she did not have a twisting injury to her low back on that day. The hearing officer found that as a result of left foot pain, the claimant was unable to work on May 17 and 18, 1999, and then from July 17, 1999, to the date of the hearing, but this did not constitute compensable "disability" because there was no compensable injury.

The claimant has appealed. She recites facts that she believes are in her favor, including many details not brought out in her testimony at the CCH. She asks for reinstatement of her temporary income benefits and approval for a lumbar MRI. The respondent (carrier) responds that the hearing officer's decision represents a correct assessment of the evidence in this case and should be affirmed.

DECISION

We affirm.

The claimant worked as a sales associate for (employer). She said that on _____, as she was squatting down to replace some blue jeans that had been taken off a rack, she twisted and felt immediate pain in her back. She said the accident happened around 9:00 p.m. When she stood up, she felt radiating pain and numbness down her left leg. She reported her injury the next day and sought medical treatment thereafter, but worked until seeing Dr. R, who took her off work as of July 17, 1999. The claimant said she eventually was referred to Dr. S, who, she said, opined that she had a problem with her lumbar spine and sought an MRI, which was refused by the carrier. She said that she had been released for light duty which did not involve standing or walking, but that she was told by the employer that no such work was available. The claimant said she had not worked since July 16th. She said she used a cane to walk, although not around her house.

On cross-examination, the claimant agreed that she reported a left foot injury to her employer and said that she did not know how it happened, just that her left foot began to hurt around 9:00 p.m. She further agreed that she had not mentioned a back injury or squatting incident to any medical doctor who treated her until four months after the date of the alleged injury. She said that her recollection was refreshed about the incident by a coworker, Ms. M, who had seen her grimace after rising from stacking the blue jeans. As the hearing officer pointed out in his decision, the Employee's Notice of Injury or

Occupational Disease & Claim for Compensation (TWCC-41) filed August 30, 1999, asserted a left foot injury which had occurred when the claimant "stepped wrong or tripped."

Ms. M testified that she was working that night on the later shift on _____, beginning at 2:00 p.m., and could see the claimant from her station at the cash register. She said she had an unobstructed view notwithstanding that there were two round carousels with hanging clothing between her and the claimant. At around 8:00 p.m., she saw the claimant grimace and, later that evening, saw the claimant limping and in pain. Expressly asked if she had not in fact worked the earlier shift that day, from around 9:00 a.m. until 6:00 p.m., she said that was not possible.

Ms. G, the employer's human resources manager, testified that if Ms. M was in the store at 8:00 p.m. or 9:00 p.m., it would have been as a customer, since Ms. G had worked, according to her time card, from 8:55 a.m. until 6:07 p.m., with time out for lunch and breaks. She said that if Ms. M had been asked to work overtime, it would be reflected on this time card. Ms. G disputed that Ms. M would have been able to see from her cash register the claimant squatting down and that her view would be obstructed. Ms. M said that since the incident, she had seen the claimant in the store, walking around without a cane, and once at a garage sale at Ms. G's house, during which the claimant was walking around carrying a small child.

Ms. M was recalled as a witness and she said that because _____, a Saturday, had been prom night, she had been asked to work a second shift, after her regular day shift, and this was why she was on duty the night she saw the claimant stacking the jeans.

Medical records in evidence reflect that the claimant was treated by Dr. R for left foot problems of unknown cause. An August 16, 1999, letter from Dr. S noted that the claimant had been diagnosed in a hospital emergency room on May 17th with plantar fascitis. He noted a history that the claimant had developed heel pain at work around 9:00 p.m. on _____; he recommended an MRI of her left foot and an EMG of the left foot and ankle. He felt her injury was work related because she did a lot of standing and walking at work. The foot MRI revealed peritendinitis of the left Achilles tendon and a soft tissue injury around the left ankle. It appears that Dr. S opined on September 8, 1999, after consultation with the EMG doctor, that there could be lumbar nerve root irritation.

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.). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v.

Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.- Amarillo 1980, 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). And, where there is a finding that there is no compensable injury, one important element of disability, as defined in Section 401.011(16), is not present. As we review the record developed at the CCH, we cannot agree that there is not sufficient support for the hearing officer's determination that there was no injury, either to the claimant's back or her foot, which arose out of her employment.

We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge