APPEAL NO. 93730

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 *et seq*. (1989 Act). At a contested case hearing held in (city), Texas, on July 26, 1993, the hearing officer, (hearing officer), found that the appellant (claimant), a tank truck driver for (employer), did not sustain a back injury when the truck in which he was riding crossed a rough railroad crossing on (date of injury), and that his inability to work at his preinjury wage rate from March 10th to the 25th and from April 12 to June 28, 1992, was not due to the effects of a compensable injury. In his request for review claimant challenges the sufficiency of the evidence to support those findings and attaches a document not tendered at the hearing. The respondent (carrier) urges the sufficiency of the evidence, challenges the attempt to bring new evidence before the Texas Workers' Compensation Commission Appeals Panel, and seeks affirmance of the hearing officer's decision.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant, a truck driver for 16 years, testified that for a week or two before (date of injury), he had a head and chest cold and that he had "a rattle in my back when I cough." On (date of injury) while out on a trip for employer with truck team member, (Mr. B), claimant notified the dispatcher that when he returned to the terminal he was "going on sick board" because of his chest cold. Claimant stated that when Mr. B, who was driving the tractor trailer, neared a railroad crossing close to the terminal, he stopped the truck, then pulled across the tracks in the lowest gear at approximately three miles per hour. Claimant said that the tractor and trailer hit some potholes at the crossing and that although he had his air cushioned seat partially inflated, "my seat bottomed out and I felt a severe jolt and sharp pain shoot up my back." Claimant stated that Mr. B hurt his back at that time also but was able to complete the drive to the terminal. (In Texas Workers' Compensation Commission Appeal No. 93692, decided September 20, 1993, the Appeals Panel considered an appeal by Mr. B of the hearing officer's decision in the matter of his workers' compensation claim.) Claimant said that when he arrived at the terminal he told the dispatcher, (Mr. I), that he still felt terrible and needed to go home because he was "was hurting all over," including his back, but conceded he said nothing about the railroad crossing incident. He said that at that time he could not distinguish between his aching all over and his back pain but that while on his way home he noticed "an aggravation" in his lower back. The next day claimant visited (Dr. V), who obtained x-rays and an MRI on March 18th and referred him to (Dr. F), an orthopedic surgeon. The x-rays were normal while the MRI revealed a grade III central posterior disc protrusion at L4-5. Claimant said Dr. V took him off work from (date of injury) through the 26th after which he returned to work. He stopped working on April 11th due to back pain, was later taken off work by Dr. F for a work hardening program, and had not yet returned to work as of the hearing date. Although he was released to return to work by Dr. F as of June 28, 1993, with certain lifting, bending, and twisting restrictions, he was not sure he could do his job, felt he would have "problems," but could go "give it a try." He said he also saw (Dr. B), a neurologist, for another opinion and that Dr. B agreed with the Dr. F's conservative

treatment.

Dr. V's record, showing claimant's visits on March 10th and 19th, stated a history of claimant's complaining of low back pain since driving an old truck for several days and for several hundred miles with the onset of symptoms on (date), and did not mention the (date of injury) railroad crossing incident. Claimant said that Dr. V had since indicated that the (date) reference was an error. According to Dr. F's record of claimant's March 25th visit, which referred to his having "hit a hole," claimant's diagnosis was lumbar strain and degenerative disc disease. However, in Dr. F's opinion, the "disc bulging is not a factor in his current symptomatology."

The terminal manager,(Mr. W), testified he felt claimant could do his job consistent with Dr. F's restrictions. He said he felt claimant did have a back problem which he viewed as job related but by that he meant claimant's not having been in his own tractor on his last trip, not resting properly, and having aches and pains. Mr. W acknowledged having signed claimant's "creditor insurance application for disability benefits" and indicating thereupon that claimant's "disability" was due to his employment. Mr. W explained that he signed the form to "help him out," and that in so doing he did not mean to agree with claimant's assertion that his back was injured riding across the rough railroad crossing. To the contrary, Mr. W testified he did not believe claimant's back was injured at the railroad crossing. He stated he did not see claimant on (date of injury) but when informed by (Mr. H), employer's human resources director, that a workers' compensation claim was being asserted by the driver, Mr. B, he called Mr. B and got his story about the railroad crossing incident. He said he then called claimant at home about it and claimant kept saying, "I don't know about that guy." When asked directly by Mr. W if the railroad crossing incident happened as related by Mr. B claimant replied "no" and indicated his disagreement with Mr. B, but did say he had a back problem. Mr. W said he rode across the tracks on March 22nd in the same truck, before the potholes were filled with asphalt, described the effect as "very minimal," and stated he got a rougher ride in his own vehicle.

Claimant's wife testified that it was not until several days after he came home on (date of injury) that claimant mentioned the railroad crossing incident. Mr. B testified that he stopped at the crossing, proceeded over the tracks and potholes in low gear, felt a sharp pain shooting up his back, and told claimant about it. He said that claimant also felt a jolt in his back at that time.

Mr. H testified that claimant called him on March 10th and inquired generally about employer's medical insurance plan. Claimant said he was "aching" but indicated it was not a work related injury. Their discussion also covered the differences between employer's health insurance coverage and workers' compensation benefits. According to Mr. H, on March 22nd claimant called him to advise he "couldn't get by" on health insurance and needed to file a workers' compensation claim. Mr. H went to claimant's house on April 26th and

assisted him with the forms.

Mr. I, employer's district coordinator, testified that on (date of injury) at 7:00 a.m. when he relieved Mr. F as dispatcher, the latter stated that he had spoken with claimant earlier that morning (while claimant was still out on the trip) and that claimant had complained of "severe back pain" and indicated he would go on "sick board" when he returned to the terminal. Mr. F had also mentioned that perhaps it was due to the flu. When claimant returned to the terminal, Mr. I said claimant made no mention of an incident at the railroad crossing and appeared to walk without difficulty. Mr. I also testified that to the best of his knowledge the suspension system and pneumatic seats in the tractor used by claimant on (date of injury) were in good operating order and that the seat was designed not to "bottom out" if it had some air in it. (Mr. T), employer's district supervisor, testified that he spoke with claimant at the terminal on (date of injury) and that while claimant said he felt bad and ached all over, he made no mention of a back injury or of the railroad crossing. On May 18th, Mr. T made a videotape which depicted the truck traversing the crossing in the lowest gear and at the lowest speed (three miles per hour), the seat, and the location and size of the potholes. He also described the vertical movement of the seat as slight. As claimant points out on appeal, however, many of the potholes were filled with asphalt when the videotape was made.

The hearing officer found that "[c]laimant did not sustain an injury to his back when the truck in which he was riding crossed a rough railroad crossing on (date of injury)." The hearing officer further found that although claimant was unable to obtain and retain employment at his preinjury wages from March 10th to March 26th, and from April 12 to June 28, 1993, such was not due to the effect of a compensable injury. No evidence was adduced as to whether he remained on the payroll after April 11th or whether he was paid for the earlier period he was off work. However, we have previously observed that a finding of a compensable injury is a threshold issue and a prerequisite to consideration of the issue of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided April 13, 1992.

We are satisfied from a careful review of the record that there is sufficient evidence to support the disputed findings. Claimant's burden was to prove by preponderance of the evidence that he sustained a compensable injury (Section 401.011(10)) and that he had disability (Section 401.011(16)) as a result thereof. It is apparent that the hearing officer was not persuaded by claimant's testimony that he sustained a back injury in the manner he described. Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex.

App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

Claimant attached to his request for review an undated statement from JB., not tendered at the hearing, to the effect that the only way to get a bulging disc is from jamming the spinal cord. Our review is limited to evidence developed at the hearing. Not only has claimant not shown this statement could not have been obtained before the hearing, but its consideration would probably not result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992, and Texas Workers' Compensation Commission Appeal No. 92459, decided October 12, 1992.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge