APPEAL NO. 991611

Following a contested case hearing held on July 8, 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 appellant/cross-respondent (claimant) did not sustain a compensable injury to his lower back and right shoulder on _____, and that because he did not sustain a compensable injury, he did not have disability. Claimant has requested our review of these adverse determinations, asserting that the evidence established that he did indeed sustain the claimed injury moving a rug at work and that the hearing officer is mistaken in stating that claimant's testimony conflicts with the statements of others and with his own prior statements. The respondent/cross-appellant (carrier) requests review of the finding that as a result of an injury to his back which was not sustained at work, claimant has been unable to obtain and retain employment at his preinjury wage rate beginning February 1, 1999, and continuing through the date of the hearing. The carrier filed a response to claimant's appeal. The file does not contain a response from claimant to the carrier's appeal.

DECISION

Affirmed.

Claimant testified that on Friday, _____ (all dates are in 1999 unless otherwise stated), while employed part time in the evenings at a store, he hurt his back while lifting and folding over a five foot by eight foot oriental rug weighing between 35 to 40 pounds. He said he had just shown the rug to a customer who had helped him take it down from a stack and that as he lifted and folded the rug over, he felt a pull in his low back, mid-back, shoulder, and neck. Claimant said he continued to work but that his back began to hurt and became stiff; that when he told his immediate supervisor, Ms. S, that he had hurt his back a few minutes ago, she responded that he had hurt it Monday, and so he also told another supervisor, Ms. W, about the injury. In evidence is the affidavit of Ms. S stating that she will be out of the state and unable to testify on July 8th, and that her handwritten statement of February 9th is true and accurate. That statement reads as follows:

> Friday, _____ (date), [claimant] made comment to me that he had hurt his back. I asked him if it had happened that night. He said "no," that it had happened on Monday. I asked if it had happened at work & he specifically told me "no." Later that evening, he was still complaining about his back & he told me that he had told [Ms. W] about it. He said that he told her that he hurt it at work on a ladder. I said that he had already told me that it didn't happen at work & he then denied it. I insisted that he had told me it did not happen at work & he insisted that conversation never took place. [Claimant] is now claiming that his back injury happened while on the job.

Claimant further testified that he was off work on Saturday; that he called in sick on Sunday; that on Monday he went to the store and told the store manager, Mr. R, about the injury; and that he then went to Dr. S from whom he received chiropractic treatment daily at first, then three times a week, and presently twice a week. Claimant stated that Dr. S took him off work on February 5th; that he remains off work and has earned no wages; and that he feels he has not been able to work since the injury date due to the pain. Dr. S's records contain a "Disability Certificate" dated "2-1-99" stating that claimant was under Dr. S's care from "2-1-99 to present 2-12-99" and "was incapacitated during this time."

Claimant further testified that he has been attending a barber school but that since the injury he has not cut hair but only studied theory. He also said he sustained a previous back injury in February 1996 for which he received a nine percent impairment rating but that he was completely recovered from that injury before sustaining the _____ injury.

Ms. W, an assistant store manager, testified that on _____ claimant told her that he hurt his back while standing on a ladder to get a rug down from a hanging rack; that she offered to complete an accident report and send claimant to a doctor but that claimant declined; and that Ms. S later told her that claimant told her that he had already injured his back but not at work. Mr. R testified that claimant came in on the Monday after _____ and said he injured his right shoulder and low back while getting a rug down from what would have been an eight- to 12-foot level and that he then prepared an Employer's First Report of Injury or Illness (TWCC-1).

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 stated in his discussion of the evidence that claimant's testimony was in conflict with the statements of others and with his prior statements of how the injury occurred, that his credibility was in question, and that he did not meet his burden of proof to show that he sustained the claimed injury. 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 hearing officer clearly did not find claimant's testimony persuasive. As for the challenged disability finding, the hearing officer could consider not only Dr. S's disability certificate but also claimant's testimony that he did not work and could not work because of pain from his injury.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge