

APPEAL NO. 990379

Following a contested case hearing held on January 28, 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 appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability as a result of that claimed injury. Claimant's request for review of these determinations states no reasons for his disagreement and will be treated as a general challenge to the sufficiency of the evidence. The respondent (carrier) details in its response the evidence it views as sufficient to support the challenged determinations.

DECISION

Affirmed.

Notwithstanding the style of the case by the hearing officer, the parties stipulated that (employer) had workers' compensation insurance coverage with (Company).

Claimant testified that he had been employed by the employer for about four years when he sustained a compensable low back injury on (prior date of injury). His medical records reflect that he was taking trash out to the dumpster at the employer's bottling plant, slipped on some grease, and fell, landing on his buttocks. A September 29, 1997, report stated that an MRI revealed a small herniated disc at L5-S1 which is largely contained within extradural fat with minimal thecal sac indentation and no nerve root involvement. Claimant said that at the time of his injury, his job was performing product line sanitizing duties. He indicated that his treating doctor for the injury was Dr. T, an orthopedic surgeon, who took him off work. Dr. T's Report of Medical Evaluation (TWCC-69) dated June 23, 1998, certified that claimant reached maximum medical improvement on "10-23-98" with an impairment rating of "6%." Claimant said that after Dr. T indicated he was released to return to work, he called the employer's "Job Line" and learned that a forklift driver position was available and he had experience in that position; and that when Dr. T released him to return to work in June 1998, Dr. T indicated he would recommend that claimant work as a forklift driver. Dr. T's duty status record of June 23, 1998, states that claimant is released for "[f]ull duty starting 7/1/98 consider change to forklift operator." Incidentally, claimant stated at different points in his testimony both that he thought he had been released by Dr. T for return to work at light duty, and that his low back injury had resolved and he was released for full duty. He said that when he reported for work on _____, his supervisor, Mr. L, assigned him duties involving the filling of orders by lifting cases of products off pallets and placing them on other pallets; that he told Mr. L he required light duty; that Mr. L then called Dr. T's office and was told claimant had been released for full duty; that claimant then performed the assigned duties for approximately three and one-half hours and developed neck pain; and that when he told Mr. L about his pain, Mr. L said to him, "Well, go on home."

Mr. L testified that when he assigned claimant his job filling orders, claimant said he was not supposed to do that kind of work and had only been released for forklift work; that he told claimant they needed to go see Mr. H, the warehouse manager, to get the matter clarified; that while walking to Mr. H's office, claimant said he was going to call Dr. T and went to the break room to use the phone; that he and Mr. H then went to the break room and told claimant they needed to get on a speaker phone for that call; and that a lady in Dr. T's office advised them that claimant was released for full duty. Mr. L further stated that claimant then performed the assigned duties until the noon lunch break when he came to Mr. L and told him, "this is not going to work" and that he had tingling in the back of his leg, and he then left the plant.

Claimant further testified that after he left the plant, he went home; that his pain increased and later in the afternoon he went to Dr. T's office; that Dr. T was not available and he asked that the EMS be called to take him to a hospital emergency room (ER); and that he was taken to a hospital ER where he was seen by Dr. D, who took him off work. The _____, statement of Mr. F, a physician's assistant in Dr. T's office, states that claimant came in on that date, stated that he got hurt at work again, asked for a note taking him off work, and was told that could not be done but that he could be seen the next day. Mr. F further stated that claimant apparently had an increase in back and leg pain and was unable to move off an exam room table; that his family insisted that EMS be called; and that he was taken to a hospital by the EMS. Mr. F further stated that claimant did not return for the appointment made for him for the next day. Mr. F's statement is also signed by Dr. T.

Claimant further testified that on July 8, 1998, he went to Dr. L, a chiropractor, who was treating his brother; that Dr. L has had him off work since the first visit; that his (prior date of injury), low back injury had resolved before he returned to work on _____; that he called Dr. T's office on _____, to check and make sure it was okay for him to do lifting-type work; and that on July 13, 1998, he filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) for a _____, injury to his neck, left hand, right wrist, mid back, low back, and both legs. Asked about his testimony that his previous low back injury had resolved before _____, claimant stated that his new injury was to his upper back and neck and conceded that he was not aware of any diagnostic tests that documented his complaints of upper back and neck pain.

Dr. C, who reviewed claimant's medical records, reported on January 27, 1999, that it would be appropriate to question the extent of claimant's current complaints; that nothing in the records would substantiate an acute herniated disc which is what would commonly be seen in a patient with pain so bad the patient could not move; and that when the length of time it took for claimant to improve from his previous injury is considered, "questions as to the extent of injury and motivation appear" and that "one has to consider whether alternate agendas are at work here." Dr. C further stated that if there is no ER documentation of neck complaints, then he believes claimant did not suffer a new injury since neck complaints were not recorded earlier that day by Dr. T.

Dr. L's July 27, 1998, report states that claimant presented with complaints of pain in the neck, upper extremities, left hand, right wrist, mid back, low back, and bilateral lower extremities and gave a history of stacking cases of coke on a pallet, feeling a sharp pain in his mid back, telling his supervisor about it and being told to continue working. Dr. L further reported that later that day, claimant developed pain in other areas and had to go to the ER for an injection that evening.

While claimant contended that he sustained a new injury from the work he did on _____, the carrier contended that claimant filed a spite claim because he was not put to work as a forklift operator when he returned to work after being off work for nearly one year. As noted above, the hearing officer determined that claimant was not injured in the course and scope of his employment on _____, and did not have disability from the claimed injury of that date.

Claimant had the burden to prove that he sustained the claimed injury and that he 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). The hearing officer's discussion of the evidence reflects that he found claimant's testimony unpersuasive concerning his having sustained the claimed new injury and, further, did not find sufficient evidence that claimant sustained a new injury on _____, by aggravating at work his (prior date of injury) injury.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge