APPEAL NO. 000585

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 31, 2000. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____; that the appellant (carrier) waived its right to contest compensability because it failed to do so in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 124.6 (Rule 124.6); that the claimant continues to suffer from the effects of his _____, compensable injury; and that he had disability as a result of his compensable injury from May 21, 1999, through the date of the hearing. In its appeal, the carrier asserts that the hearing officer's determinations that the claimant sustained a compensable injury, that he continues to suffer the effects of his compensable injury, and that he has had disability from May 21, 1999, through the date of the hearing are against the great weight of the evidence. The carrier also argues that its contest of compensability was based on newly discovered evidence and that, as a result, the hearing officer erred in determining that it had waived the right to contest compensability in this instance. In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The claimant worked as a heavy equipment operator for the employer for about five months prior to his alleged _____, injury. He initially operated a bulldozer and then began operating an end dump rock truck, which he drove for about four months. The claimant testified, and coworker statements in evidence confirm, that the dump truck was old and in disrepair. Specifically, the claimant testified that the smoke from the exhaust system came into the cab where he sat. The claimant testified that the smoke was so bad that by the end of the day his light-colored hair would be black from the smoke; that shortly after he began driving the truck he developed problems with nausea and headaches; and that at times he felt disoriented and thought he would "pass out" after a day of inhaling the smoke. The claimant further testified that on _____ and _____ the smoke was "five times worse" than it had been previously; that he developed burning in his eyes, nose, throat, and lungs from breathing in the smoke; and that by about 11:30 a.m. on _____, he had developed chest pain and "shooting pain" down his left arm. He stated that he thought he was having a heart attack so he left work and a coworker drove him home. Thereafter, the claimant's wife took him to the emergency room.

The _____, emergency room records reflect complaints of chest pain and a history of breathing heavy exhaust fumes in the cab of a truck. Those records further state that the claimant has been a two-pack-a-day smoker for 25 years. The claimant was placed on oxygen, EKG testing was interpreted as normal, and the claimant's level of carboxyhemoglobin was 5.1. The claimant was released from the emergency room and advised to follow up with

his family doctor, Dr. W. In his May 21, 1999, report, Dr. W noted the claimant's history of exposure to heavy exhaust fumes at work and stated that it was "possible" that the claimant was having some side effects from the smoke and working conditions. Dr. W also referenced the claimant's extensive smoking history in that report. Eventually, Dr. W referred the claimant to a pulmonologist and a neurologist. The claimant saw Dr. JS, the pulmonologist to whom he was referred, on June 11, 1999. Dr. JS noted that the claimant felt he had suffered carbon monoxide poisoning from his exposure to exhaust fumes at work. However, Dr. JS concluded his June 11th report by stating that there was "[n]o evidence on physical, radiographic or lung mechanics testing of defect present which cannot be attributed to his cigarette smoking." There is a date stamp of August 19, 1999, on Dr. JS's report, and the carrier contends that this report was the newly discovered evidence which triggered its August 27, 1999, contest of compensability.

Dr. RS, the neurologist to whom Dr. W referred the claimant, likewise noted a history of the claimant being exposed to diesel exhaust fumes, which the claimant believed was the cause of his problems. Among other diagnoses, Dr. RS diagnosed a possible industrial exposure related disorder. The claimant stated that he was concerned about his ongoing symptoms and wanted to find out what was going on so he began to do research on the Internet about carbon monoxide poisoning. He stated that he came across an article written by Dr. V and that he called Dr. V's office to see if Dr. V could recommend a doctor for him to see close to his home. Dr. V was not able to recommend another doctor but he agreed to see the claimant. The claimant traveled to (city) to treat with Dr. V. In his initial report, Dr. V indicated that he was considering carbon monoxide poisoning based upon the claimant's exposure to exhaust fumes at work; however, he ordered numerous diagnostic tests in an attempt to confirm that diagnosis. In a July 20, 1999, report Dr. V confirmed the diagnosis of carbon monoxide poisoning, a diagnosis which Dr. V repeated in reports of August 3, 1999, and September 2, 1999. In response to questions posed to him by the claimant's attorney in a letter dated October 6, 1999, Dr. V stated that the claimant was diagnosed with carbon monoxide poisoning. In response to the question of whether the claimant's diagnosis/condition was work related, Dr. V responded "probably" and wrote the term "exposure" in response to the question of how it was work related. Finally, Dr. V opined that the claimant's condition prevented him from working from the date of his first appointment through the present.

The carrier had Dr. R conduct a review of the claimant's medical records. In a letter dated November 18, 1999, Dr. R noted that the claimant's carboxyhemoglobin level of 5.1 which was tested at the emergency room was consistent with his smoking but was not consistent with acute carbon monoxide poisoning. Dr. R concluded:

> In all, the claimant had a noncardiac episode of chest pain on _____, with carboxyhemoglobin level consistent with smoking and no acute carbon monoxide poisoning. All his medical evaluations since _____ are

consistent with non-work-related illnesses (i.e. anxiety, chronic obstructive lung disease, hyperlipidemia, and hypertension).

Initially, we will consider the carrier's assertion that the hearing officer's determination that the claimant sustained a compensable injury is against the great weight of the evidence. The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass=n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant sustained a compensable occupational disease injury. The hearing officer was acting within his province as the fact finder in deciding to credit the claimant=s testimony and the other evidence about his exposure to exhaust fumes at work and the causation opinion of Dr. V over the contrary opinion from Dr. R. The carrier asserts that Dr. V's opinion does not rise to the level of reasonable medical probability and thus did not provide sufficient evidentiary support for the hearing officer's decision. In his discussion, the hearing officer noted that Dr. V had not used the phrase reasonable medical probability; nonetheless, the hearing officer further noted that "after reviewing [Dr. V's] records in context with his response, his answer was sufficient to establish that he found a causal relationship between the Claimant's condition and his duties as a truck driver for the Employer." That interpretation of Dr. V's records was a reasonable interpretation. Our review of the record does not reveal that the hearing officer=s determination that the claimant sustained a compensable occupational disease injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The questions of whether the claimant continued to suffer the effects of his compensable injury and whether he had disability were similarly questions of fact for the hearing officer to resolve. Dr. V's records and the claimant's testimony provide sufficient evidentiary support for the determinations that the effects of the injury continue and that the claimant had disability as a result of his compensable injury from May 21, 1999, through the

date of the hearing, January 31, 2000. We cannot agree that those determinations are so contrary to the great weight of the evidence as to compel their reversal on appeal.

Finally, we consider the carrier's assertion that its contest of compensability was based upon newly discovered evidence and that, as such, the hearing officer erred in determining that it had waived its right to contest compensability in this case. The carrier asserts that Dr. JS's June 11, 1999, report, which is date-stamped as having been received on August 19, 1999, was the newly discovered evidence which triggered its August 27, 1999, contest of compensability. In that report, Dr. JS stated that no defect was present "which cannot be attributed to [claimant's] cigarette smoking." As the hearing officer noted in his decision, the medical records from the beginning of the claimant's treatment for this injury are replete with references that the claimant is a moderate to heavy smoker. Accordingly, the hearing officer determined that Dr. JS's report was not newly discovered evidence. The hearing officer's determination in that regard is not so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust and we will not disturb it on appeal. Therefore, the hearing officer did not err in further determining that the carrier was not permitted to reopen and contest compensability in this instance because Dr. JS's report did not rise to the level of newly discovered evidence. Thus, we likewise affirm the hearing officer's determination that the carrier waived its right to contest compensability in this case.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge