APPEAL NO. 991512

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 17, 1999, a contested case hearing was held. With regard to the two issues before her, the hearing officer determined that appellant (claimant) had not sustained a compensable injury on _____ (all dates are 1998 unless otherwise stated), and that claimant did not have disability because he did not have a compensable injury.

Claimant appealed, contending that the hearing officer had ignored claimant's evidence while accepting respondent's (carrier) evidence; that claimant's testimony and the medical evidence established an injury and disability; that the doctors, in expressing their opinions, need not use precise legal terms; and that the hearing officer went outside of the evidence in making her determination on disability. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, urging affirmance and citing authority for its points.

DECISION

Affirmed.

Many of the underlying facts are in dispute. It is undisputed that claimant was employed by (employer), assigned to work for (construction company) and was working on the premises of (plant), when an explosion occurred on the plant grounds on Friday, _____. Claimant testified that he was working as a "rod buster," tying rebar onto a "vessel pad." The pad was described as being 40' long by 20' wide and anywhere from two to four feet high. Claimant testified that when the explosion occurred, he was 100 yards away (other testimony was, and the hearing officer found, that claimant was 600 yards away from the point of the explosion). Whether claimant was knocked down or off the pad is also in dispute. A statement from a coworker working with claimant indicates claimant did not fall down nor was he knocked off the pad. In any event, claimant, and other workers, ran or were driven to the plant gate and then apparently to the construction company offices and were sent home. Claimant testified that his back began hurting that evening and got progressively worse over the weekend. Claimant and his wife testified that they do not have a telephone and that on Monday, December 7th, claimant's wife went to a nearby convenience store, called the construction company, spoke with Ms. E (or Ev, Ms. E) and told her that claimant had been injured and had to see a doctor. What Ms. E (apparently a temporary employee) did or said is unclear. Claimant and his wife testified that claimant's wife called the construction company again on Tuesday, December 8th, and spoke with Ms. AN, the owner's wife. Ms. AN denies that and it is relatively undisputed that claimant's wife again called on Wednesday, December 9th, and spoke with Ms. AN. What was said and whether Ms. AN made an appointment for claimant to see the company doctor is unclear and disputed. Claimant did speak with Ms. AN on either Wednesday or Thursday, December 9th or 10th, and, after some calls back and forth, was able to see his

own doctor (on referral from his attorney), Dr. L, on December 10th. Claimant is basically alleging a back injury, bilateral loss of hearing (ringing in the ears), worse right than left, and post-traumatic stress disorder (PTSD). Various doctors have taken claimant off work from December 10th through sometime in 1999.

An office note dated December 10th from Dr. L notes a history that claimant "was thrown about 3 to 4 feet and landed on his back." Dr. L's assessment is thoracic and upper lumbar spine strain without radiculopathy, right ear concussion with tinnitus and possible PTSD. Dr. L took claimant off work. X-rays and an MRI were essentially negative. In another progress note dated December 17th, Dr. L states that the "diagnoses continue as before." Dr. L referred claimant to Dr. JS for an orthopedic evaluation and Dr. WS for a hearing evaluation and claimant's vertigo. In an office progress note dated January 4, 1999, Dr. L noted that claimant "was assaulted in his own home and during the fight he sustained an injury to the back." Claimant described the fight involving a neighbor and how he got "beat up." Another note dated February 12, 1999, in essence, repeats prior assessments.

A report dated January 29, 1999, from Dr. WS noted that the "otologic exam was entirely normal" and that claimant had some high frequency hearing loss with "the left ear being somewhat worse than the right," and concluded:

> It is my impression that this patient has a high frequency sensorineural hearing loss, which could be the cause of his tinnitus. This could quite possibly have been caused by a loud blast. I am somewhat surprised at the patient's indication that his right ear was worse than his left, because there is essentially no difference between the two . . . .

Dr. JS, in a report dated February 3, 1999, recites a history that claimant "fell off a 2-foot high mat" and assesses "residuals of contusion to the thoracic and lumbar spine." Apparently, another MRI ruled out any compression fractures. In a report dated April 14, 1999, to claimant's attorney, Dr. JS states:

> He had a myofascial injury secondary to his job. He had preexisting conditions in the form of an old Scheuermann juvenile kyphosis and a hypertrophic transverse process having pseudarthrosis of the sacrum in the low back area. These are preexisting conditions and developmental anomaly respectively. At this time, the patient is not able to continue his regular work activities and he currently remains disabled and will remain disabled for the next two months.

Claimant was also seen several times by Ms. LG, a licensed professional counselor, who, in a report dated December 9th, diagnosed PTSD and who, in several reports dated through February 10, 1999, comments on claimant's social history, financial problems, etc.

Carrier's evidence consists of the testimony of claimant's immediate supervisor who said that he was supervising 30 of the employer's workers at the site at the time of the explosion, that none of the other workers had been injured and that 10 had had hearing tests, with no one suffering hearing loss. Other evidence consisted of a fairly detailed statement of Ms. AN and a statement from a coworker who was working with claimant stating claimant had not fallen down or been hit by anything by the explosion.

The hearing officer, in her Statement of the Evidence, summarizes the testimony and medical evidence in some detail and concludes that claimant "failed to establish a causal relationship between the alleged injuries and the explosion of _____." Claimant, in his appeal, states that the hearing officer ignored the statements of the doctors and claimant's testimony (and his wife's testimony) and, instead, "chose to accept the written statement of the employer, a written statement from a coworker and the testimony of claimant's supervisor, none of which addressed the issue of whether or not claimant was injured." An injury is defined as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). Whether an employee has "a disease or infection naturally resulting from the damage or harm," or whether an injury extends to a particular member of his body, is a factual matter for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it 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 could 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the

hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Claimant contends that the hearing officer "completely ignores" the medical records, noting that the treating doctor's medical records state: "He had sustained a back injury from the explosion at the [plant]." The opinions of the doctors were in large part based on claimant's history and the hearing officer need not believe that history to be accurate. In this regard, we have noted that a fact finder is not bound by the testimony (or evidence) of a medical witness when the credibility of the testimony is manifestly dependent on the history given to the doctor by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

Claimant also contends that the hearing officer "improperly held claimant and his doctor to the use of some precise legal terms," citing that Dr. WS had said that the hearing loss "could quite possibly have been caused by a loud blast" as meaning the hearing officer found that phraseology failed to amount to reasonable medical probability. We disagree with claimant and point out the hearing officer's complete sentence, which says:

> With regards to causal relation, [Dr. WS] states, it is possible the hearing loss could have been caused by a loud blast, however, he was surprised at the Claimant's indication that his right ear was worse that [sic] his left because there was essentially no difference in his findings between the two.

We view the hearing officer's comment on Dr. WS's report as merely pointing out an inconsistency between claimant's testimony and Dr. WS's findings.

Claimant also contends the hearing officer went "outside of the evidence" in commenting that "a diagnosis of back sprain or contusion does not take six months to heal." We view the hearing officer's remark as merely stating her view and common experience regarding back strains and sprains, rather than referring to evidence outside the record. On the issue of disability, in that we are affirming the hearing officer's decision that claimant had not sustained a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra*. We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in the result. In his appeal, the claimant wrote:

> Finally, the hearing officer appears to have gone outside of the evidence for a determination of the period of the Claimant's disability. On the decision, she wrote that a diagnosis of back sprain or contusion does not take six months to heal. Yet this conclusion is no where supported in the evidence, and was not even discussed.

In Texas Workers' Compensation Commission Appeal No. 960173, decided March 6, 1996, the Appeals Panel stated that the Texas Workers' Compensation Commission has not adopted lost time guidelines, that there was no counterpart evidence concerning lost time in the record, and that the hearing officer was not expected to supply gaps in the evidence. In other decisions, the Appeals Panel has stated that a hearing officer is not to consider evidence not in the record. In my opinion, it was error for the hearing officer to consider that certain injuries do not take six months to heal, but under the facts of the case before us, the error is harmless.

_____
Tommy W. Lueders
Appeals Judge