APPEAL NO. 002228

Following a contested case hearing held on August 29, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant's (claimant) compensable injury did not include the C4-5 level of the cervical spine nor the lumbar spine, that the respondent (self-insured) timely disputed that the injury extended to the C4-5 level of the cervical spine and to the lumbar spine, and that the claimant's impairment rating (IR) is 18%. The claimant appealed the hearing officer's decision, asserting that the hearing officer's determinations were against the great weight of the evidence and that his IR should be 37%, as determined by the designated doctor. There was no response on appeal from the self-insured.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant sustained a compensable injury to the C5-6 level of his cervical spine when the dump truck in which he was a passenger was rear-ended by the trailer of a jack-knifed truck on _____. The existence of a compensable injury was not disputed by the self-insured, although the extent of the compensable injury is now highly disputed. Although the claimant asserts that the self-insured waived the right to contest that his lumbar spine and the C4-5 level of the cervical spine are included in the compensable injury, the Employer's First Report of Injury or Illness (TWCC-1) lists a contusion/strain of the head and shoulder as the reported injury. The matter before the hearing officer was firmly presented as an extent-of injury-question. As noted by the Appeals Panel in Texas Workers' Compensation Appeal No. 000713, decided May 17, 2000, and a number of Appeals Panel decisions since then, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3)

> :provides that Section 409.021 and the implementing provisions of this statute in Rule 124.3(a) "do not apply to disputes of extent of injury." Rule 124.3(c) further provides that if a carrier receives a medical bill and wishes to dispute liability for the treatment it shall file a notice of dispute not later than the earlier of the date the medical bill is denied or the due date for paying or denying the medical bill. The preamble to this rule states that failure to timely dispute the extent of injury "is a compliance issue. It does not create liability."

Since the matter before the hearing officer was a question of the extent of the accepted injury, the alleged waiver is controlled by Rule 124.3 and the hearing officer correctly determined that the self-insured did not waive the right to contest the extent of the compensable injury.

The claimant also appeals the hearing officer's factual determination that the compensable injury of _____, did not include the C4-5 level of the cervical spine nor the lumbar spine. Although the claimant asserts that the great weight and preponderance of the evidence proves that those areas of the body were injured on _____, there was conflicting evidence. It is noted that among the documents admitted into evidence were the following:

1. A report from Dr. M regarding an examination of the claimant on _____, which indicates that the claimant complained of pain in his upper back, but not the lower back.

2. A report from Dr. S dated _____, which diagnosed a strain of the left and right shoulders and the cervical spine, and a contusion of the scalp, but made no mention of the low back;

3. An MRI report dated April 8, 1997, which revealed dessication of the C4-5 cervical disc, but made no mention of any other abnormality of that disc.

4. A report from Dr. E, the first Texas Workers' Compensation Commission (Commission) selected designated doctor, which noted that the claimant complained of weakness in the left leg, but no apparent tenderness of the thoracic/lumbar/sacral spine; and

5. A peer review by Dr. A a chiropractor, which opined that neither the C4-5 cervical spine injury nor the lumbar injury were causally related to the compensable injury.

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.

The determinations of the hearing officer that the self-insured did not waive the right to contest the extent of the claimant's injury and that the claimant's injury does not include the C4-5 level of the cervical spine nor the lumbar spine are supported by the evidence and are affirmed.

The hearing officer reviewed the 37% IR assigned by Dr. O, the Commission-selected designated doctor, and determined that Dr. O had assigned the following impairments:

Cervical - 19% impairment including:

9% impairment for specific disorders under Table 49 (II)(E) of the [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)
1% for an additional level
2% for the second surgery
8% for range of motion deficits

Lumbar - 22% impairment

Having determined that the compensable injury did not include the second level of the cervical spine or the lumbar spine, the hearing officer recomputed the IR by subtracting the 1% impairment of the cervical spine for an additional level and subtracting the 22% IR given for the lumbar spine. Under the Combined Values Chart, the resulting IR was computed to be 18% (9% + 8% + 2%). Although not mentioned by the hearing officer, there had been no surgery to the C4-5 level and, even had it been part of the compensable injury, the C4-5 level was not an additional "operative level" and was not notable in the AMA Guides.

We have previously approved of the mathematical correction of an IR provided that such correction results only from a mathematical computation utilizing the measurements provided by the designated doctor and does not involve the use of independent judgment by the hearing officer. In Texas Workers' Compensation Commission Appeal No. 992223, decided November 15, 1999, we stated:

> Section 408.124 provides that an award of impairment income benefits "shall be made on an [IR] determined using the" AMA Guides. We have in the past approved a simple mathematical correction of a designated doctor's report to reflect the correct use of the AMA Guides, even though this results in what some may consider an anomaly of an IR not contained in any doctor's report. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 950616, decided May 24, 1995; and Texas Workers' Compensation Commission Appeal No. 960844, decided June 20, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 950558, decided May 24, 1995. The action of the hearing officer constituted an application of these decisions to effect a simple mathematical correction and is without error to the extent that the underlying rationale or reason for the correction is without legal error.

We hold that the foregoing principles apply in a case such as the one before us where the impairment from an affected body part can be distinguished from the remainder of the IR without the use of independent judgment by the hearing officer. In this case, it was a simple matter for the hearing officer to determine that the impairment awarded for the lumbar spine was not included in the proper IR, nor was the 1% impairment for a second level of the cervical spine when that second level was neither an additional operative nor part of the compensable injury.

There being no reversible error, we affirm the decision and order of the hearing officer that the claimant's compensable injury does not include the C4-5 level of the cervical spine nor the lumbar spine and that the claimant's correct IR is 18%.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge