APPEAL NO. 000069

Following a contested case hearing (CCH) held on December 20, 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 _____, and that as a result of that injury, she had disability from June 11, 1999, through the date of the CCH. The appellant (carrier) seeks our review, urging that the evidence is insufficient to support the injury determination and that the hearing officer applied an incorrect legal standard in reaching his disability determination. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant testified that she is employed at a (employer); that on (date of first injury), she sustained an on-the-job injury which did not include her neck; that she was eventually returned to light duty working fewer hours per week, in contrast to her regular duties as a floor manager at 40 hours per week; that she was assigned a 13% impairment rating for this injury and on May 20, 1999, she was released for return to her regular duties; and that she received her last partial temporary income benefits check paying such benefits up to May 20, 1999, and thereafter began receiving impairment income benefits. According to the Employer's First Report of Injury or Illness (TWCC-1), claimant's "rate of pay at this job" is $9.05 hourly and $362.00 weekly and a full work week is 40 hours over five days. Claimant further stated that before the employer arranged to get her rescheduled for resumption of her regular duties, there being a lag time in such scheduling, she sustained a new injury on _____, while performing the light-duty work. Claimant stated that her light duty included recharging the batteries in cell phones used by the floor managers; that she had to reach up and out to a shelf in her work area in order to put the devices on the rechargers; and that on _____, while reaching up to a phone to grasp it with her fingertips and pick it up, she felt a spasm which ran from the side of her neck, down her left arm, and into her fingertips. She said she had no control over her left arm, which "just flopped," and had to pick it up with her right hand; she reported this injury to a floor manager who replaced her at her workstation, and then reported it to the duty manager who sent her home.

Claimant further testified that during the morning of (day after injury), the employer sent her to (Dr. S); that Dr. S prescribed medication and physical therapy (PT) and told her she could continue light duty for four to five hours per day, four to five days per week, with no lifting, pushing, or shoving; that during the course of her PT, the therapist told her she needed a better diagnosis; that a June 26, 1999, MRI ordered by Dr. S revealed that she has two herniated discs in her neck; that she changed treating doctors to (Dr. M) in August 1999 since Dr. S was relocating; that both treating doctors told her she injured her discs at work; and that she has not yet been released to resume her full-time, regular work.

Dr. S's record of (day after injury), states that claimant "pulled muscle in shoulder and neck" on the previous day; that the diagnosis was "MS Strain/Muscle Spasm"; that the treatment plan included medication, moist heat, and PT; and that claimant was released for light duty. Dr. S's June 14, 1999, record reflects the continuation of light duty for another seven days; Dr. S's June 21, 1999, record continues the light duty. The June 26, 1999, MRI report states the impression as a moderate, posterior disc herniation at C5-6. Dr. M's records refer to claimant's injury as work related and contain work certificates which limit claimant to working light duty at no more than five hours per day, four days per week.

The July 12, 1999, report of Dr. K reflects that he reviewed the medical records; that claimant has a history of fibromyalgia; that the MRI indicated that the herniation at C5-6 was slightly more pronounced to the right, the opposite of claimant's pain; and that there is no evidence in the documentation of a causal relationship between the _____, injury and the MRI findings. Dr. K reported on November 11, 1999, that claimant reported an acute left shoulder injury but not an acute neck injury when she presented for treatment on June 14, 1999, and that there was not any correlation between claimant's cervical spine MRI and the side of her acute symptoms. This report also noted variations in claimant's statements of some details concerning the mechanism of injury.

Claimant had the burden to prove that she sustained the claimed injury and that she 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).

We do not find merit in the carrier's assertion that the hearing officer applied an incorrect standard in determining the disability issue. According to the evidence, claimant was released by her doctor on May 20, 1999, to return to her regular work as a floor manager working 40 hours per week, and the employer was so informed. At that point, claimant was able to obtain and retain employment at the wages she earned before her (date of first injury) injury and thus no longer had disability. However, before the employer

scheduled her for a floor manager shift, she sustained the new injury and was thereafter restricted to light duty with fewer hours.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge