

APPEAL NO. 000576

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 1, 2000. The issues at the CCH were whether the compensable injury sustained by the appellant (claimant) extended to an injury to the right shoulder and lumbar spine; the date claimant reached maximum medical improvement (MMI); and claimant=s impairment rating (IR). The hearing officer determined that the compensable injury of _____, does not extend to an injury to the right shoulder and lumbar spine; that claimant reached MMI on June 1, 1999; and that claimant=s IR is five percent. Claimant appeals, requesting that we reverse the hearing officer=s decision and render a decision in his favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury to his right foot on _____; that the designated doctor selected by the Texas Workers= Compensation Commission (Commission) is Dr. B; that on September 28, 1999, Dr. B, the designated doctor, certified that claimant reached MMI on June 1, 1999, and assigned a five percent IR; and that on June 3, 1999, Dr. S, the carrier-selected required medical examination doctor, certified that claimant reached MMI on June 1, 1999, and assigned a three percent IR.

Claimant testified that on _____, while holding a large piece of metal with a sharp edge, apparently an I-beam, a forklift hit the piece of iron and it fell on his right foot. He said the iron piece weighed 500 pounds; that he tried to pull his foot out from beneath it; and that he does not know if that is when he injured his right shoulder and low back. He said he was first seen by Dr. RN and was referred to Dr. G; that he told Dr. G that his right shoulder and low back hurt; that Dr. G only treated his shoulder but did obtain x-rays of his low back; and that he changed treating doctors to Dr. JN because Dr. G would not treat his back.

Dr. G=s Initial Medical Report (TWCC-61) dated _____, states the diagnosis as a crushing foot injury and closed fractured metatarsal. Dr. G=s Specific and Subsequent Medical Report (TWCC-64) dated December 14, 1998, states the diagnosis as crushing injury and fractures of the second, third, fourth and fifth metatarsals on the right. The first medical record which mentions pain in any body part other than the right foot is the February 22, 1999, report of Dr. G and it says that claimant is starting to get stiffness of the foot; that he is still limping a lot because of this; and that he is getting some back pain. The March 1, 1999, report of Mr. W, a physical therapist, states that in addition to his complaints of burning pain, weakness and limited range of motion (ROM) to the right foot, claimant also complained of pain and a tingling sensation to his right thigh, low back, trunk, shoulder, and right upper extremity (UE). Mr. W=s report of April 7, 1999, states that claimant complained of pain to the

right foot, right UE, and right hip and knee. Dr. G's monthly reports through September 1999 did not change the diagnosis of crushing injury to the foot nor mention low back or right shoulder pain.

Dr. S's June 1, 1999, report, which assigned claimant an IR of three percent for his right foot injury, states, among other things, that claimant demonstrated no abnormalities of gait and that his gait was brisk and balanced.

Dr. B's Report of Medical Evaluation (TWCC-69), dated September 28, 1999, certifies that claimant reached MMI on June 1, 1999, with a five percent IR. Dr. B's accompanying narrative report states that claimant was then 63 years of age and makes no mention of right shoulder or low back pain and restricted ROM. The report further states that Dr. B believes that claimant has had appropriate care and postoperative and post-fracture rehabilitation. Claimant testified that he disagrees with Dr. B's five percent IR because it only considers his right foot while his main problem is his ankle. He argued to the hearing officer that he should be returned to Dr. B for evaluation of his right shoulder and low back.

Dr. G's report of October 19, 1999, states that claimant still walks with a slight limp and complains of foot pain; that he also hurts in his back; that because he, Dr. G, thought the limping might be bothering claimant's back, he took an xray; and that the xray shows degenerative lumbar spine changes consistent with claimant's age. This record does not reflect that Dr. G added to the diagnosis.

Dr. JN's initial report dated November 11, 1999, states that claimant has restriction of ROM of both shoulders and tenderness over the right rotator cuff; that he also has restricted lumbar ROM and lumbar region tenderness; and that he feels Dr. G did not address the right shoulder and back pain that developed from this injury.

Claimant contended that common sense would tell one that claimant injured his right shoulder and low back, given the mechanism of his foot injury. The carrier stressed the lapse in time after _____, before any medical record reflected complaints of shoulder and low back pain.

The hearing officer found, among other things, that the medical evidence is insufficient to establish a causal relationship between claimant's right shoulder and lumbar spine condition and his compensable right foot injury of _____; that claimant did not sustain an injury to his right shoulder and lumbar spine in the course and scope of his employment on _____; and that the great weight of the other medical evidence is not contrary to the determination of the designated doctor and that his findings are entitled to presumptive weight. The hearing officer concluded that the compensable injury sustained on _____, does not extend to an injury to the right shoulder and lumbar spine; that the date of MMI is June 1, 1999; and that claimant's IR is five percent.

Sections 408.122(c) and 408.125(e) provide, in part, that if disputes exist as to whether the employee has reached MMI and over the IR for the compensable injury, the report of a designated doctor chosen by the Commission shall have presumptive weight and the Commission shall base its determinations of the MMI date and IR on such report unless the great weight of the other medical evidence is to the contrary.

Claimant had the burden to prove that his compensable injury extended to his right shoulder and low back and that the great weight of the other medical evidence was contrary to Dr. B's report concerning the MMI date and IR. The Appeals Panel has stated that in workers-compensation cases, the disputed issue of injury, 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst

Appeals Judge