APPEAL NO. 92551

A contested case hearing was held on August 31, 1992, in (city), Texas, (hearing officer) presiding as hearing officer. He determined that the appellant (hereinafter called claimant) sustained a compensable injury in the course and scope of his employment but that the greater weight of the evidence established that he did not sustain disability as a result of the compensable injury. Claimant's request for review urges error in the hearing officer "failing to consider and act on (a claimant's exhibit) showing that (claimant's doctor) gave claimant maximum medical improvement on 11-7-91 and 8% permanent impairment rating." He asks that the decision be reversed and the claimant awarded 24 weeks of impairment benefits. Respondent (hereinafter called carrier) points out that the issue upon which the claimant seeks review was not in issue at the contested case hearing and further that the request for review does not challenge the finding of the hearing officer regarding disability. Carrier asks that the decision of the hearing officer be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The two issues specified at the contested case hearing and agreed to by both parties were: (1) whether the claimant sustained a compensable injury in the course and scope of his employment with (employer); and (2) whether the claimant sustained disability as a result of a compensable injury. The carrier's point is well taken that the request for review does not contest the hearing officer's decision that insufficient evidence was offered to establish that the claimant sustained disability as a result of the compensable injury. Article 8308-6.42(c), TEX. REV. CIV. STAT. ANN., art. 8308-6.42(c) (Vernon Supp. 1992) provides in pertinent part that the Appeals Panel determines only those issues upon which review was requested. *See* Texas Workers' Compensation Commission Appeal No. 91048, decided December 2, 1991. And, in a similar vein, we have held that the Appeals Panel does not determine issues first raised on appeal which were not raised or considered earlier in the dispute resolution process. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992; *See also* Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. This is the case with the attempt to raise, for the first time on this appeal, an issue of impairment income benefits. This issue was not raised below and has not been a matter considered at any prior stage of the dispute resolution process.

Aside from these matters, there is sufficient evidence to support the determination of the hearing officer that disability (defined in Article 8308-1.03(16) as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury") has not been established. In this regard, the evidence shows that the claimant, who testified that he sustained a back injury on the job (unloading roofing shingles), did not report any such injury to anyone until some two weeks later and after he had been terminated, that he continued to work normally, that no one (several witnesses were called by the carrier including the claimant's brother-in-law) noticed any indication of

any physical problem with the claimant prior to his termination, and that he stated he could continue working and would have done so had he not been terminated. The claimant testified that he had to keep working in spite of pain because of financial problems. (The termination was for other cause and not related to the injury). He went to a doctor some three days after his termination and was diagnosed, in pertinent part, as having sustained post-traumatic lumbar and lumbosacral sprain, post-traumatic lumbar and lumbosacral somatic and fact dysfunction and post- traumatic thoracic strain. One month following the claimant's original visit, the doctor opined that the claimant sustained an eight percent permanent impairment of his whole person. (A document, which we do not consider for purposes of this appeal, submitted with the request for review shows an MMI date to be "11-7-91" in addition to the eight percent empairment rating. *See* Texas Workers' Compensation Commission Appeal No. 92332, decided August 20, 1992).

It is clear that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). As we have repeatedly held, we affirm the factual determinations of the hearing officer if there is sufficient evidence to support those determinations. Texas Workers' Compensation Commission Appeal No. 92252, decided July 27, 1992; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20 1992. Only if his determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, which is not the case here, would it be appropriate to set aside or reverse his decision. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992.

The decision of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge