APPEAL NO. 002102

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 August 10, 2000. The issue at the CCH was whether the respondent (claimant) was entitled to the sixth quarter of supplemental income benefits (SIBs). The hearing officer determined that the claimant had no ability to work during the qualifying period for the sixth quarter and was entitled to the sixth quarter of SIBs. The appellant (carrier) appealed the hearing officer's determinations that the claimant's unemployment was a direct result of his impairment and that the claimant had no ability to work during the qualifying period. The claimant responds that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

Affirmed.

The claimant was employed as a truck driver for a sand and gravel company on _____. As he stepped from his truck, his foot slipped on an oil film on the step, he fell to the ground, and he injured his low back. The parties stipulated that the claimant reached maximum medical improvement on October 8, 1997, with a 24% impairment rating, that the claimant did not commute any portion of the impairment income benefits, that the claimant's monthly SIBs rate is $1,148.66, and that the qualifying period for the sixth quarter of SIBs was from February 11, 2000, through May 11, 2000. It was uncontested that the claimant did not earn any wages during the qualifying period and that the claimant did not look for any work during the qualifying period. The hearing officer found that the claimant's unemployment during the qualifying period was a direct result of his impairment and that the claimant had no ability to work during the qualifying period. The carrier attacks specific findings of fact and conclusions of law as follows:

FINDINGS OF FACT

7. As a result of the injury of _____, Claimant had spinal surgery which has failed.

8. Claimant has been approved for two level spinal fusion with internal fixation.

9. Claimant has a cardiac condition that prevents the spinal fusion at this time.

* * * *

11. During the Qualifying Period for the disputed sixth quarter the Claimant had no ability to work because of his compensable impairment.

* * * *

13. Claimant's monthly [SIBs] rate is $1,148.66.

CONCLUSION OF LAW

4. Claimant is entitled to [SIBs] for the sixth quarter May 25, 2000, through August 23, 2000.

It is noted at the outset that a list of written stipulations was attached to the benefit review conference (BRC) report, and the written stipulations were approved and signed by the claimant and the carrier's representative, Ms. D, at the BRC. One of those stipulations was that the claimant's monthly SIBs rate was $1,148.66. That stipulation was dictated into the record at the CCH and both the claimant and the carrier so stipulated. There is more than adequate evidence in the record from which the hearing officer could find that the claimant's monthly SIBs rate is $1,148.66 and the carrier's appeal of that finding is without merit. The carrier on appeal also asserts that the claimant had an ability to work, that there were other records which showed that the claimant had an ability to work during the qualifying period, and that the claimant's unemployment during the qualifying period was not a direct result of the impairment from the compensable injury.

The claimant underwent spinal surgery on April 2, 1997. The surgery consisted of a laminotomy and disk excision at L4-5 and the fusion of the lumbar spine from L4 to S1. That fusion failed and on August 17, 1999, the Texas Workers' Compensation Commission (Commission) approved a change of treating doctors. The claimant's new treating doctor was Dr. W. The claimant went to Dr. W on August 25, 1999, and a full examination and history was done. In his report of that examination, Dr. W noted that he had reviewed medical records from Dr. Ba which indicated that Dr. Ba had been following the claimant for back problems secondary to failed back surgery and that Dr. Ba felt that the claimant was totally disabled and permanently unable to work. Dr. W then concluded that the claimant needed further surgery to stabilize the back. Dr. W recommended an anterior lumbar interbody fusion at L4-5 and L5-S1 with BAK cages. Dr. W stated:

> The patient is totally disabled so far as being able to work at his job as a truck driver. He is unlikely to be able to return to work in the foreseeable future and certainly will not be able to return to work unless he has a successful stabilization of his lumbar spine.

It is probable that one of the reports from Dr. Ba that Dr. W reviewed was a "To Whom It May Concern" letter written by Dr. Ba on May 24, 1999. In that letter, Dr. Ba wrote:

> [The claimant] was last seen in this office on April 21, 1999. He is still being folowed [sic] for continued back problems. In addition, he has had alot [sic] of cardiac problems.
>
> This man has a failed back syndrome and is considered to be totally disabled and unable to work. This is a permanent condition.

Dr. W recommended spinal surgery and the spinal surgery second opinion process was initiated. As a part of the process, the claimant was examined by Dr. B. In a narrative report dated December 7, 1999, Dr. B concurred in the need for spinal surgery. By January 10, 2000, the spinal surgery second opinion process had been completed and the claimant's surgery had been approved. But there was an obstacle to the claimant's surgery, the claimant also has a heart condition.

On March 3, 2000, Dr. S, the claimant's cardiologist, sent a letter to Dr. W expressing some reservations about the proposed spinal surgery. In that letter, Dr. S stated that the claimant had some residual ischemia in his inferior wall, that the condition did not warrant bypass surgery, but that the claimant was not completely cleared for spinal surgery. As a result of that report from Dr. S, plans for spinal surgery have been placed on hold.

On April 17, 2000, Dr. W addressed the claimant's work status in a chart note. In the note, he stated:

> Because of his cardiac problems, surgery is not an option for this patient at this time. Because of his disc disruption at two levels, the patient is unable to work and at this time is considered disabled.

And on June 21, 2000, Dr. W issued a work status report which stated:

> Pt [the claimant] has 2 level lumbar disc disruption & can't sit, walk, stand for more than 10-15 minutes. Pt should avoid bending, lifting, stooping. Pt must change position every 10 minutes.

Although Dr. W did not check the block which states that the claimant is unable to work, neither did he check a block which would indicate that the claimant could return to work with restrictions or return to a prior job with sedentary, light, medium, medium-heavy, or heavy physical demand levels.

The hearing officer could have concluded that the work status report of June 21, 2000, reinforced and explained why the claimant was unable to work in any capacity, rather than showing that the claimant had some ability to work. Although carrier urges that the work status report must be read to state that the claimant has some ability to work, we disagree. We also disagree that the functional capacity evaluation of December 1995 and work release of January 1996 necessarily show that the claimant had some ability to work

during the qualifying period. Those records predate the claimant's spinal surgery (which ultimately failed) by at least a year. The hearing officer could conclude that those records were not indicative of an ability to work during the qualifying period four years later.

Since the hearing officer could have determined, on the basis of the evidence before him, that the claimant had no ability to work during the qualifying period for the fifth quarter as a result of his failed back surgery, surgery which was for the treatment of the compensable injury, the carrier's argument that the claimant failed to establish that his unemployment was a direct result of his impairment is without merit.

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 judgement 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, 244 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 judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Finding the evidence sufficient to support the hearing officer's decision and there being no reversible error in the record, we affirm the Decision and Order of the hearing officer.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge