

APPEAL NO. 990126

Following a contested case hearing held on January 11, 1999, 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 respondent (claimant) sustained a compensable injury on Injury 2, and that he had disability resulting from that injury, beginning June 16 and ending August 19, 1998. The appellant (self-insured) challenges these determinations for evidentiary insufficiency, asserting that claimant "cavalierly" reported a new injury on the day before the employer's plant temporarily closed in order to obtain benefits during the plant closure period and that he was "miraculously" healed and returned to work shortly after the plant reopened. The file does not contain a response from the claimant.

DECISION

Affirmed.

It was not disputed that on Injury 2 (all dates are in 1998 unless otherwise stated), claimant was the employee of (employer and self-insured). Claimant testified that he is 34 years of age; that he has been employed by the employer as an automotive assembler since July 1983; that he had a prior compensable injury on Injury 1, consisting of a carpal tunnel injury in his right wrist, a cubital tunnel injury in his right elbow, and a knee strain; that he underwent left elbow surgery in October 1995; that he thereafter had some follow-up visits for this injury; and that his treating doctor is Dr. S. He further stated that on Injury 2, about two hours after starting his 4:30 p.m. shift, while using a high pressure air gun to secure the bolts of a "mickey bracket" he was attaching to a steering column, the air gun, which weighs approximately 10 to 12 pounds, would not turn off and jerked his right upper extremity, injuring it. Claimant indicated that he had previously had trouble with the air gun malfunctioning. He said he called the safety office and advised that he had hurt his right arm and that he was told to go to the medical department, which he did. Claimant said he obtained a medical pass to see a doctor and left the plant; that he was not having pain in his right arm before this incident but that afterwards, his entire right arm hurt; that he saw Dr. S who treated him and took him off work; that on August 19th, Dr. S released him to return to work with light duty for two weeks followed by regular duty; and that on August 20th, about two weeks after the plant reopened, he returned to work at his usual wages, first working light duty and then resuming regular duty. Claimant said he was not paid for the time he was off work but did receive one check for some sick leave.

On cross-examination, claimant conceded knowing that the plant would close temporarily on June 16th due to a lack of parts from a plant on strike, but denied making a comment that he was claiming an injury in order to obtain income benefits for his family while the plant was closed. The self-insured introduced the transcribed June 23rd interview of Ms. K, a production supervisor, who stated that on Injury 2, at about 5:00 p.m., claimant asked her for a "hospital pass," stating he had right elbow pain and that it was an old injury flaring up; that he told the medical department it was a new injury; and that when he

returned to the floor, he said it was a new injury because the pain started when he was securing screws to the bracket with a gun. Ms. K further stated that she questioned the claim because claimant was smiling and chuckled when asked for the hospital pass, because the plant was going to shut down for lack of parts caused by a strike, and because she had heard that claimant had said he needed to make his house note payment.

The self-insured introduced a Specific and Subsequent Medical Report (TWCC-64) from Dr. S reflecting claimant's visit on March 23, 1998, the prior injury date of Injury 1, and the prior diagnosis, and which stated that claimant had decreased right hand grip, decreased sensation in the fourth and fifth digits, positive tenderness of the right cubital tunnel, and a right elbow callous. The self-insured's contention was that on Injury 2, claimant had only a flare-up of his prior injury which he attempted to parlay into a new injury to obtain weekly income benefits because he knew the plant was closing. Claimant introduced the June 3, 1996, report of Dr. A, the designated doctor for his prior injury, which stated that claimant was injured on Injury 1, when he fell down some stairs injuring his right wrist, right elbow, and right knee; that he underwent a right ulnar nerve transposition; and that he was assigned zero percent impairment for his wrist, zero percent for his elbow, and two percent for his knee. Dr. A's May 30, 1996, report of his records review and physical exam stated that claimant had been found to have severe bilateral cubital tunnel, right greater than left, which was felt to be job related because claimant works with an air pressure gun at work; that he underwent a right ulnar nerve transposition on December 14, 1995; that claimant returned to work without restrictions; and that claimant had full range of motion and strength in the right elbow and right wrist upon examination.

Dr. S's August 17th report recounts claimant's history of his right upper extremity being jerked hard by a large torque gun on Injury 2; that he examined claimant on June 16th and diagnosed acute cervical and right shoulder, elbow and wrist strains; that claimant was taken off work on that day and conservative treatment commenced; and it was his opinion that claimant's injury was a direct result of his job duties and should be treated as a workers' compensation injury.

Claimant had the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of employment on Injury 2 (Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991) and that he thereafter had disability as that term is defined in Section 401.011(16). The Appeals Panel has recognized that, generally, an injury and disability can be proven by the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991; Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found that on Injury 2, as claimant was performing his job duties for the employer, a high pressure air gun which he was holding jerked suddenly and forcefully, causing claimant to sustain an injury to his upper right shoulder and whole right arm, and that due to that injury, claimant has been unable to obtain and retain employment at his preinjury wage from June 16th to August 19th. The dispositive legal conclusions are based on these factual findings.

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 tribunal, the Appeals Panel will 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 could credit claimant's testimony and the opinion of Dr. S and also consider that after his prior injury claimant was released to return to work without restrictions and without impairment ratings for his right wrist and elbow.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge