

APPEAL NO. 000269

Following a contested case hearing held on January 10, 2000, 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's (claimant) compensable injury of _____, includes the cervical spine and that claimant had disability beginning on August 13, 1999, and continuing through October 5, 1999. The appellant (carrier) requests our review, asserting the insufficiency of the evidence to support these determinations and pointing to various claimed inconsistencies in claimant's evidence. Claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, and that if claimant's compensable injury does not include the cervical spine, he has not had disability through the date of this hearing.

Claimant testified that he had worked for the employer as a cement finisher of pipes since 1965 when, on _____, he tripped on some cords while walking on a cement floor carrying a one-gallon can of paint in each hand and fell all the way forward striking his elbows and knees; that he felt immediate pain in his elbows and knees; that about three weeks later he began to experience pain in his neck; and that he continued to perform his regular duties and did not seek medical attention. Claimant stated that when he went to his family doctor, Dr. R, for a blood pressure check, he complained of his neck pain and that a diagnostic test was obtained which revealed a neck injury. He said that he was referred to Dr. JR who took him off work effective August 14, 1999, and later released him for light duty, and that he has since been working the light duty at the same wage rate. Claimant acknowledged not having reported a neck injury to the employer before telling his supervisor about it in mid-August 1999, explaining that the employer was acquired by another company and the word came out to have no more accidents. Ms. B, the employer's human resources administrator, stated that claimant came to the office on August 13, 1999, and provided the employer with the first notice of a neck injury. We note that there was no disputed issue concerning the timeliness of claimant's notice of injury.

Dr. JR's report of August 27, 1999, states a history of claimant's slipping while carrying two buckets of paint, falling forward on his lower arms, elbows and knees, causing him to jerk his neck back and forth, and of having "immediate neck pain." Dr. JR further reported that a cervical spine CT scan of July 30, 1999, shows a large right C3-4 disc herniation and his diagnosis included right cervical radiculopathy, right C3-4 herniated disc with some spinal cord impingement, and morbid obesity. Dr. JR further stated that he would try a course of physical therapy (PT) and that claimant will likely require surgery if he

does not improve with PT. The carrier points out that in his discussion of the evidence, the hearing officer erroneously states that claimant had surgery on August 13, 1999. In evidence is a Recommendation for Spinal Surgery (TWCC-63) signed by Dr. JR on August 30, 1999. Also in evidence is Dr. JR's "Work Status Form" stating that claimant "is unable to work from 8-27-99 until 10-8-99" and another such form returning claimant to work on "10-6-99" with restrictions against overhead work and lifting more than 15 pounds. Dr. JR wrote on September 10 and October 6, 1999, that claimant's fall caused him to jerk his neck back and forth and in the latter report commented, "[s]uprisingly, the insurance carrier does not feel that his neck injury is work compensable." Dr. JR also indicated that he was returning claimant to work at the latter's request because he has no income and his family will be on the street.

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's discussion of the evidence reflects that he gave weight to Dr. JR's opinion that claimant's neck was injured when he fell on _____, and that he found claimant to be a credible witness. The carrier's focus was on the length of time which passed before claimant said he experienced the onset of neck pain. However, the carrier presented no medical evidence to the effect that a three-week delay in the onset of neck pain would rule out its having been caused by the fall.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge