APPEAL NO. 990285

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 on _____, the appellant (claimant) did sustain a compensable injury in the form of posttraumatic dizziness and/or posttraumatic vertigo but that her compensable injury did not include injury to her neck, shoulder, wrist, finger, back, or gluteal area, nor injury in the form of memory loss and difficulty with concentration. The hearing officer further determined that claimant had disability resulting from the _____, injury from August 27 through October 1, 1998. Claimant has appealed, asserting that the evidence established that she did sustain the other injuries and that her disability continued to the date of the hearing. The respondent (self-insured) filed a response, urging the sufficiency of the evidence to support the challenged findings of fact and conclusions of law.

DECISION

Affirmed.

We note at the outset that, inexplicably, the hearing officer's decision reflects that only one witness, the claimant, testified. However, the tape recording of the hearing contains testimony from Ms. E, the self-insured's employee benefits administrator and risk manager, and from Mr. Z, an investigator hired by the self-insured to obtain surveillance evidence of claimant's activities. We cannot emphasize too strongly the importance of assuring accuracy in hearing officers' decisions concerning the identification of testimonial and documentary evidence admitted or excluded at hearings.

Claimant testified that on _____, she was performing her duties as an art teacher in a middle school; that she went to the rear of the classroom to sit at a table where one of two students, both of whom had been previously disruptive, sat; that she bent down, pulled out a stool and sat down; and that she almost immediately felt the impact of what she assumed was the body of one of the students fall onto her head, neck and left shoulder as he fell to the floor. She said she was not knocked from the stool; that she reported the incident to her supervisor and to the vice principal; that she insisted that a police report be prepared; and that she has filed an assault leave claim which she indicated was provided for in the Texas Education Code. Claimant further stated that she went to the school nurse for an ice pack for her neck and felt dizzy, apparently finished her work day, and then kept a previously scheduled appointment for that day with Dr. PM who had been providing her with chiropractic treatment for her previous work-related neck and back injuries. According to the testimony of Ms. E, who investigated the incident, one student had attempted to kick the other and the latter student turned to avoid the kick, lost his balance, and fell against but not onto claimant as he fell to the floor. According to Ms. E, the student who fell was four feet, nine inches tall, weighed 86 pounds, and was not hurt in the incident. She also said that the school nurse's assessment of claimant was no apparent injury. The school nurse, Ms. T, wrote on September 1, 1998, that she saw claimant signing papers at a desk

that day without any problems and appearing fine but that when she approached the desk, claimant began to moan and rub the right side of her neck.

Claimant further stated that in January 1987, she was injured in an automobile accident and subsequently underwent cervical spine surgery; that she sustained a low back injury (on (subsequent date of injury), according to the records) when she grabbed a student from behind to break up a classroom fight; and that her left shoulder, neck and back were injured (on (prior date of injury), according to the records) when a student ran into her during a fire drill.

According to the self-insured's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated October 14, 1998, the self-insured disputed the compensability of the claim on the grounds that while claimant may have had an incident at work, no damage or harm was sustained to the physical structure of her body per Section 401.011(26). The form further stated that claimant did not fall from the stool, that evidence of her daily activities indicates she could return to work, and that she has full range of motion and shows no obvious signs of discomfort to support her claimed disability.

Claimant testified that she worked until about noon on September 1, 1998, after which she could no longer work although she continued writing the lesson plans for substitutes and driving these plans to the school. She acknowledged that she owns and operates a jewelry business; that she makes some of the jewelry and buys some; that she sells the jewelry at arts-and-crafts shows; that she sets up and closes down her wares at the shows but usually has help from a family member; and that she has participated in four or five such shows since the _____, incident. The self-insured introduced surveillance videotapes which included scenes of claimant's driving, loading and unloading boxes from her vehicle, selling her wares at her booth, walking, and carrying a 16-month-old child in her arms. Ms. E testified that she viewed the videotapes and felt they demonstrated that claimant had the physical capacity to perform her art teaching duties. Claimant said that her art teaching duties involve preparing lesson plans, obtaining the supplies from classroom closets and distributing them to the students, instructing the students, and collecting their work and supplies at the end of the classes. Ms. E said that claimant has not attempted to return to work even though a doctor who examined her reported that she could perform light duty. Ms. E indicated that she regarded claimant's art teaching duties as meeting claimant's restrictions.

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, as 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).

As the hearing officer noted in discussing the evidence, claimant testified for approximately two hours without any apparent difficulty in formulating her responses and that while the aggravation of her prior injuries could be shown to be new injuries, none of the numerous doctors who examined her indicated that the incident of _____, aggravated her prior injuries. The Appeals Panel has said that whether a claimant sustained a new injury or merely suffered a continuation of an original injury is normally a question of fact to be determined by the hearing officer (Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993) and that the bare assertion that an aggravation has occurred does not relieve the proponent of the burden of proving that an injury, as defined in Section 401.011(26), was sustained (Texas Workers' Compensation Commission Appeal No. 93416, decided July 8, 1993). We have further held that what must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved but that there has been some enhancement, acceleration or worsening of the underlying condition from an injury, and that this is particularly true where a claimant returns to work and is not 100% over the effects of an injury and experiences subsequent pain or medical problems related to an original injury. *See* Texas Workers' Compensation Commission Appeal No. 950125, decided March 10, 1995, and cases cited therein.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney

Appeals Judge