

APPEAL NO. 950019
FILED FEBRUARY 15, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 7, 1994, a contested case hearing (CCH) was held. The issues were:

1. Did the Claimant sustain a compensable injury in the course and scope of employment on _____?
2. Has Claimant had disability as a result of the compensable injury of _____, and if so, during what period?

The hearing officer determined that the claimant suffered a compensable injury in the nature of a right inguinal hernia and a lumbar strain in the course and scope of his employment on _____ (all dates are 1994, unless otherwise noted) but that claimant has not had disability as a result of the compensable injury. Appellant, carrier, contends that the claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury or has disability and requests that we reverse the hearing officer's decision and render a decision in its favor to include recoupment of any benefits paid. Respondent, claimant, did not file a response.

DECISION

Affirmed.

Claimant was employed as an "edge vendor machine" operator for employer in (City), Texas, with duties that required heavy lifting and physical labor. Claimant usually had the assistance of a helper. Claimant testified that on _____, after lifting several large doors, he felt pain in his back and lower abdomen and that he reported to a coworker and supervisory personnel that his stomach and back were hurting. What was said, the location of the injury (whether upper abdomen, lower abdomen or side), and whether claimant was referring to a work-related incident or food poisoning or ulcers is hotly disputed depending on which statement is considered and how the testimony is interpreted. Claimant's coworker and assistant (CD), in an unsigned transcribed statement, admitted as Carrier's Exhibit No. 6, seems to support claimant's testimony that although he normally was claimant's assistant, he had been operating a forklift during the time in question and that claimant had complained "that his back was bothering him." Supervisory personnel, (JK), also a part owner, and (RN) support a report of abdominal pain ("pain in his upper part of his stomach" and "stomach aches and a pain in his side") on _____. Claimant testified that he continued to suffer pain and that on September 12th, he was sent to the doctor for an unrelated hand laceration. Claimant testified that, while at the doctor's office, he voiced complaints of abdominal pain and the doctor, after a

brief exam, told claimant that he had a hernia. According to claimant, the doctor advised him that he could not evaluate him or treat him for the hernia until he reported it to his employer. This testimony is also hotly disputed by the carrier which introduced a statement by (Dr. C), where Dr. C denies examining claimant for a hernia, although Dr. C did note claimant complained of abdominal pain which claimant thought was a hernia. Dr. C released claimant back to work on September 12th.

Claimant returned to the work place on September 12th, and testified that he reported the hernia to his supervisor, RN, and the company owners, JK and (AK), that he was told to return to work but not lift anything and the owners would "look into it." Claimant testified that he attempted to work, was still in pain, and that he left work early that day. Claimant said that he saw (Dr. E) the next day, September 13th, and that Dr. E confirmed the hernia and advised claimant that "[h]e will be unable to work until this [the hernia] is repaired." Claimant said that he advised his employer of his off-duty status (denied by AK) and moved from (City) to (City B). Apparently, the move was on September 15th. In (City B), claimant consulted (Dr. W) who, in an Initial Medical Report (TWCC-61), dated September 27th, and brief narrative of the same date, confirmed a right inguinal hernia, stated the hernia "is a new injury" and diagnosed a lumbar strain. Claimant testified that before going to work for the employer he had received a pre-employment physical in November 1993, which established that he did not have a hernia at that time. Claimant testified that to date he has not had surgery and that he had not made any attempt to obtain and retain employment. Claimant testifies that he cares for his two young children and is able to work, sit, stand and perform a variety of tasks.

Carrier's position is that claimant did not sustain a work-related injury, that complaints of stomach pains were due to an ulcer or food poisoning and that claimant had participated on the company softball team. Carrier offered testimony of AK and other transcribed statements to the effect that the employer had light duty available but that claimant had suddenly left town without explanation. A benefit review conference (BRC) on October 18th, resulted in the benefit review officer (BRO) entering an Interlocutory Order ordering carrier to pay temporary income benefits (TIBS) beginning September 13th. The hearing officer, at the CCH, specifically advised the parties that her decision and order would supersede the BRO's Interlocutory Order.

The hearing officer, in her discussion, indicates that she believes claimant's version regarding an injury in the course and scope of employment, but stated, regarding the issue of disability:

Claimant's testimony establishes that while he may have disability during his surgery and post-surgical convalescence, that from the date of injury to present he has been able to engage in physical activity including caring for his two young children, walking, sitting, standing, and a variety of other tasks which enable him to perform light duty work. Despite his ability to work in a light duty capacity, Claimant has made no effort to obtain or retain

employment. Accordingly, it cannot be concluded that Claimant has had a disability at any time as a result of the compensable injury of _____.

Carrier appeals the hearing officer's determination regarding an injury in the course and scope of employment as being against the preponderance of the evidence. Carrier summarizes its interpretation of various portions of the evidence characterizing that evidence as "undisputed." Carrier further argues that the case "revolves around the credibility of [claimant]." We tend to agree that claimant's credibility is a major factor and point out that it is the hearing officer, as the trier of fact, who is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer was able to observe the demeanor of the witnesses and judge their credibility. Carrier, in its interpretation of the evidence, points out some contradictions and inconsistencies in claimant's testimony; however, we note that it is within the province of the hearing officer, as trier of fact, to resolve the conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing findings on factual sufficiency, the challenged findings will be upheld unless the Appeals Panel determines that the evidence is so weak or that the findings are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist] 1988, no writ); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Carrier states that the hearing officer "appears to rely on out-of-court statements made by [CD] which were objected to as hearsay by the Carrier." Our review of the record shows that although carrier objected to what claimant related CD had said, that objection was specifically overruled by the hearing officer. Further, it appears to us that the hearing officer largely relied on CD's transcribed statement which was admitted as a carrier exhibit. Further, we note, regarding the hearsay objection, that in workers' compensation hearings conformity to legal rules of evidence is not necessary. Section 410.165(a). We find no error in the hearing officer's ruling or reliance on CD's statement.

We are puzzled by carrier's contention on appeal that:

Throughout her decision, the hearing officer refers to an injury in the nature of an [right] inguinal hernia. It appears from her own use of language the hearing officer questions whether in actuality such an injury exists, and if so, when it appeared.

We find no ambiguity or contradiction in the hearing officer's determinations. If, as carrier goes on to state, there is a difference of opinion among physicians and that "at least one physician . . . has not found evidence of a hernia," that is a factual determination to be resolved by the hearing officer. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Carrier's prayer for relief, in its appeal, requests that the hearing officer's decision be reversed and that carrier "be entitled to recoupment of any benefits paid pursuant to such decision." Although the hearing officer's decision does not require the present payment of TIBS, having found claimant does not presently have disability as that term is defined by the 1989 Act, carrier may have paid TIBS pursuant to the BRO's Interlocutory Order of October 18th, and we refer carrier to Section 410.032 for any relief to which it believes it is entitled.

Neither party having appealed the hearing officer's determinations as to disability, we need not address it further.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge