

APPEAL NO. 000857

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 29, 2000. The hearing officer found that the respondent (claimant) sustained a new right leg and back injury on _____ and that he had disability from September 28 to December 12, 1999. The appellant (carrier) requests our review, asserting that the injury determination is against the great weight of the evidence and that, because claimant did not sustain a compensable injury, he did not have disability. The file does not contain a response from claimant.

DECISION

Affirmed.

The hearing officer's Decision and Order contains a summary of the evidence with which the appeal does not take issue. Thus, we will limit our recitation of the evidence to only that necessary for our decision.

Claimant testified that on _____, while working as an assembler of commercial refrigerators, he stepped up on a wheel to attach an inspection plate and that as he came down, his right foot lodged between the wheel and a raceway or bracket and he caught himself with his left arm but twisted his low back and right knee in this near fall. He said he reported the injury that day to his supervisor, completed an accident report, and was taken by the company nurse to a clinic used by the employer; that after being treated at the clinic and released for work the next day with restrictions, he went to the office of Dr. O, a chiropractor who had previously treated his low back; and that Dr. O commenced treating his right knee, took him off work, and referred him to Dr. R for treatment.

Claimant further testified that he was released for light duty by Dr. O in November 1999 but that the employer would not take him back for light duty until December 13, 1999, after he had obtained a setting for a benefit review conference. Claimant conceded that he had several prior workers' compensation injuries while working for the employer, the most recent being a low back injury in _____, but said the back pain from the _____, injury was different, with a burning sensation. He also stated that he thought the pain in his right leg was radiating down from his low back and that is why he did not note the right knee injury on his accident report. Claimant also acknowledged that he was an assistant coach for a "peewee" football team but denied faking this injury or any previous work-related injury in the autumn so that he could be off work for coaching.

Mr. C, the employer's environmental health and safety manager, testified that claimant has been either off work or on light duty since 1996; that some coworkers think he faked this injury because he did not get a particular job he bid for; and that his case is a

"typical" one for Dr. O who commonly characterizes the "aggravation" of old injuries as new injuries and extends injuries to other body parts.

The assessment in Dr. O's record of September 28, 1999, reflects both a low back injury and a right knee injury. Dr. O reported on December 22, 1999, that nerve conduction studies performed by Dr. B on November 3, 1999, when compared with similar studies done by Dr. B on December 21, 1998, showed right S1 radiculopathy "which is a new finding that cannot be manifested or exaggerated or 'faked' by the patient." Dr. O also noted that an MRI study showed edematous fluid accumulation in the right knee consistent with severe knee strain.

The carrier introduced the January 31, 2000, report of Dr. M who reviewed certain records and opined that claimant did not suffer a new injury on _____, but "simply an exacerbation of the old injury."

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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge