APPEAL NO. 992488

Following a contested case hearing held on October 15, 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 _____; that he has had disability resulting from the injury from day after injury date, through the date of the hearing; and that the appellant (carrier) did not waive its right to contest the compensability of the claimed injury. The carrier has requested our review of the injury and disability determinations, asserting that expert evidence was required to prove the claimed low back injury, which the carrier asserts is an ordinary disease of life, and that claimant's expert evidence was insufficient to meet his burden of proof. Claimant's response urges that the evidence is sufficient to support the challenged determinations. Since the hearing officer's determination of the carrier waiver issue has not been challenged on appeal, it has become final pursuant to Section 410.169.

DECISION

Affirmed.

We note at the outset that the hearing officer's decision states that the parties stipulated that venue is proper in the City 1 field office while her Conclusion of Law No. 2 states that venue was proper in the City 2 field office. The record reflects that the hearing was held in the City 2 field office and that the parties stipulated that venue was proper in the City 2 field office. We reform Finding of Fact 1C accordingly.

We further note that although the hearing officer's Decision and Order reflect that Claimant's Exhibits Nos. 8, 9, and 10, which included the affidavit of Dr. F, were admitted into evidence, the record reflects that the hearing officer sustained the carrier's objections to their admission based on claimant's failure to have timely exchanged them.

Claimant testified that on _____ (all dates are in 1999 unless otherwise stated), while driving an empty forklift over an approximate six inch "offset" between the back of the trailer he was loading and the edge of the employer's warehouse dock, his back was "jarred" and he felt immediate back pain which he immediately reported to his supervisor; that he also developed pain radiating down his left leg; that he continued to work for a week thinking the pain would subside; that when the pain failed to resolve, he saw his family doctor, Dr. K, on May 24th; and that Dr. K ordered an MRI and later referred him to an orthopedic surgeon, Dr. F. Claimant indicated that he had not been able to work since his first visit to Dr. K on May 24th because his work as a freight delivery person involves heavy lifting and prolonged sitting while driving a truck to other locations and that his back and leg pain prevent him from performing such work. He also indicated that when Dr. F gave him a 20-pound lifting restriction, he called the employer and was advised that

the employer had no light duty for him. Claimant also indicated that while he had twisted his back in 1989 and hurt it again in 1991, he had not had medical treatment for a back injury nor lost time from work for such an injury and had passed annual physical exams.

Dr. K testified that claimant provided a history of riding on a forklift and experiencing a sudden jarring followed by back pain; that the MRI he ordered was accomplished on May 20th; that he referred claimant to Dr. F and thinks claimant will ultimately require surgical treatment; that the finding of degenerative disc disease is normal for a man of claimant's 47 years; and that in his opinion, "a jarring, a blow could aggravate a degenerative disc condition." Dr. K further opined, to a reasonable medical probability, that the sudden jarring trauma claimant experienced on _____ "produced an acute herniated disc" at the L4-5 area. He added that, considering the MRI, the clinical history, and the physical examination, he "can definitely state that the herniated disc occurred at that time, producing that pain, and that is why I saw him." While the carrier's appeal characterizes Dr. K as a family friend and "a hunting buddy" of claimant's, Dr. K, who acknowledged the friendship, said that claimant went hunting with him just once, over seven years ago.

Dr. GS testified that based upon his review of claimant's medical records, which did not include a review of the diagnostic films, claimant had degenerative disc disease before _____ and there is no medical evidence of a new injury. Dr. GS noted that Dr. F's examination noted no neurological deficits nor herniation and that Dr. RS, who reviewed claimant's May 28th MRI films, found "no extrusion." Asked if the trauma claimant experienced on _____ could have aggravated his preexisting degenerative disc disease, Dr. GS responded, "anything is possible."

Dr. RS's July 15th report concluded that claimant has "[d]isc degeneration with spondylosis, bulging, and accentuated posterolateral protrusions at L4-5 and L3-4, including left L4-5 foraminal annular tearing, probable herniation, and moderate stenosis." Dr. RS went on to state that the findings represent chronic disc degeneration and that "[t]his MRI does not document a new injury but neither does it document the absence of a new symptomatic injury on that date."

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 also cites seven cases in support of its position, each of which is distinguishable or inapposite.

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