

APPEAL NO. 991908

Following a contested case hearing (CCH) held on August 9, 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 on _____, the respondent (claimant) sustained compensable injuries, that he had disability from March 25th through the date of the hearing, and that on April 8, 1999, the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving Dr. B as claimant's alternate doctor. The appellant (self-insured and/or employer) has requested our review, asserting the insufficiency of the evidence to support the hearing officer's determinations.

DECISION

Affirmed in part; reversed in part.

Claimant testified that between 2:00 a.m. and 3:00 a.m. on _____ (all dates are in 1999 unless otherwise stated), he was driving the self-insured's 18-wheel tractor-trailer truck back from an out-of-state trip to the distribution center; that he exited an interstate highway and stopped for a red light; and that while stopped, he felt "a pretty severe jolt" from the rear. He said he was not wearing the seat belt because the seat lock was defective, allowing the seat to slide back and forth and making use of the seat belt uncomfortable; that his abdomen hit the steering wheel; and that he did not feel immediate pain but was "in a daze." Claimant further stated that he got out of the truck and walked to the rear and that the driver of the car which had struck the rear of the trailer drove away but was arrested a few miles away and charged with DWI. Claimant wrote on the accident report he completed on _____ that the car tore the D.O.T. bar on the rear of the trailer and bent the license plate. He indicated that the D.O.T. bar is a steel, U-shaped bar. He further stated that within about 24 hours, he was feeling "a pulling sensation" in his low stomach area and "tension" in the area of his neck and shoulders with the abdominal pain being worse. Claimant said he called the family doctor he had been seeing for three or four years, Dr. LL, and got an appointment for March 24th; that Dr. LL gave him pain medicine, took him off work for a week, and scheduled a follow-up visit in a week; and that he saw Dr. LL again on March 30th and she referred him to Dr. RL for treatment of his stomach. Dr. LL's records reflect her diagnosis of musculoskeletal spasm and abdominal pain. Dr. LL wrote on June 16th that claimant's musculoskeletal spasm of the neck and shoulder are consistent with the dynamics of the injury, that she elicited umbilical tenderness on exam, and that she "was the treating doctor for the 'emergency' and related follow-up care only." Claimant said he was initially unsuccessful in seeing Dr. RL because Dr. RL did not treat workers' compensation patients.

Claimant also testified that when he learned that Dr. RL did not take workers' compensation patients, he submitted an Employee's Request to Change Treating Doctors (TWCC-53) requesting Dr. B, a chiropractor, as an alternate doctor; that Dr. B began treating his neck and shoulders; that the self-insured refused to pay for the abdominal surgery he was told he required so he used private health insurance and underwent

surgery on July 9th by Dr. RL for the repair of an umbilical hernia. Dr. RL wrote on July 1st that claimant reported receiving a blow from the steering wheel to his abdomen in the motor vehicle accident on _____, that claimant thereafter experienced pain in the umbilicus, and that "this could . . . be cause and effect" which Dr. RL went on to explain in some detail. Dr. RL's operative report of July 9th states the diagnosis as "[i]ncarcerated umbilical hernia plus morbid obesity" and that Dr. B, who has had him off work since the first visit, will undertake some treatment of his neck and shoulders which had to be deferred pending the surgery and his recovery. Claimant said that he still has the stitches in from the surgery and that neither Dr. LL nor Dr. B have released him to return to work. He denied having had a prior problem with an umbilical hernia but said he had undergone a procedure for a mass in his groin to check it for cancer.

Claimant further testified that when he turned in Dr. LL's off-work slip to the self-insured, he was told to take a drug screen test; that his urine specimen tested positive for "traces" of marijuana, a drug he had not used for 10 years; that the retest he requested was also positive; and that the self-insured terminated his employment. He said he has not worked nor earned wages since _____. Claimant also stated that his average earnings with the self-insured were \$1,000.00 per week and that he is receiving weekly income benefits from the self-insured in the amount of \$508.73.

Dr. B's initial report sets out the history of the injury as stated by claimant and states 10 diagnoses involving the cervical and thoracic spinal regions, shoulder, and brachial neuritis. Dr. B's records do not, however, contain any mention of the diagnosis and treatment of a lumbar spine injury. Dr. B's report also notes that claimant is off work for one week per Dr. LL and opines that, based upon the consultation and examinations, the injuries claimant has suffered resulted from the work-related incident of _____. Dr. M, who apparently practices with Dr. B, wrote on May 27th that, based on claimant's medical record, he had no prior history of an abdominal hernia before the _____ accident but did complain of one following the accident, and that he, Dr. M, feels that the mechanism of injury, the _____ accident, could very well have caused the abdominal injury.

Claimant's TWCC-53, which he signed on "4-1-99," requests a change in treating doctor from Dr. LL to Dr. B. The reason, which does not appear to have been written by claimant, states that "[c]are is denied. Pt needs Dr to treat. [Dr. LL] [illegible] Dr. doesn't take WC is HMO Dr. [illegible] Dr. closer to home also." Dr. B also signed this form on "4-1-99." The Commission employee signing the Commission's approval of the request at the bottom of the form on April 8th wrote that "[Dr. LL] does not take w/c claims." The Commission's Dispute Resolution Information System [DRIS] note of April 8th by this same employee states as follows: "53E exception to change trtg dr from [Dr. LL] to [Dr. B] of NRH. This was an exception due to [Dr. LL] does not take W/C claims. I called [Dr. LL] and spoke to Mrs. K re the above info. I was told this is correct."

The self-insured introduced a vehicle accident reconstruction report dated May 21st which concluded that the tractor-trailer experienced a forward increase in speed of two miles per hour or less and that an occupant would not have been injured as a result of this accident.

The self-insured disputes findings that on _____, claimant injured his neck and shoulders, lower back, and sustained an incarcerated umbilical hernia; that from March 25th to the date of the CCH, claimant has been unable to obtain and retain employment at his preinjury wage due to his work-related injuries; that Dr. B is claimant's alternate choice of treating doctor; that claimant's reason for requesting an alternate choice of treating doctor was his belief that Dr. LL and the referral doctor, Dr. RL, did not treat workers' compensation injuries; and that on April 8th, the Commission's Official Action Officer approved claimant's choice of alternate doctor based on verified factual information at the time that Dr. LL did not treat workers' compensation patients.

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). The hearing officer could credit claimant's testimony and the medical opinions concerning the cause of his injuries. The hearing officer's discussion of the evidence noted that she found claimant's evidence credible. However, we do find as being against the great weight of the evidence so much of Finding of Fact No. 2 as finds that on _____ claimant injured his lower back. Claimant did not testify that he injured his lower back nor do his medical records reflect that he was diagnosed and treated for a lower back injury. Accordingly, we reverse that portion of Finding of Fact No. 2 which refers to the lower back.

As for the Commission's approval of the request to change treating doctors, we review such for abuse of discretion by the Commission based on the information known at the time of the Commission's action on the request. We find no error in the hearing officer's findings and conclusion on this issue. See *generally*, Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996.

The hearing officer's decision and order are affirmed except for that portion of Finding of Fact No.2 which includes the lower back.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge