

APPEAL NO. 990169

Following a contested case hearing held on January 12, 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 finding that on _____, the appellant (claimant), then employed by (employer), did not injure herself at work, and that her inability to obtain and retain employment at her preinjury wages from that date forward was not due to a work-related injury. The hearing officer then concluded that claimant did not sustain a compensable injury on _____, and that, since there is no compensable injury, there can be no disability. Claimant has requested our review and challenges these findings, contending that the witness called by the respondent (carrier) was not truthful concerning the events at work on _____. The carrier has filed a response and urges that the evidence is sufficient to support the appealed findings and conclusions.

DECISION

Affirmed.

Claimant testified that on _____ (all dates are in 1998 unless otherwise stated), she and Ms. A were reboxing boxes of Butterfinger candy bars at a (job site); that at about 10:30 a.m., she climbed up onto a table to reach the highest of the boxes stacked on pallets and threw them down to Ms. A; and that, when she jumped down off the table, she struck her left shoulder against a pallet, injuring herself. Claimant wrote in an employer injury report that she was standing on top of a table throwing boxes down to Ms. A from the top pallet, that it was too high, and that she got onto the table. In a later answer to an interrogatory, claimant stated that she was throwing boxes of candy from the top pallet down to Ms. A, that it was too high, and that, when she jumped down, she hit her left shoulder on the table.

Claimant further testified that Ms. A ran up and grabbed her as she lurched forward and asked if she were okay, that she responded that she was fine, that Ms. A then went to use the bathroom and, when Ms. A returned, she told Ms. A she had hurt herself. Claimant further testified that she looked for Ms. D, a job site supervisor, to tell about her injury but could not locate her; that she and Ms. A went to lunch; that she completed her shift; that she subsequently reported the injury to her employer; and that she later went to a clinic for treatment of her injury and was taken off work. She said she was later treated by Dr. B, who took her off work, and that he released her to return to work on November 20th but that she has not yet been assigned to a job by the employer. Claimant also stated that her shoulder pain was similar to the shoulder pain she had previously experienced but made clear that she was claiming a specific accidental injury, not repetitive trauma.

Ms. A testified that she does not remember claimant's having jumped off a table on _____ but only recalls claimant's complaining that her shoulder hurt. She said that the tables were used to place boxes on and were flimsy and not sturdy and that she

never saw claimant climb onto a table or jump off. She also stated that when claimant complained about her shoulder, they were putting cocoa into boxes.

A clinic record of September 11th states the history as claimant's lifting and throwing boxes off a pallet and feeling pain and tenderness at the left shoulder and neck, and states the diagnosis as cervical and thoracic strain. Another clinic record of September 11th reflects that claimant was taken off work on that date. A clinic record of September 17th states, "strained shoulder lifting boxes." An employer's "Claim Intake Form" dated September 17th states that claimant "strained her shoulder lifting boxes."

Dr. B's report of October 3rd states that claimant injured her shoulder on _____ "lifting boxes" and that his impression is left shoulder strain, rule out rotator cuff injury. Another of Dr. B's records of that date indicates that it was on October 3rd that claimant came under his care and that he took her off work. Still another report of October 3rd, the Initial Medical Report (TWCC-61), states the history as claimant's standing on top of a table throwing boxes down over and over and that is when her shoulder started to hurt.

Claimant had the burden to prove that she sustained the claimed injury and that she had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), 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), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). 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's discussion of the evidence indicates that she did not find claimant's testimony persuasive concerning the manner in which the claimed injury occurred. The hearing officer could consider the lack of consistency in the various versions of the incident related by claimant and credit the testimony of Ms. A.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge