APPEAL NO. 000808

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 March 16, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable right shoulder or neck injury on _____; and that claimant did not have disability. The claimant appealed, arguing that he proved that he hurt his shoulder at work. He says he still has a large "knot" and is in pain that affects his ability to work. He objects to admission of a videotape at the CCH. The respondent (carrier) responded that the hearing officer's decision on injury and disability is supported. The carrier does not specifically respond to the evidentiary point of error.

DECISION

We affirm the decision.

The claimant was employed by (employer) for whom he had performed a series of temporary jobs. On _____, he was assigned to work at (client company) where he stacked bricks. On Monday, _____, he said, he was using tongs to stack bricks in four-foot high piles and, as he swung the tongs up, he experienced a pop and burning sensation in his right shoulder. He said that he had a crunching sensation. The claimant said he switched out tasks with his coworker, Mr. K, after telling Mr. K that his shoulder hurt. The claimant said that he called the employer on October 26th to report his injury, but was not able to go to their office to file an official report on October 28, 1999, because of transportation problems. He spoke to Ms. L when he called. The report of injury showed the date of injury as _____ at 3 p.m. The claimant said that this was just a mistake. It is notable that this report also shows that the dates the injury was first reported were _____ and _____.

The claimant sought medical treatment from Dr. CH on October 28th, and said he was taken off work then released back to light duty on November 4, 1999. Dr. CH told him to exercise and the knot would go away. The claimant said that Ms. L told him there was no light duty for him when he called. He said he had not seen a doctor since November 4th because the insurance company would not cover it and a doctor would not treat him without payment. However, it was brought out that claimant had been receiving temporary income benefits.

Dr. CH's records are not very legible. A slip was issued by Dr. CH on November 4th that stated that claimant should not work with his right arm and that he had AC joint pain.

The claimant said that he had a knot in his shoulder since that day. The soreness was localized to the shoulder joint and did not radiate to the elbow or wrist. The claimant said he had not been asked to work on Saturday. He said that the video showing him

working on his car involved his tightening a bolt in his engine. He pointed out that he still had to do things around the house, whether or not injured, and this is why he was performing some physical activities.

Mr. S, who worked as a supervisor with the client company, explained that brick tongs were used to pick up as many as nine four-pound bricks at a time. He said that claimant did not mention to him at all that he had been hurt or had problems. Mr. S was under the impression that the two days claimant worked were Thursday and Friday, the 21st and 22nd of October. He said that he asked them if they could work Saturday and they declined and were to report on the following Monday. Mr. S said that only Mr. K showed up for work. A signed and witnessed statement from Mr. K said that he and claimant worked together on _____ and claimant complained increasingly of pain on _____ as they worked together, and did not return the next day.

Ms. L testified that she was branch manager for the employer. She maintained that claimant never turned in a time ticket for Monday _____ and when he called about not getting paid, she arranged to get a new time ticket from the client company and did. Ms. L said that claimant contended that he was hurt on the _____ when he first called Ms. L to report the injury. Ms. L recalled that claimant came into the office when she was not there to fill out the accident report. She said that she had not seen the light-duty release from Dr. CH prior to the date of the CCH. She did not recall being contacted by claimant about a light-duty position.

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 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). 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). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole.

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). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of

the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the videotape, which was not in existence 15 days after the benefit review conference, we cannot agree that the hearing officer abused his discretion in admitting it.

We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge