APPEAL NO. 990813

Following a contested case hearing held on April 2, 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 respondent (claimant) sustained a lumbar spine injury in the course and scope of his employment with (employer) on Injury 2; that the medical evidence was sufficient to causally relate claimant's perirectal abscess to the Injury 2, injury; and that due to the claimed injury of Injury 2, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage beginning on (alleged date of injury), and continuing through the date of the hearing. The appellant (carrier) has appealed, asserting that the evidence established that claimant did not sustain a new injury but had symptoms from his injury 1 back injury and that his perirectal abscess and disability related to the injury 1 injury. Claimant filed a response indicating agreement with the hearing officer's findings.

DECISION

Affirmed.

Claimant testified through a Spanish language interpreter that he has been employed by the employer for approximately seven years; that he injured his low back at work in injury 1 (Injury 1) but fully recovered and resumed his regular duties operating a "filler" machine without any problems; that on or about (prior date of injury), he began to experience low back pain which he associated with the twisting and lifting he was doing at the filler machine and which became progressively worse; and that he complained to a supervisor, Mr. M, about the pain and was moved to the "depalleterizer," apparently a less strenuous activity. He said that on Injury 2, while working on the depalletizer, he went over to the filler machine to assist in freeing a jam and in that effort pulled on a chain and the pain became more severe and he could no longer handle the pain. The carrier introduced claimant's recorded statement of December 10, 1998, in which he made reference to having back pain on (date of injury's).

Claimant stated that he has been unable to work since (alleged date of injury); that he also has right leg pain and numbness; that Dr. B had him off work and undergoing physical therapy (PT); that he had to stop the PT when he developed a perirectal abscess while exercising on a stationary bicycle; that the abscess was drained on January 11, 1999; and that he has not yet been released to return to work by Dr. B or by Dr. S, who treated the abscess. Claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which he signed on December 21, 1998, states the date of injury as " Injury 2" and the date he first missed work as "(alleged date of injury)."

Mr. M testified that he saw claimant in the area of the filler machine on Injury 2, and that claimant did not tell him he hurt his back at the machine on that date but did complain of back pain on an earlier date. An undated statement by Ms. V, a human resources representative of the employer, stated that claimant had come in with a doctor's note and

said that his pain started about a week earlier but that he did not say anything, thinking it would go away. Mr. M acknowledged that an employer's injury report form introduced by the carrier reflected the date of injury as (alleged date of injury), and also reflected that the injury was reported on November 28, 1998. The carrier also introduced two Employer's First Report of Injury or Illness (TWCC-1) forms, one handwritten with an illegible date reported and the other typewritten with the date reported as "11-25-1998." We note that although much was made by the carrier of inconsistent dates of injury in records and documents and of inconsistent dates of reporting the injury, there were no disputed issues concerning the date of injury or the timeliness of the notice of the injury.

Dr. B's November 25, 1998, report states that he saw claimant four years earlier for his back and that claimant returned to work; that claimant was doing some lifting and twisting on Injury 2, and since then has gotten worse and has back pain; and that claimant has a lot of spasm in his back. Dr. B's diagnosis was lumbar sprain and rule out lumbar disc disease. The report further indicates that the claimant would be treated conservatively and that the dates he could return to either limited or full-time work were "to be determined." Dr. B's December 29, 1998, report states that he and claimant reviewed the MRI which showed a right-sided disc herniation; that treatment options were discussed and claimant wants to try more conservative treatment; and that light-duty work is not available (according to claimant) and that claimant may not return to full-time work. On January 27, 1999, Dr. B wrote an addendum to a January 14, 1999, letter stating that "[t]he back injury of Injury 2 is a new injury." The January 14, 1999, letter stated that claimant was seen for a injury 1 back injury; that he had a repeat back injury on Injury 2, and was seen on November 25th; and that he is off work for that reason and has a new injury. Dr. B wrote further on February 4, 1999, that claimant recovered from the injury 1 back injury and was having no problems until he sustained a new injury on Injury 2.

The March 30, 1995, MRI report stated that claimant had a herniated disc at L5-S1 on the right and that no spinal or foraminal stenosis was noted. The December 11, 1998, MRI report stated both that no significant changes had occurred since March 30, 1996, and that claimant has mild inferior neural foraminal stenosis at L5-S1 bilaterally. The impression was stated as right-sided disc extrusion at L5-S1 associated with severe changes of degenerative disc disease and mild inferior neural foraminal narrowing at L5-S1 bilaterally. Dr. B wrote on March 31, 1999, that the 1998 MRI showed a worsening of the herniation and significant degenerative change. He further stated that claimant had fully recovered from the injury 1 injury and had been working for three years at hard work without any problems.

Dr. S wrote on February 18, 1999, that claimant sustained a perirectal abscess by the use of an exercise bike while receiving therapy; that the skin became abraded and then infected with an abscess developing; and that the abscess was drained on January 11, 1999. Dr. S further stated that there was no evidence of any fistula as the cause of the abscess and that he believed it to be totally due to trauma sustained from the exercise bike together with the secondary bacterial infection from skin bacteria.

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.). Claimant's testimony concerning the sustaining of a new low back injury on Injury 2, was corroborated by the medical records as was the additional injury resulting from his treatment and the disability from (alleged date of injury), to the date of the injury.

The carrier focused its defense on various inconsistencies concerning whether claimant was having back pain before pulling on the chain on Injury 2, the various dates he stated that new back pain commenced, and what he reported to his supervisor and when. However, 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.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge