APPEAL NO. 000361

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 January 13, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability resulting from the alleged compensable injury.

The claimant has appealed, arguing that the decision is against the great weight and preponderance of the evidence. The respondent (carrier) responds by reciting facts in favor of the hearing officer's decision.

DECISION

Affirmed.

The claimant was a truck driver for (employer) for over 15 years and delivered new cars to various dealerships. He said that he worked 40 to 50 hours a week.

The claimant asserted that on _____, as he turned his head to the right to check for traffic while unloading a vehicle, he felt a pop in his neck. He said this was a Friday and he finished his shift for the day. He did not report for work the following Monday due to increasing pain.

The claimant saw a doctor, Dr. M, D.C., on that Tuesday (_____), and he had "signed off" at work as unavailable due to this appointment. The claimant had another coworker "sign off" for him and did not himself call. The claimant said he was sent for an MRI but was never told what was wrong with him. He said he went for treatments at Dr. M's office five days a week. He said that his major symptom was the inability to turn his head, and he went for five-day-a-week therapy for three months.

The claimant said he had hurt his neck before, in 1994, and was off work for two months at that time. The mechanism of that injury was also turning his head. He was not really sure about when he had last been treated for that injury prior to the current asserted injury. The claimant said that he had not told the adjuster about his prior neck injury because Dr. M had already pointed out to him that the employer knew, and it didn't matter anyway.

Dr. M took the claimant off work effective August 17, 1999. The claimant returned to work this time around November 22, 1999. The claimant said he had taken no medication for this injury and was still seeing Dr. M once a week. The claimant asserted that Dr. M had not talked to him about the treatment plan in his case, notwithstanding seeing him five days a week for three months. The claimant said he was currently capable of doing his job although his neck was still stiff.

The claimant agreed he did not report his injury on _____ or the next day when he spoke to the employer (Mr. H) about making a delivery that following Monday. Although furnished with emergency numbers to call if he could not report to work, the claimant agreed he did not call on the Monday when he did not report because he thought a day of rest would help. Asked why he did not answer his telephone all day Monday, he said he was in bed and could not hear it. Nor did he answer any telephone calls on Wednesday, when he had been at the doctor's office only two hours and home the rest of the day.

Claimant said that the first person he spoke to at the employer was Mr. M, and agreed that he "may have" told him that he did not know how he hurt his neck. This report was apparently made two weeks on the telephone after the claimed injury.

Mr. W, the terminal manager for the employer, testified that claimant was one of his drivers and Mr. M was his assistant manager. He said that due to contract provisions with the union, drivers were supposed to immediately report on-the-job injuries. He confirmed that claimant spoke on Saturday, _____, with Mr. H, the weekend manager, and was assigned a load for Monday, but that the claimant did not show up on Monday.

He said that the employer made numerous attempts to contact the claimant that day and the next two days, and he understood that claimant was eventually contacted on Wednesday afternoon at around 4:00 p.m. He said that although claimant was asked to fill out an injury report, he did not do so until sometime in September.

Statements from Mr. H and Mr. M were excluded because they were not timely exchanged. Claimant's injury report was filed with the employer on September 14, 1999, and does not state how the injury happened but says it happened when he was unloading at a dealership. His statement to the adjuster denied any previous injuries at least twice. In fact, his prior claims history indicated several injuries (most before 1990), and a 1995 back injury in addition to the neck injury of 1994.

Dr. M's records show a diagnosis of cervicobrachial syndrome as well as low back and thoracic pain. An MRI of August 27, 1999, shows a small bulge at C4-5, and a left herniation at C5-6.

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).

It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. 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.). In this case, the hearing officer could believe that claimant was injured, but was not compelled to believe that this happened at work, as opposed to the intervening weekend. While notice may not have been in issue, he could evaluate claimant's behavior in not promptly calling in the injury as inconsistent with it being a work-related occurrence, not merely that he thought the pain would go away. Without a finding that the claimant sustained a compensable injury, the hearing officer could not in turn hold that claimant had "disability" as defined in Section 401.011(16).

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 find that the record sufficiently supports the decision, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge