APPEAL NO. 002239

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (City 1). The issue reported as unresolved at the benefit review conference was is the appellant's (claimant) sleep apnea a result of the compensable back injury he sustained on _____. At the CCH, the parties agreed that that was the issue. The hearing officer determined that the claimant's weight gain and subsequent diagnosis of sleep apnea is not a result of the compensable injury. The claimant appealed; contended that venue was proper in City 1, and not in (City 2), Texas, as indicated in the Decision and Order of the hearing officer; urged that the evidence proved that his sleep apnea is a result of his compensable injury; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that his sleep apnea, excessive weight gain, and hypertension are the result of his compensable injury. The respondent (carrier) replied and stated that the parties stipulated that venue was proper in City 1, that the CCH was held in City 1, and that the use of City 2 in the Decision and Order is a clerical error. The carrier also stated that, in his request for review, the claimant brought up additional matters that were not mentioned at the CCH and are not pertinent to the issue before the hearing officer. The carrier urged that the evidence is sufficient to support the decision of the hearing officer and requested that it be affirmed. The claimant sent a letter addressed to the Chief Clerk, Hearings Division, of the Texas Workers' Compensation Commission (Commission) dated October 4, 2000, and attached a letter from him to the Chief Clerk, Hearings Division, dated October 3, 2000, with a report from Dr. BWB dated May 16, 2000, and a letter from Dr. RMB dated April 4, 2000, attached to the October 3, 2000, letter. The carrier responded, stating that the October 3, 2000, letter from the claimant and the documents attached to it should not be considered.

DECISION

We affirm.

In his request for review, the claimant stated that he received the Decision and Order of the hearing officer on September 11, 2000, and correctly stated that September 26, 2000, was the last day for him to file an appeal. The appeals filed in October 2000 are untimely and will not be considered. The issue of whether the claimant's weight gain and hypertension resulted from the compensable injury was not before the hearing officer and will not be considered on appeal.

The CCH was held in City 1 and the parties stipulated that venue was proper in City 1. We correct the Decision and Order by replacing City 2 with City 1 each place it appears in the Decision and Order.

The Decision and Order contains a statement of the evidence. Only a brief summary of the evidence will be included in this decision. The claimant injured his lower back when he fell on _____. He was initially treated by a chiropractor. Later, a surgeon recommended lumbar surgery, but stated that the claimant should lose weight before surgery is performed. Medical records indicate that the claimant is 5 feet and 11

inches tall; that on January 27, 1997, he weighed 285 pounds; that on _____, he weighed 275 pounds; that on March 23, 1998, and April 8, 1998, the claimant weighed 289 pounds; that on August 18, 1999, he weighed 320 pounds; that on April 4, 2000, he weighed 314 pounds; and that on May 14, 2000, he weighed 309 pounds.

In a letter dated November 9, 1999, Dr. RMB said that the claimant had nasal septal deviation repair in 1991, that presumably the claimant's left nares is occluded at this time, that the claimant had a weight gain of 45 pounds over the last two years, that the weight gain had worsened his symptoms, that most likely the claimant had obstructive sleep apnea syndrome, and that it was imperative that he lose weight. In a letter dated December 13, 1999, Dr. RMB stated that the claimant had a weight gain and that increased weight is a contributing factor to sleep apnea syndrome. In a letter dated April 4, 2000, Dr. RMB stated that he felt that the claimant's weight gain is a major contributing factor to his obstructive sleep apnea syndrome. In a letter dated February 9, 2000, Mr. Cox (Mr. C), a physical therapist, wrote that he had been working with the claimant during his rehabilitation and weight loss program during the past four weeks, that the claimant demonstrated very good progression, but that he had some limitation and difficulty with his energy level to allow maximal participation secondary to his sleep apnea. In a letter dated July 24, 2000, Dr. S said that surgery was being delayed due to sleep apnea, hypertension, and morbid obesity; that he thought that the interrelation of these problems to the claimant's injury was substantial; that he thought that the back injury interfered with an exercise program and the inactivity contributed to weight gain; and that since the weight gain got out of control, the claimant's sleep apnea problems and hypertension worsened.

In a letter dated December 22, 1999, Dr. J said that the claimant was on Cardura for his hypertension and Claritin for his allergic rhinitis and that those conditions are unrelated to his back injury. At the request of the carrier, Dr. BWB reviewed medical records. In a report dated May 18, 2000, Dr. BWB stated that the claimant was obese at the time of the injury; that the claimant gained weight after the accident; that obesity is a major risk factor for obstructive sleep apnea; that diagnosis of obstructive sleep apnea is frequently delayed for several years after the onset of symptoms; that it is unclear whether the claimant had symptoms of obstructive sleep apnea at the time of the injury; that he reviewed the issue with Dr. RMB and that Dr. RMB indicated that he could not specifically relate the work injury to the obstructive sleep apnea; and that in his, Dr. BWB's, opinion, the sleep apnea is not causally related to the work injury. In a report dated August 22, 2000, Dr. G said that the claimant asked for her opinion regarding the relationship between the back injury and the subsequent development of sleep apnea, that clearly the incidence of sleep apnea increases with additional weight, and that it is impossible to state whether the claimant would have developed the symptoms of sleep apnea if his preinjury weight had remained at 270 pounds or not.

The burden is on the claimant to prove by a preponderance of the evidence the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. 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). The trier of fact may believe all, part, or none of any

witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the evidence. 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 issue of the extent of the compensable injury, 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 are 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 judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision of the hearing officer that the claimant's sleep apnea is not a result of the compensable injury and the order that the carrier is to pay medical benefits in accordance with the decision.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge