

APPEAL NO. 990436

Following a contested case hearing held on February 4, 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) sustained a compensable lumbar injury but not a neck injury and that she had disability from July 10 to July 20, 1998, and from July 22 to September 15, 1998. Claimant appeals the hearing officer's determination that her neck was not part of the compensable injury, asserting both that the hearing officer improperly expanded the compensability issue to include the extent of the injury and that the great weight of the evidence established that claimant's neck was injured when she injured her low back. Claimant also appeals the disability determination which limits claimant's periods of disability to those related to her lumbar spine injury. The respondent (carrier) contends that the hearing officer properly determined that the neck was not part of the compensable injury and that the evidence supports the periods of disability found by the hearing officer.

DECISION

Affirmed as reformed.

Claimant testified that on _____ (all dates are in 1998 unless otherwise stated), while employed as a cashier at a (Employer 1), she injured her back at the cash register by lifting heavy items from long carts onto other long carts for approximately six hours; that she finished her shift and worked on _____; that she saw a doctor on (day after the date of injury), a scheduled day off; that she went to work on (2 days after the date of injury) and gave a light-duty slip to a manager named Mr. D; that she was told by Ms. P that Employer 1 did not have light duty; that she did not return to work on (3 days after the date of injury) because the pain was worse and saw Dr. G who took her off work; that she returned to work on July 21st and had back pain when her medication wore off; that she did not return to work on July 22nd and saw Dr. G who took her off work; and that she has not since returned to work for Employer 1. According to Dr. G's records he took claimant off work on (day after the date of injury) until the next appointment on (3 days after the date of injury). Additional work status slips of Dr. G have claimant off work from one appointment to the next until September 17th. Since Dr. G's last work status slip had claimant off work until September 17th, we reform Finding of Fact No. 6 and Conclusion of Law No. 4 to change the end date of the last period of disability determined by the hearing officer from September 15th to September 17th.

Claimant testified that she attended two benefit review conferences (BRC); that at the first BRC, the carrier agreed to pay temporary income benefits (TIBS) until the second BRC was held; that she received the TIBS payments while working as a home health care employee for (Employer 2); and that although she agreed that it was "a little dishonest" to receive TIBS while still working, she insisted that she was unaware this was a problem because no one asked her if she was working when the TIBS were ordered and while they were being paid. In evidence is a Benefit Dispute Agreement signed by the parties and an

employee of the Texas Workers' Compensation Commission on November 5th, stating that the carrier agrees to pay TIBS beginning on that date until the next BRC.

Claimant further testified that in September, she resumed working as a home health care aide for a former employer, Employer 2, caring for an elderly lady whom she cared for before commencing her employment with Employer 1 a few weeks before her _____ injury. She said she mostly just sat with this patient and described the job as light duty which paid \$5.15 per hour contrasted with the \$6.00 per hour she earned from Employer 1. She also indicated that she worked from 20 to 25 hours per week for Employer 1 and 27.5 hours per week for Employer 2. Claimant conceded that she was able to work from September until January 15, 1999.

Claimant said she received no treatment for her injury from sometime in September until January 1999 when she commenced receiving chiropractic treatment from Dr. N who took her off work and obtained an MRI of her neck.

The report of the BRC held on December 8th states that the injury issue was "Did the claimant sustain a compensable injury in the course and scope of employment on _____." The report reflects claimant's position as being that she sustained an injury to her back after lifting boxes of merchandise on _____ and the carrier's position as being that claimant did not sustain a compensable injury on that date and that there were no witnesses. Claimant raised no objection to the carrier's examining her and two witnesses, Ms. M, a personnel manager, and Ms. A, a supervisor, specifically concerning the statements claimant made or did not make to the effect that on _____ she injured her neck in addition to the middle of her low back, and even claimant herself did not mention injury to her neck unless responding to leading questions. Under these circumstances, we do not find merit in the claimant's contention that the hearing officer improperly added a disputed issue of extent of injury or improperly expanded the scope of the compensable injury issue.

Concerning the area of her back injury, claimant testified that on _____, "I popped my back or something pulled my back when I was lifting merchandise from long carts"; that the area of injury was the middle of her back to the low back; that on _____ she told a supervisor, Ms. A, "I hurt my back" and "I told her I pulled my back"; that a few days later, she told the doctor that pain was "coming to [her] neck and arm" and that she let her employer know that; and that on July 21st, she told a supervisor, "my back is still hurting." Dr. G's report of _____ describes claimant's present illness as having sustained injuries to her upper and lower back which causes a shooting pain down to her lower right leg and up to her bilateral shoulder blades. Dr. G's impression was lumbar strain and Dr. G's August 31st record reflects cervical, thoracic and lumbar tenderness and spasm. According to a January 29, 1999, report, a lumbar spine MRI ordered by Dr. N revealed no abnormality, but a cervical spine MRI revealed disc protrusions compatible with small herniations at L3-4 and C4-5, a herniation at L5-6, and mild compression of the thecal sac at these levels. The January 7, 1999, Initial Medical Report (TWCC-61) of Dr. N, which reflects claimant's visit on January 6, 1999, states that when claimant was lifting

merchandise, she "felt a pop in back & pain in low back, mid back, and neck." However, a December 11th record among Dr. N's records states that she "felt a pop on her lower, between middle back."

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).

The decision and order of the hearing officer are affirmed, as reformed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge