APPEAL NO. 990843

Following a contested case hearing held on March 24, 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 respondent (claimant) sustained a compensable injury on _____, and that he had disability from July 25, 1998, through the date of the hearing. The appellant (carrier) has appealed these determinations, asserting they are against the great weight of the evidence. Claimant's response, which addresses only the injury issue, asserts that the evidence is sufficient and seeks our affirmance.

DECISION

Affirmed in part; reversed and rendered in part.

Claimant testified that on _____, while driving a dump truck on a haul road at a strip mine at approximately 30 miles per hour, the left front tire dropped into a pothole and, wearing only a lap belt, his body slammed up against the steering wheel striking and injuring his abdomen. He said that he called the acting foreman, Mr. D, on a CB radio; that Mr. D and a coworker assisted him in getting out of the truck; that he went to a (hospital 1) emergency room (ER) where x-rays were taken; and that he was sent to (hospital 2), where he was seen and referred to Dr. RW, a doctor who had previously treated him. Claimant also said that he had been in a motor vehicle accident (MVA) on May 17, 1998; that in the accident he sustained broken ribs and a ruptured kidney and spleen which were removed; and that he was given a full release to return to work on July 13, 1998. He returned to his truck driving job on July 14, 1998, and had no problems until the accident at work on _____. Dr. RW's record of August 17, 1998, reflects a history of the May 1998 MVA, of the return to work and hitting the pothole, and complaints of pain and swelling. Dr. RW ordered CT scans of the neck, chest, and abdomen at that time. Claimant further testified that, although he did not obtain any work excusal slip from a doctor, he was unable to work after _____ because of the progressively increasing stomach pain and vomiting and bowel dysfunction symptoms; that he did attempt a sales job with (employer 2) for the last three weeks in November 1998; that he "got lucky" and sold one truck for which he received $1,500.00, his only earnings; and that he was unable to continue that work because of his inability to take deep breaths and walk the distance of the car lot. He also said that he earned $9.50 per hour from the employer and worked 50-hour weeks. Dr. RW's record of August 19, 1998, states, "can do light work . . . [illegible.]"

Claimant further testified that he went to the hospital ER in December 1998 where testing was done; that Dr. R told him his stomach was shoved up into his diaphragm; and that in January 1999 Dr. R performed surgery to reposition his stomach and bowels. Dr. R's December 23, 1998, record states a history of claimant's having recovered from the May 1998 MVA and then having a second MVA in July 1998 when he had "a deceleration injury" with the steering wheel hitting his abdomen. Dr. R's December 23, 1998, operative report stated the postoperative diagnosis as an incarcerated incisional hernia and extensive

adhesions of the stomach up to the diaphragm from a previous diaphragm repair from previous surgery. Dr. R wrote on January 11, 1999, that claimant had been under his care since December 23, 1998; that claimant required surgery on that day for an incarcerated hernia and extensive adhesions from the stomach to the diaphragm; and that "[t]hese problems occurred most likely from a motor vehicle collision that occurred while working." Dr. R further stated that claimant has not fully recovered from the surgery and that he cannot travel until he is released by Dr. R. Answering the carrier's deposition question on March 13, 1999, Dr. R stated that the incisional hernias occurred because of his previous surgery incision but could have occurred due to other factors such as increased abdominal cavity pressure or from the blunt trauma to the abdomen from the July MVA. Concerning the adhesions, Dr. R stated that while they were a result of his previous surgery, the July collision could have caused irritation and increased or promoted further adhesion formation.

Claimant said that he cannot lift or do anything physical because such activity hurts his stomach. He denied advising health care personnel and co-employees that it was his chest that was injured in the dump truck but he also stated that while the major impact was to his abdomen, he was ""slopped over" the steering wheel which was tilted down as far as it would go without hitting his legs. Dr. R wrote on March 13, 1999, that the normal recovery time for claimant's surgery would be four to eight weeks but that he had not seen claimant since January 8, 1999.

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. 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).

We are satisfied that the evidence sufficiently supports the hearing officer's finding that on _____, claimant sustained an injury when he was thrown into the steering wheel of his truck when he hit a pothole while driving for the employer.

Concerning the disability issue, the hearing officer found that the inability of claimant to obtain and retain employment at wages equivalent to the preinjury wage from July 25, 1998, through the date of the hearing on March 24, 1999, was the result of the injury claimant sustained while working for the employer. Although the hearing officer developed the information that claimant worked for the last three weeks in November 1998 for employer 2 and earned $1,500.00 for selling one truck, and also developed the information that claimant's average weekly wage was $450.00, she made no findings concerning this information. Because the evidence established that during one of the last three weeks in November 1998 claimant earned $1,500.00, an amount which clearly exceeded his average weekly wage, we reverse the determination that claimant had disability from July 25, 1998, through March 24, 1999, and render a new decision that claimant had disability for all but one week of that period.

We affirm the decision and order of the hearing officer that claimant sustained a compensable injury on _____, and reverse and render a new decision that claimant had disability for all but one week from July 25, 1998, through the date of the hearing held on March 24, 1999.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge