

APPEAL NO. 000104

Following a contested case hearing (CCH) held on December 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 concluding that the respondent (claimant) sustained a compensable injury in the course and scope of his employment on _____, and that he had disability beginning on (day after injury) and continuing through the date of the hearing. The appellant (carrier) has requested our review for evidentiary sufficiency, contending that the evidence establishes that claimant's diagnosed low back injury is based on subjective complaints of pain, that claimant did not have disability because he "walked off the job," and that claimant filed a spite claim motivated by his anger with the employer. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant testified that he had worked as an "order puller" at the employer's warehouse for about a year when, at around 2:00 p.m. on or about _____ (all dates are in 1999 unless otherwise stated), he was injured while pulling 50 bundles of "pipes." These pipes were described by claimant's supervisor, Mr. M, as roof edging, and both he and claimant indicated that the bundles weighed approximately 35 pounds. Claimant said that after pulling the order, he loaded the bundles onto a cart and experienced cramping in the area of his right hip; that after pausing to "work it out," he pulled the cart to the customer's truck, loaded the bundles onto the truck, and experienced further cramping; and that he just ignored the cramping, did not report it, and continued to work until the end of the shift at 4:00 p.m. Claimant further stated that at quitting time, after seeing another employee pick up the last order ticket out of the box, he asked Mr. M if he could leave; that Mr. M "blew up like a bomb," said the work was not finished, and asked him to pull the order on the last ticket; that he responded that he was not going to do it; and that he and Mr. M then met briefly with the warehouse manager, Mr. G, after which he went home. Claimant further testified that about 7:00 p.m. that evening, he began to experience "serious pain" and took Advil; that the next morning he felt "really bad," called the employer and left a message that he thought he was injured, and that he then called the emergency medical services to take him to an emergency room (ER) where he was given morphine shots, told he had a torn muscle in his right hip area, taken off work for three days, and told to see his own doctor. He indicated that he commenced treating with Dr. R who took him off work and has been treating him with injections, pain medication, and other modalities. Claimant further stated that he last saw Dr. R about two months before the hearing, that his pain is not as severe as it was, that he is still taking medications, and that Dr. R has not yet released him to return to work.

Mr. M testified that he had given claimant, an average employee, a written reprimand about excess absenteeism; that claimant had called in sick six times in a month,

one day at a time and mostly on Tuesdays, the employer's busiest day of the week; and that when claimant left the workplace after having been told the work was not completed and refusing to fill the last order, he met with Mr. G who decided that claimant's employment should be terminated for excess absenteeism and insubordination. Both testified that while meeting with claimant at around 4:00 p.m. on _____, he never mentioned an injury and gave no appearance of being injured.

Ms. H, the employer's office manager, testified that she received a call from a doctor's office about 9:30 a.m. on (day after injury) concerning the verification of claimant's workers' compensation injury; and that claimant came to the office around noon to complete an injury report at which time she informed him of the termination of his employment. She stated that claimant gave no appearance of being hurt at that time.

The (day after injury) ER record reflects that claimant gave a history of lifting and dragging multiple pipes late the previous day which weighed 30 to 40 pounds and complaining of low back pain, primarily on the right side; that he was treated with several medications including Demerol; that he was diagnosed with back sprain; and that he was taken off work for three days. A (day after injury) radiology report stated the conclusions as negative for an acute injury, moderate degenerative disc disease, and status post posterior fusion procedure from L4 to S1.

The July 2nd report of Dr. R, whose letterhead reflects she is with a pain management clinic, states the history of claimant's lifting and loading 37 pieces of pipe weighing 25 to 30 pounds and having significant pain about seven hours later. The report notes that claimant, then 45 years of age, was status post fusion of the lumbar spine following a high school football injury, and that he had marked spasms in the entire spinal musculature, marked tenderness to palpation, and an antalgic gait. Dr. R diagnosed a lumbar sprain/strain and lower extremity radiculitis and her treatment plan took claimant off work for two weeks. Dr. R's records reflect that claimant's treatment included trigger point injections on July 15th and that on that date he was taken off work for an additional two weeks. Dr. R's records reflect additional injections and other modes of conservative treatment. On October 18th Dr. R wrote that after making progress in the decrease of his pain level and increase in his range of motion and strength, claimant is unable to continue the prescribed therapy and medically necessary treatment because the carrier has not recognized the injury as work related, and that claimant, who strikes her as being very honest, has, as a consequence, now become moderately to severely depressed.

The hearing officer found that the medical evidence is sufficient to establish that claimant suffered harm or damage to his back while in the course and scope of his work on _____. The hearing officer further found that claimant was unable to obtain and retain employment at his preinjury wage due to his back injury, from (day after injury) through the date of the CCH.

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).

Concerning the disability issue, we also note that the Appeals Panel has held that the compensable injury need not be the sole cause of the disability (Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996) and that a claimant, despite termination of the employment for cause, may still be entitled to temporary income benefits if the claimant can show that the disability was in some way caused by the compensable injury (Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992).

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