

APPEAL NO. 991545

Following a contested case hearing held on June 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 concluding that the respondent (claimant) sustained a compensable injury, that the date of injury is _____, that claimant reported an injury to his employer on or before the 30th day after the injury, and that claimant had disability from February 8 through April 4, 1999. The appellant (carrier) appeals the determination that claimant sustained a compensable injury, pointing to various conflicts and inconsistencies in the evidence and contending that the determination is against the great weight of the evidence. Claimant filed a response urging the sufficiency of the evidence to support the challenged determination.

DECISION

Affirmed.

The parties stipulated that in _____ claimant was the employee of (employer) and that the employer provided workers' compensation coverage with (specific carrier), identified by the hearing officer as the "specific carrier" with the carrier being the "umbrella carrier."

Claimant testified that he worked as a route salesman for the employer; that his job entailed driving a large van loaded with various products, including cases of cleaning agents such as fuel injector cleaners, and some machines, which he delivered to established customers as well as showed to potential customers; and that the cases weighed approximately 15 to 20 pounds while the radiator flush machines weighed approximately 45 pounds and the transmission machines approximately 60 pounds. He said he could not recall the exact date nor the customer but that at some time in the period of _____ to _____, before lunch, he stepped up on the rear bumper of the van, leaned inside, moved some cases around to find the product he was looking for (a common procedure), and that as he leaned forward and shifted the cases around he "felt a pinch" in his right leg; that he "trivialized" the incident and pain, continued to work, and self-treated; that at the next weekly sales meeting, which were held every Monday, he told the employer's owner, Mr. G, that he had "pulled a hamstring reaching into the back of the van"; that he thought he would "just work it out" but the pain increased; and that on February 8, 1999, the pain was so bad he could not drive and he called in to advise the employer he could not come to work and talked to his supervisor, Mr. AG. He stated that he reminded Mr. AG of his earlier reporting (at the Monday sales meeting) of feeling the pinch in his leg while moving products around in the van; that he advised Mr. AG that the pain was worse and that he could not even drive the van and needed to see a doctor; that they discussed his going to a doctor and he told Mr. AG he would just use his health insurance with the copayments and not workers' compensation insurance because he did not want to jeopardize his employment but that if it turned out to be serious, they would "put it under workers' comp"; and that Mr. AG responded, "fine."

Claimant testified that he saw Dr. C with whom he had previously treated; that he had a lot of pain in his right leg and that Dr. C told him it was caused by a pinched nerve in his back; that Dr. C gave him a shot, told him to rest for a week, and ordered an MRI; and that Dr. C later told him the MRI revealed a herniated disc and referred him to Dr. F, a neurosurgeon. The MRI report of February 16, 1999, states the history as a 46-year-old male with a three and one-half week history of right leg pain and the impression as a severe right L5-S1 disc herniation which likely accounted for claimant's symptoms, together with small bulges at L4-5 and L3-4. Claimant said that Dr. F mentioned surgery and told him he could not continue to do the type of work he was doing. Claimant said he then called Mr. AG and advised him of the seriousness of the injury and that Dr. F said he could not continue to perform the work he was doing and, as claimant put it, "there went my job." In evidence is Mr. AG's letter of March 22, 1999, advising claimant that his employment was terminated "effective immediately." The carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated March 11, 1999, states that the carrier received first written notice of injury on "02/25/99" from Mr. AG. This document states the date of injury as "_____" whereas claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated March 3, 1999, states the date of injury as "alleged injury" and the date claimant first missed work as "2/8/99."

Claimant further stated that although he told Dr. C about his being injured on the job, he had Dr. C bill his health insurance carrier; that he did not file for workers' compensation coverage because, as he put it, "I was more concerned about my job than my leg"; and that after Dr. F talked about spinal surgery, he realized he had a serious injury and took steps to "get it under workers' comp." He also indicated that he changed treating doctors from Dr. C to Dr. L, who provided chiropractic treatment and shoe inserts, and that his back condition has improved with Dr. L's treatments.

Claimant further testified that the employer terminated his employment; that he needed employment to pay his bills; that he began to look for less strenuous work because the doctor had given him a light-duty release and was concerned about reinjury; and that at least two months before the hearing, a date he could not recall, but he did not disagree with April 4, 1999, he obtained employment as a night clerk at a (store). He said he took a big pay cut because the job only paid \$6.00 an hour but that the work was less strenuous than his prior employment.

In his recorded interview of March 11, 1999, by Mr. H, the adjuster, Mr. AG stated that claimant did not report a back injury to him on or about ____ or ____; that claimant did call to say that he was not coming to work because his hamstring hurt; and that claimant also called when he found out he had a ruptured disk and the doctor told him that he was not able to continue in his present line of work. In his recorded interview of March 11, 1999, by Mr. H, Mr. G stated that claimant did not report a back injury to him on or about ____ or ____, but did tell him on February 25, 1999, when he came in to pick up his check, that he received a cortisone injection in the lower back and was now able to get around. Mr. G further stated that he asked claimant how he did it and claimant said he did not know. In her recorded interview of March 24, 1999, by Ms. G stated that she is employed with carrier's agency; that on February 24, 1999, claimant called, stated that he had pinched his hamstrings on the job on _____, and asked for authorization to see a doctor.

At the hearing, the carrier in closing statement recited various inconsistencies and conflicts in the evidence and advised the hearing officer that given those inconsistencies and conflicts, claimant failed to meet his burden of proof. In its appeal, the carrier urges that, based on the evidentiary inconsistencies and conflicts, the determination that claimant sustained a compensable injury is against the great weight of the evidence. The carrier does not specifically appeal the timely notice of injury and disability determinations. Claimant had the burden to prove that he sustained the claimed injury, that he timely reported the injury to the employer, 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 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