

APPEAL NO. 990177

Following a contested case hearing held on January 5, 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 the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability due to the claimed injury of that date. Claimant has filed a request for review, asserting that these findings are against the great weight of the evidence. The respondent (self-insured) urges in response that the evidence is sufficient to support the appealed determinations.

DECISION

Affirmed.

Claimant testified that at approximately 4:00 a.m. on September 2, 1998 (all dates are in 1998 unless otherwise stated), while employed as an aide in the mental retardation unit of a state mental health center, she lifted a patient to change a diaper and felt a strong pain in her left arm which subsided when she stopped the activity. She further stated that at about 6:00 a.m., near the end of her shift, she and coworker Ms. C lifted a large plastic bag of trash out of a container and that she, alone, then drug it out to a dumpster. Claimant said she reported her left arm injury the next day and thought she was "just sore" because she had been on vacation before starting her shift at 10:00 p.m. on _____; that she saw Dr. W at about 8:30 a.m. on September 2nd because she had neck pain as well as pain in her left arm and numbness in her fingers; and that Dr. W immediately referred her to an orthopedist, Dr. K. She said that when she saw Dr. K on September 2nd, he asked her about any "trauma" and she "racked [her] brain" thinking back to possible "trauma." She said she recalled that the previous month she had painted her deck and that a few weeks before _____ she hit the top of her head when changing the oil in her car. However, claimant also said that she had "no problems" with her neck or left arm before the lifting incident at work. She further stated that both Dr. W and Dr. K asked her if she had seen a doctor after painting the deck and changing the oil and she said she had not.

Claimant further testified that Dr. K took her off work and referred her to Dr. S, who is in the same orthopedic clinic; that Dr. S obtained an MRI which revealed that she had a herniated disc at C6-7; that she has had two epidural steroid injections and other conservative treatment; and that since she has been improving, the possibility of surgery is no longer discussed. She further stated that Dr. K released her for light-duty work on November 16th but that her employer told her funds were not available to pay for light duty, that she still has not returned to work, and that she continues to have the restrictions given to her on November 16th against lifting, carrying, pushing and pulling more than 10 pounds and against bending. In claimant's medical records is a record dated November 28th stating she is unable to work pending the next appointment and no light duty.

In evidence is an Employer's First Report of Injury or Illness (TWCC-1) which claimant signed on September 8th and, apparently, completed, which stated that the

accident happened "while working in C-dorm during grave yard shift" and that she reported it to her supervisor, Ms. R, on September 5th. Also in evidence is a Supervisor's Report on Employee's Injury which is signed by Mr. C and which was, apparently, completed by claimant, in which she described how the injury occurred as "unknown some time while doing my shift work" and which described the injury as "left arm started to hurt during shift."

Mr. C wrote the following on the form, which he signed on September 11th: "Talked with employee and stated that she did not remember getting injured. All she could say was her arm started hurting."

In the September 21st transcript of claimant's recorded interview, she responded as follows when asked what happened on _____ regarding an injury:

1. Um I don't realize how I got hurt. I just know that after well [sic] during working my left arm was hurting a lot. (Okay) And I couldn't find any position for it that it wouldn't hurt, but I thought it was just sore because I had come back from eight days vacation. And so I thought I was just sore from not working. (Okay) And it was the first time I was on the MR floor. I had been working MH the past three years and so it was a lot more physical job. You know, changing diapers every two hours and we were lifting patients. We were also washing wheel chairs, washing walkers.

Later in the interview, claimant stated that after she got off work on September 2nd, she was in pain, "didn't even realize it was work related or anything," and just went to her regular HMO doctor. She further stated that she later called the evening shift supervisor and told her she was "real sick," that the supervisor asked her if it was a work-related accident, and that she said to the supervisor, "I didn't know that from what I had talk [sic] with the doctor. The only thing that he could think is that it aggravated it."

The self-insured's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated September 21st, states that the self-insured denies liability for a left arm and upper back injury because there is insufficient evidence to show a specific incident took place and no evidence of a causal connection between the alleged injury and the employment.

The written statement of Ms. C, dated September 26th, reflects that she worked side-by-side with claimant the entire shift on _____ and 2nd, including changing patients' diapers and bed sheets and later taking out the bag of trash, and saw no indication that claimant had hurt herself.

The history section of Dr. K's September 2nd report states that claimant said she has had occasional twinges of neck pain but no real problems until about three weeks ago; that she painted her deck and developed pain in her left shoulder which increased and became associated with left upper extremity numbness and severe neck spasm, and that "over the last three days she has been in agony."

Dr. S's September 4th report states that claimant was seen that day by Dr. K who referred her; that an MRI revealed a large herniated disc at C6-7 which was felt to be impinging on the left C7 nerve root; that claimant said the pain began on _____; that she was working the night shift doing a lot of lifting and manual activity; and that she began having pain in the neck and left upper extremity which was very severe by morning. Dr. S further reported that claimant has denied that she had any previous history of any injury to her neck prior to the work-related pain that began on _____ but that she did admit to Dr. K that sometime in the past she bumped her head changing oil in a car but did not have significant pain associated with that incident.

Dr. S's September 10th report states that Mr. C had called to ask if claimant's problem was due to work or other causes; that claimant states it developed while she was at work with no real preexisting situation; that he, Dr. S, talked to Dr. K and he said claimant told him she injured it while working on her car, hitting it on the oil pan; that claimant feels it was mostly due to work; and that he, Dr. S, would have to talk to Dr. K to see how much weight he placed on the previously mentioned injury.

Dr. S's report of September 28th states that claimant said when she began work at 10:00 p.m. on _____, she had no neck pain; that at 6:00 a.m., she lifted a garbage bag full of wet diapers and remembers having some neck pain and some left arm pain and numbness at that time; that she also had to move patients and change diapers on adult patients; and that at the end of her shift, she had severe neck and left upper extremity pain. Dr. S further stated that "from the way this patient describes the presentation, it does appear to be a work related injury, that she had no pain when she presented to work on _____, and that a subsequent MRI scan showed a very large extruded disc which correlated very well with her symptoms." He also stated that "[Dr. K] also feels this is a work-related injury."

Claimant had the burden to prove by a preponderance of the evidence that she sustained an injury in the course and scope of employment and that she thereafter had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. 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. However, the testimony of a claimant, as an interested party, only raises an issue 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)) 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 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). As the hearing officer stated in her discussion of the evidence, "it appears that the Claimant does not know exactly how or when her injury occurred." It is clear that Dr. K and Dr. S only knew what claimant told them in terms of the history of her injury and the hearing officer could infer that claimant's contention that the injury occurred when lifting a patient at 4:00 a.m. on September 2nd seemed to have evolved over some time. Since we affirm the injury determination, we also affirm the disability determination since there cannot be disability without a compensable injury.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge