APPEAL NO. 991513

Following a contested case hearing held on June 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 concluding that the appellant/cross-respondent (claimant) did not sustain a compensable injury and that because there was no compensable injury, there can be no disability. Claimant has appealed those determinations and points out certain favorable evidence. The respondent/cross-appellant (carrier) filed a response which specifies various inconsistencies in claimant's evidence and conflicts with the carrier's evidence and which urges the sufficiency of the evidence to support the challenged findings and conclusions. The carrier also filed a timely appeal of the one finding pertaining to the disability issue. The file does not contain a response to the carrier's appeal.

DECISION

Affirmed.

At the outset of the hearing, the hearing officer stated that she was changing the date of injury on the benefit review conference report from April 1 to April 2, 1999 (all dates are in 1999 unless otherwise stated), consistent with a pre-hearing discussion with the parties and no exception was taken to that statement.

Claimant testified that he was employed by (employer) for about eight and one-half months before his employment was terminated on April 6, 1999; that he was hired as a welder but after several months his duties were changed to those of a fitter; that on April 2nd, while grinding spots off a heavy beam plate, which he estimated to weigh between 150 and 180 pounds and which was balanced on a pallet, the plate fell towards him and, as he pushed it back, he felt a strain and burning sensation in his low back and that the pain was immediate; that he told both his foreman, Mr. M, and coworker, Mr. B, that his back was hurting; and that when his shift ended about 30 minutes later, he went home. Claimant said he remained in bed the next three days due to his back pain and that when he went to the plant on Monday, April 6th, he was advised by Mr. M that his employment was terminated due to substandard performance. He conceded that when he told Mr. M and Mr. B about his back hurting, he did not state that he had injured his back at work but that he had intended to explain himself and that he later indicated to Mr. M that his back injury was job related. He also indicated that after Mr. M advised him of the termination of his employment, he spoke to Ms. VF, the employer's human resources coordinator, and to Ms. OF, the employer's benefits manager, about the continuation of his health insurance and could not recall advising them that he had been injured on the job. Claimant explained that he was waiting for Mr. M to submit an accident report. He further stated that he first sought medical treatment at an emergency clinic on April 18th and was seen by Dr. K, who obtained x-rays, which were negative, and referred him to Dr. B. He said he deferred seeking treatment because he could not afford to make copayments and was waiting to be told by the employer where to go for treatment. Claimant also indicated that before his

injury he had complained about Mr. V, the plant manager, treating him unfairly over the quality and quantity of his work.

Claimant further testified that he had not seen another doctor since his last visit to Dr. B on April 26th when Dr. B restricted him to light duty from April 26th to May 4th. He indicated that he did not know what his work status was after May 4th but that no doctor had taken him off work altogether.

Mr. M testified that claimant's work as a welder was unsatisfactory and that he was changed to the job of a fitter; that he was given many chances but that he was "basically non-productive"; that the plant manager was aware of this; and that claimant became angry when he advised him of the termination of his employment on April 6th but said nothing about being injured on the job. He said that when claimant called him on April 12th and stated that he had a sore spot on the side, claimant provided no details. Mr. M also indicated that the plates claimant was grinding did not weigh between 150 and 180 pounds. Mr. B testified that the plates weighed between 50 and 90 pounds.

Ms. VF and Ms. OF both testified that claimant did not advise them he had been hurt at work when he inquired about continuing his health insurance under COBRA on April 6th and that claimant's wife did not mention his injury when she brought in a check to pay for the health insurance.

Dr. K's April 18th record states that claimant denied trauma but said he lifted a few heavy objects two to three days prior to the onset of pain. Dr. K diagnosed acute low back pain and prescribed Tylenol. Dr. B's April 20th record states a history of claimant's attempting to clean and remove another plate and developing acute pain in his back radiating into his neck and right leg. Dr. B diagnosed back strain and cervical spasm and his treatment plan included physical therapy for 14 days. Dr. B's record of April 26th states that claimant is to be placed on light duty until May 4th with restrictions against bending, stooping, squatting, pushing or pulling more than 10 to 20 pounds, and lifting more than five pounds.

Claimant contended that he injured his back on April 2nd when he pushed back the heavy steel plate he was grinding, which was falling toward him. The carrier contended that claimant filed a spite claim after being advised that his employment was terminated. 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 carrier challenges the finding that claimant was unable, due to his claimed compensable injury, to obtain or retain employment at wages equivalent to his preinjury wage beginning on April 26th and continuing through May 3rd. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. The Appeals Panel has stated that "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues" (Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992); that "[w]here the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage" (Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991); and that "an employee under a conditional work release does not have the burden of proving inability to work" (Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995). We are satisfied that Dr. B's work release record of April 26th sufficiently supports the challenged finding.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Dorian E. Ramirez
Appeals Judge