

APPEAL NO. 000008

Following a contested case hearing held on December 7, 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 (claimant) did not sustain a compensable injury on _____, that claimant did not have disability, and that claimant was not intoxicated at the time of his alleged injury of _____. Claimant has requested review of the injury and disability determinations, asserting that the hearing officer ignored his medical evidence. The respondent (carrier) filed a timely response, urging that the evidence is sufficient to support the challenged injury and disability determinations. The carrier's response then goes on to request review of the hearing officer's determination that claimant was not intoxicated at the time of the alleged injury, detailing why it asserts that such determination is against the great weight of the evidence. Texas Workers' Compensation Commission records reflect that the carrier's Austin representative signed for the carrier's copy of the hearing officer's decision on December 15, 1999. Accordingly, the carrier had 15 days from that date or until December 30, 1999, a Thursday, to file an appeal of the intoxication determination. See Section 410.202(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3. Since the carrier's response was mailed on January 18th and received on January 20, 2000, it is untimely as a request for review. The hearing officer's determination of the intoxication issue has thus become final pursuant to Section 410.169.

DECISION

Affirmed.

Claimant testified that on _____, he was employed by (employer) as a laborer; that he was assigned to a crew working the 6:00 p.m. to 6:00 a.m. shift at a (customer) plant; and that at about 2:30 a.m. on that date, as he exited through a manhole in the storage tank he had been cleaning, with his boots soaked with diesel, he slipped, or tripped over hoses, and fell onto his back and right leg, injuring his low back and leg. Claimant said that he asked about first aid and was told none was available at that hour so he completed his shift; that while riding in the employer's van back to the employer's office from the plant, he told the employer's branch manager, Mr. R, who was driving the van, about his injury; that when they arrived at the employer's office, he again told Mr. R about his injury and requested to see a doctor and that Mr. R told him to go to the doctor on his own; that he went home and took prescribed Vicodin ES for pain and Valium for sleep; and that later that day Mr. R took him to the doctor and for drug screen testing. Claimant was unable to identify the doctor who prescribed the Valium as well as the pharmacy that filled the prescription.

In his recorded interview of August 17, 1999, coworker Mr. L stated that when claimant was climbing out of the tank, it appeared that a foot caught and that claimant fell forward, landing on his hands and forearms to catch himself. He said that claimant did not

say he was hurt but did say, "Y'all saw me fall." Mr. L further stated that claimant completed his shift and gave no appearance of having been injured and that when they were back at the employer's office and Mr. R advised them of who was no longer needed at the plant, claimant said, "Well, what about me falling?".

Mr. R testified that claimant did not report an injury either while they were driving back to the office or upon arrival at the office. He indicated that while they were at the office, he got a call from the work site and was told that the customer did not want claimant and two others of the eight-man crew working at the plant any longer, and that claimant then informed him that he had been injured and was going to see his own doctor. Mr. R stated that claimant said to him, "If I can't go back to work tonight, I guess I'll go see a doctor." Mr. R further stated that later that day, claimant called, complaining of his low back and leg, and indicated that he would see the doctor, and that he, Mr. R, then took claimant to (clinic) for medical attention and for a drug screen test. Mr. R further testified that claimant gave no appearance of being injured on _____.

In evidence is a handwritten statement dated "8-3-99" at 11:40 a.m. which is signed by claimant. This statement says that claimant came out of the tank and "slipped this morning"; that Mr. P saw him slip; that he notified his supervisor, Mr. J, and told him he was "OK"; that Mr. J did not offer to take him to the hospital but that he did not ask to go; and that he was not refused medical attention. Mr. R indicated that Mr. J was an employee of the customer. Claimant acknowledged signing the statement but said he did not read it.

The clinic records of _____, reflect that claimant gave a history of slipping and falling while exiting a tank the previous night and that the assessment of Dr. C was a bruise to the right femur, bruised right hip, and lumbosacral strain. Claimant's medical records reflect that he continued to receive conservative treatment for a low back strain.

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 hearing officer makes clear in her discussion of the evidence that she did not find claimant's testimony persuasive, noting inconsistencies as well as conflicts with other evidence.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge