APPEAL NO. 94325

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 7, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues submitted for resolution were:

1.Did the Claimant sustain a compensable injury on or about (date of injury);

2.Assuming there was a compensable injury on (date of injury), did the Claimant have disability resulting from the injury of (date of injury), and if so, for what period;

3.Did the Claimant report the injury to the Employer on or before the 30th day after the injury, and if not, does good cause exist for failing to timely report the injury;

4.What was Claimant's average weekly wage [AWW]?

The hearing officer determined that the claimant sustained a compensable injury in the course and scope of his employment on (date of injury), that claimant reported the injury to his supervisor within 30 days of the date claimant sustained the injury, that claimant suffered disability due to the compensable injury beginning on November 1, 1993, and continuing through the date of the CCH, and that claimant's AWW is $484.08.

Appellant, carrier herein, contends that the hearing officer misapplied the facts, the law, and the argument on all four issues, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed in part and reversed and remanded in that part pertaining to the AWW.

Claimant testified he was working out of town (City) "redoing" a fast food franchise's signs on (date of injury) (all dates will be 1993 unless otherwise noted), when he slipped and fell about six feet "onto the back of the bed of the truck." Claimant testified he rested a few minutes and then told his helper and coworker about the accident and injury, to what claimant at the time believed to be, his leg. Claimant continued work and on the next work day, after returning to the home base, told (MB), his supervisor, about the accident and injury. Claimant testified he would mention the injury to MB "at least twice a week" and in the period between June 1st and September 24th, mentioned it "at least 20 times." Claimant specifically testified, several times, that he told MB that he had "slipped and fell . . . and had pain in his leg." Claimant testified he continued to work but that the pain became progressively worse. Claimant was fired on September 24th for a noninjury-related matter

when he "flipped somebody off." Claimant apparently did not look for work for a period of time and then on or about October 28th was hired by another employer (Employer A). Claimant said he worked for Employer A "two or three days" when his pain became so bad he had to go to the hospital. Claimant went to the hospital and was seen by (Dr. N) on November 1st.

By report dated February 7, 1994, Dr. N stated that on November 1st claimant:

> . . . complained of severe back pain with radiation down the left lower extremity. The findings were consistent with a herniated necleus [sic] pulposus. This was confirmed by a cat scan on 11/2/93.
>
> [Claimant] explained that his pain began on or about (date of injury). He continued to work as long as he could but the severity of the pain his work [sic] was discontinued. . . . it is very likely that his work was related to his problem. At the present time he is still incapaciatating [sic] and I do not feel that his condition will improve until he undergoes surgical treatment.

A lumbar spine x-ray series taken on November 1st showed "[n]o radiographic abnormalities." A lumbar CT on November 2nd showed a "[m]edium large fairly smooth and broad-based right central disc herniation" at the L5-S1 level.

Claimant offered a written statement of a coworker, who stated he had not seen the accident but that claimant had complained to him about the injury and "[o]n one occassion [sic], while at work, I heard [MB], [claimant's] immediate supervisor, state he remembered and knew [claimant] had told him he was injured."

Carrier only offered two statements by coworkers that they had not been in (city) on (date of injury) and did not witness any injury or accident to claimant. Carrier's position is that the accident and injury had not occurred and claimant had no disability.

On the issue of AWW, claimant testified his "base pay" was $9.50 an hour for 40 hours, or $380.00 a week, but that he worked "lots" of overtime. He testified he "came up with a figure of $410.00 on my gross--or on my take home salary over the last 13 weeks." Claimant initially offered a handwritten sheet which purportedly consisted of bank deposits made during the 13 weeks prior to his termination. It was pointed out by one of the attorney's that the AWW is computed from the 13 consecutive weeks immediately preceding the injury. The hearing officer, with the agreement of the parties, allowed claimant to supplement his original offering with bank statements for the 13 weeks prior to the injury. Claimant's Exhibit 1 lists figures for 13 deposits (at somewhat irregular periods) between "4/16" and "7/9." Beneath those figures are the following computations:

total net:$4,955.20
x 27% (tax)
total gross 6,293.10

÷ 13 weeks
Ave weekly wage 484.08

There is no information who made the calculations, how the "27% (tax)" was calculated or that claimant's gross wage was $6,293.10. Section 408.041(a) provides that the AWW of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13. Claimant testified he had been employed by the employer approximately two years and claimant's bank deposits would indicate he had been employed by the employer the 13 consecutive weeks immediately preceding the injury. When claimant submitted evidence of his net income for the 13 weeks prior to his termination, it was pointed out that wage information was needed for the 13 weeks immediately prior to the injury. Claimant was given an opportunity to submit this additional information. We suggest it might have been appropriate to also allow the carrier additional time to obtain whatever wage statement the employer might have had available. Claimant's closing argument was that his AWW "is at least $380.00 based on $9.50 an hour, 40 hour a week work schedule." Carrier merely argued "the carrier would show that it's less than $380.00," without any such showing. The hearing officer, on the CCH record, stated that claimant would ". . . in essence, provide deposits into your bank account for the months of April and May, and I will go back 13 weeks, divide by 13 -- add them up and divide by 13." No mention is ever made, by anyone, of the "27% (tax)" or how that was arrived at. Part of Claimant's Exhibit 1 is what appear to be 1993 federal W-2 forms showing total 1993 income from the employer of $15,729.54. (We would note this apparently involved 38 weeks (January 1st through September 24th) which would result in an AWW of $413.94.)

As indicated, the hearing officer found for claimant on all grounds and determined the AWW to be $484.08. Carrier appealed on all the issues citing a number of Appeals Panel decisions.

On the issues of whether claimant had sustained a compensable injury on (date of injury) and had reported the injury within 30 days, we note these are factual determinations for the hearing officer to resolve. Carrier argues "there is no objective medical evidence that the claimant sustained a work related injury." The Appeals Panel has frequently held that the hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165(a). He does not have to accept the testimony of claimant as an interested party. *See* Presley v. Royal Indemnity Insurance Co,., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). He may view that testimony as only raising fact issues for him as fact finder to determine. *See* Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Texas Workers' Compensation Commission Appeal No. 93891, decided November 12, 1993. The hearing officer could, and apparently did, believe claimant's testimony on how the accident happened and that he had reported the accident and injury to his supervisor, MB. That the injured party is the only witness to an injury does not defeat an otherwise valid claim. We further note that a finding of injury

may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). In this case, claimant's testimony is supported, at least to some extent, by the coworker's statement, and Dr. N's February 7, 1994, medical report. Carrier, for the first time on appeal, objects to Dr. N's report ". . . in that it was not exchanged with the carrier prior to the hearing. Texas Labor Code § 410.160." We note the hearing officer identified the exhibit as "a note from the doctor, along with the present medical condition that the claimant has sustained, due to that injury." The hearing officer asked "Any objection?" and carrier replied, "The carrier has no objections, Your Honor." Carrier cannot now, on appeal, object to evidence which was not objected to at the CCH. Absent some type of objection, we will not consider its inadmissibility now. Parkview General Hospital, Inc. v. Waco Construction Co., 531 S.W.2d 224 (Tex. Civ. App.-(city) 1975, no writ); Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

Similarly, the issue of disability, as defined by the 1989 Act, is largely a factual determination within the province of the hearing officer. Carrier argues that "the only reason the Claimant was unable to retain employment was because he was terminated for cause." We believe this is a misstatement of fact. The uncontroverted evidence was that after claimant was terminated for good cause he did nothing until the end of October when he was hired by Employer A and then he was subsequently unable to work on November 1st because of his back injury. The termination by the employer had nothing to do with claimant's ability to obtain employment (which he did) and retain employment. Claimant did not claim, and the hearing officer did not find, disability for the period after September 24th and before November 1st, when claimant went to the hospital because of his back. Further, we would note that in a workers' compensation case the issue of disability may be based on the sole testimony of the injured claimant. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). In this case, the claimant's testimony is supported by objective clinical evidence and Dr. N's report.

It is on the issue of the AWW that we reverse and remand for further development of the evidence. We would note that the hearing officer's blanket statement that "[a]lthough all of the evidence presented was not discussed, it was considered" is not at all helpful to the Appeals Panel in reviewing how the hearing officer arrived at a particular determination. In fact, in this case, although not required to do so, none of the evidence dealing with AWW was discussed and we are unable to determine how the hearing officer arrived at his conclusion of an AWW of $484.08. No evidence was presented regarding the notation of "27% (tax)." It appears that the hearing officer (or the claimant) multiplied $4,955.20 (the net wages) by .27 to arrive at $1.337.90 (which certainly isn't stated) and then the $1,337.90 is added back to $4,955.20 to arrive at $6,293.10. If whoever was doing the calculations was alleging that 27% of the gross wage constituted some type of withholding, the gross pay would then be $6,787.95 instead of $6,293.10. However, there is no evidence of this and the parties merely make broad general statements that the AWW should be more than or less than $380.00. Neither party alleges, much less proves, a figure close to $484.08. Consequently, we reverse the hearing officer's determination that the AWW is $484.08 as

not being supported by the evidence or as being against the great weight and preponderance of the evidence.

Finding sufficient evidence to support the hearing officer's determinations on the compensable injury in the course and scope of his employment, timely reporting to the employer of the injury and disability, we affirm those determinations. On the issue of AWW, we reverse and remand for the development of further evidence to support what the AWW was for the 13 consecutive weeks immediately preceding the injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge