APPEAL NO. 990112

Following a contested case hearing (CCH) held on December 10, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability. Claimant appeals, urging that the hearing officer erred in denying his motion for a continuance of the hearing and further erred in reaching these determinations in that they are against the great weight of the evidence. The respondent (self-insured) contends that claimant's motion for a continuance was properly denied and that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

Claimant testified that on _____, while riding in the passenger seat of a utility truck owned by the self-insured, which was being driven by fellow employee Mr. M, the truck was struck by an automobile in the left rear side near a freeway ramp and pushed into an adjoining lane; that, though wearing a seatbelt, he felt the impact and his body went forward and to the side at an angle; and that both vehicles were driven to an area where they could pull off to the side and the drivers exchanged information. Claimant said the self-insured's truck had green paint on the left rear side and wheel as well as a dent in the left side tool box compartment door and a deep bend down the left rear fender. He further stated that he and Mr. M eventually drove on to the job site and that he realized he was injured when he was unable to get a ladder out of the truck. Claimant said he finished the shift but did not do any work, that the next morning he woke up sore all over, had to have a neighbor change a flat tire on his wife's car, and reported the injury when he arrived at work and asked that an accident report be prepared. He said that his back, right shoulder and left knee were injured in the collision although he said his body did not strike anything in the truck and he could not account for how his shoulder and knee were actually injured. Claimant further indicated that he saw Dr. E on August 21, 1998, for chiropractic treatment for his neck, back, shoulder, and knee; that Dr. E took him off work at that time; that Dr. E released him for light duty on October 23, 1998, and for regular duty on November 16, 1998; that he returned to work on November 16, 1998; and that he was not paid by the self-insured for the period from August 21 to November 16, 1998. An MRI report of October 14, 1998, states the impression as disc desiccation at L5-S1.

Though not reflected in the hearing officer's Decision and Order, Mr. M, who apparently had his CCH the preceding day in front of another hearing officer, testified and described the motor vehicle accident (MVA) in terms similar to the testimony of claimant.

Mr. C testified that he is the self-insured's roofing supervisor and claimant's immediate supervisor. He said that after being called by claimant, he responded to the scene of the MVA; that the only damage he saw to the self-insured's truck, which was

already "kind of beat up" and "scratched," was the green paint smears on the left rear side and wheel; that the other driver said the damage to his car was preexisting; and that since there were no injuries, he instructed claimant and Mr. M to continue on to their job site. Mr. C further stated that the next morning when claimant arrived at work, he said he was sore all over and asked that an accident report be completed, and that shortly later he said he needed to see a doctor.

Claimant had the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of employment and that he had disability as defined in Section 401.011(16). Injury is defined in Section 401.011(26) as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm.

The hearing officer found that on _____, claimant did not injure any part of his body as a result of being a passenger in an MVA which occurred while he was in the course and scope of employment and that his inability to obtain and retain employment at wages equivalent to his wages prior to _____, at any time since that date is because of something other than any injury occurring at work.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing body, the Appeals Panel does not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer indicated that claimant was "at the most jostled" in the MVA and that he did not find claimant's testimony credible concerning how he came to be injured in the MVA. Since claimant was found not to have sustained an injury, as defined in Section 401.011(26), he cannot, by definition, have disability.

As for claimant's assertion of error in the hearing officer's denial of his motion for a continuance, no such motion was made or reurged at the hearing nor was any prehearing written motion offered into evidence or otherwise made a part of the record. While we do find in the file a motion for continuance dated November 19, 1998, with the hearing officer's annotation "Denied, 12-1-98" and an amended motion to continue dated December 5, 1998, with a similar annotation of the hearing officer's denial, we do not regard these documents are a part of the hearing record and determine that claimant did not preserve error concerning his motions.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge