APPEAL NO. 93569

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing (CCH), (hearing officer) presiding, was held in (city), Texas, on June 10, 1993. The issues at the CCH were: 1. whether during her injury of (date of injury), the claimant injured her neck; 2. what was the claimant's impairment rating; 3. whether the condition of fibromyalgia was causally related to the claimant's injury of (date of injury). The hearing officer found that the claimant did injure her neck during her injury of (date of injury), that the claimant has 17% impairment rating, and that the claimant's injury of (date of injury), was not related to fibromyalgia.

The claimant files a request for review arguing that she had not, as found by the hearing officer, stipulated she had reached maximum medical improvement (MMI) on December 2, 1992, and that her injury caused her to suffer from fibromyalgia. The claimant attaches a number of documents to her request for review--many of which are copies of documents which had been admitted into evidence at the CCH and some of which were not. The a political subdivision which is statutorily self-insured (city herein), files a response contending that the Appeals Panel lacks jurisdiction over this case because the claimant allegedly failed to properly serve a copy of her request for review on the city, that the parties stipulated to MMI as found by the hearing officer, and that the claimant failed to present any evidence that her fibromyalgia is related to her injury of (date of injury).

The claimant files a reply to the carrier's response stating that she did serve the carrier with a copy of her request for review and attaching certified mail receipts to indicate that the carrier had received the request for review.

DECISION

Finding the jurisdiction proper, no reversible error in the record, and sufficient evidence to support the decision of the hearing officer, we affirm.

The first question we must address is the one of jurisdiction. The carrier contends that the Appeals Panel lacks jurisdiction to consider this case because the claimant failed to send the carrier a copy of her request for review. The claimant in her reply for response attaches certified mail receipts showing her request for review was sent to carrier's adjusting firm but the date of receipt is not legible. We do not generally consider a reply to a response for review when it is untimely. *See* Texas Workers' Compensation Commission Appeal No. 92003, decided February 12, 1992; Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. However, we do not need to do so to reject the carrier's argument because we have held that the failure to properly serve a respondent with a request for review does not affect the timeliness of the request for review or deprive the Appeals Panel of jurisdiction, but may extend the time for the response to be filed. *See* Texas Workers' Compensation Commission Appeal No. 92397, decided September 21, 1992; Texas Workers' Compensation Commission Appeal No. 91120, decided March 30,

1992. Further, we do not consider claimant's attachments as we normally do not consider such attachments which are not part of the record made at the CCH. *See* Article 8308-6.42(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992; Texas Workers' Compensation Appeal No. 93536, decided August 12, 1993.

The facts of the case are well summarized in the decision of the hearing officer in the section entitled "Statement of the Evidence," which we adopt for purposes of our decision. It is undisputed that the claimant suffered a compensable injury when an elevator she was exiting closed on her. The claimant testified that her injury included damage to her shoulders, arms, hands and neck. The medical evidence indicated that the claimant had degenerative disc disease in her neck which predated her injury. The claimant testified that she had never had neck symptoms or treatment prior to the accident. She admitted medical records from previous doctors showing no such treatment and indicating that before the accident that the claimant had been "blessed with good health."

Since the accident the claimant has had a number of symptoms and has been particularly troubled with pain. The various doctors who have seen the claimant have expressed differing opinions concerning both her diagnosis and treatment. (Dr. G), her treating doctor, diagnosed the claimant as suffering from among other things fibromyalgia. Fibromyalgia is described, in documents admitted into evidence at the CCH, as an illness with widespread muscle and joint pain, intense fatigue and disturbed sleep patterns which is similar in symptomology to chronic fatigue syndrome, difficult to diagnose and of uncertain etiology.

Much of the dispute at the CCH revolved around whether the hearing officer should adopt the impairment rating provided by (Dr. T), a (city) plastic surgeon chosen by the carrier to evaluate the claimant's impairment, or Dr. A, an orthopedic surgeon selected as the designated doctor by the Texas Workers' Compensation Commission (Commission). The hearing officer chose to adopt the rating given by the designated doctor, but this is not an appealed issue. After disposing of the jurisdictional issue, the only remaining issues on appeal are whether or not the parties stipulated MMI and whether the hearing officer's finding that the claimant's injury neither caused nor was related to the claimant's alleged fibromyalgia.

In regard to MMI, the record discloses the hearing officer discussed stipulations with the parties including stipulation of MMI. The record shows that initially there was a discussion as to whether the parties could stipulate MMI or not as there seemed to be a disagreement over two possible dates of MMI. The parties then asked to go off the record so that the parties could attempt to reach an agreement concerning the MMI date. As soon as the parties went back on the record the hearing officer asked if MMI could be stipulated and both parties indicated it could. Both parties then clearly stipulated that MMI was

reached December 2, 1992. When claimant states in her request for review that she did not stipulate the date of MMI, she is mistaken as she clearly did so on the record. We cannot and should not overturn the hearing officer's finding of the MMI date based upon this stipulation of the parties.

As to the issue of whether fibromyalgia was related to the claimant's injury, we cannot find any medical evidence in the record showing any such relationship. The claimant clearly believes that her injury caused or aggravated fibromyalgia and testified to that effect. Lay testimony is not always sufficient to prove an injury. As the court noted in Hernandez v. T.E.I.A., 783 S.W.2d 250 (Tex. Civ. App.-Corpus Christi 1989, no writ), where the cause of disease is difficult to ascertain, ". . . expert testimony may be required where a claimant alleges that employment caused or aggravated a disease and the fact finder lacks the ability from common knowledge to find a causal basis." *See* Texas Workers' Compensation Commission Appeal No. 93390, decided July 2, 1993; Texas Workers' Compensation Commission Appeal No. 93094, decided March 19, 1993.

Further even if some of the documents offered into evidence by the claimant constituted such expert testimony of causation, and our careful examination of them indicate that they do not, this would at most raise a question of fact. Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Clearly in the present case we have no such basis to overturn the finding of the hearing officer. We, therefore, affirm.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge