APPEAL NO. 002347

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 on September 12, 2000. The appellant (carrier) and the respondent (claimant) stipulated that on _____, the claimant sustained a compensable injury. The hearing officer determined that the compensable injury extends to and includes the diagnosis of Grade 1 anterolisthesis of L4-5 due to severe bilateral facet hypertrophy, right eccentric disc protrusion at L4-5, and disc and facet degenerative changes at C3-4 through L5-S1; that the claimant did not make an election of remedies; and that she had disability from October 15, 1999, through the date of the CCH. The carrier appealed, urged that the evidence is not sufficient to support the determinations of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on all disputed issues. The claimant responded, urged that the determinations of the hearing officer are not against the great weight of the evidence, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Briefly, the claimant lifted a heavy bag of coins on _____, and had severe pain in her lower back all the way down to her feet. Prior to that incident, the claimant had significant low back problems demonstrated by taking pain medication, being seen by a surgeon in July 1999, and electing not to have back surgery because she could not afford to miss work and not be paid. The claimant testified that she had back pain before the incident, but that she was able to work; that after the lifting incident, her pain was so bad that she could not stand it; that an adjuster told her it would take four or five months to get spinal surgery approved; and that since she was hurting so much, she decided to use her health insurance to have surgery in October 1999. The claimant said that she cannot work because of the pain she has and the medication she takes. Much of the medical evidence pertains to the claimant's condition and treatment before and after the lifting incident on _____, and does not contain opinions concerning the cause of the claimant's codition for which she had surgery in October 1999. In a letter dated March 6, 2000, Dr. G responded to questions from the carrier and wrote:

> I think that [the claimant's] lumbosacral strain is intimately tied in with the fact that she needed surgery and I think that she will reach maximum medical improvement from the lumbar strain when she reaches maximum medical improvement status post surgery and I think that [Dr. R] would be the man who would best let you know about this.

The claimant contended that she aggravated her preexisting back condition when she lifted the heavy bag of coins. The carrier contended that she sustained only a

lumbosacral strain when she lifted the heavy bag of coins and that her surgery and the inability to work are not related to the lifting incident.

The issue of election of remedies was added during closing argument. The carrier contended that the claimant elected remedies when she decided to use her health insurance after an adjuster told her there would be a delay in obtaining approval for spinal surgery.

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). 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 would 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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the hearing officer's determinations on extent of injury, disability, and election of remedies are so against the great weight and preponderance of the evidence as to be clearly wrong or 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 Co., 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.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge