APPEAL NO. 001285

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 May 9, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) did not sustain a compensable injury on _____, and that the claimant did not have disability. The appellant/cross-respondent (self-insured) filed a request for review, asserting that the hearing officer erred in failing to add the issue of whether the claimant timely notified the employer of her claimed injury. The self-insured's appeal is conditioned upon the claimant's filing an appeal. The claimant has filed a request for review, asserting that her testimony about how her back was injured at work met her burden of proof. The self-insured responded that the evidence is sufficient to support the hearing officer's determinations. The appeals file does not contain a response to the carrier's appeal.

DECISION

Affirmed.

The claimant testified that she commenced employment with the employer in May 1999 as a kitchen aide working the 12:00 p.m. to 8:00 p.m. shift; that she had arranged to leave work at 6:00 p.m. on _____, to sign a lease on a trailer; that just before leaving work that day she injured her low back and right ankle throwing a bag of garbage into a dumpster; and that she did not report the injury to her supervisor, Ms. ET, because she thought she had just pulled a muscle and that it would resolve. She further stated that she had arranged to be off work on October 27 and 28 and the ensuing weekend because she was moving from a house to the trailer; that her back pain increased; and that on November 1, 1999, she was treated by Dr. W, who gave her an off-work slip. With regard to the move, the claimant said that her husband, son, and some neighbors did the moving and that she was unable to participate. She indicated that she had to request several more days off because of her back injury and that her employment was terminated in November 1999. The carrier's documents reflect that the claimant's employment was terminated for absenteeism and job abandonment. The claimant also stated that she is currently being treated by Dr. Y, who has her off work, and that she cannot work because of her back injury.

Ms. T testified that she was at work on _____, and that the claimant never mentioned hurting her back taking out trash before she left for the day. Ms. T further stated that the claimant worked in the salad area of the kitchen, that her duties did not include taking out the garbage, and that the "pot man" who washed the pots usually took out the garbage before leaving at 3:00 p.m. Ms. T further testified that she spoke to the claimant when she called in on November 1, 1999, and that "she told me that she had hurt her back moving the washing machine." Ms. T further stated that she responded, "[y]ou hurt your back moving a washing machine?" and the claimant said, "[y]es."

The 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).

As noted in its conditional appeal, the self-insured asserts error in the hearing officer's denying its motion at the hearing to add a disputed issue on timely notice. The self-insured adduced evidence from both its adjuster and the attorney who represented the self-insured at the benefit review conference (BRC) that the subject of the claimant's provision of notice of her injury to the employer was discussed at the BRC but was not resolved. Both of these witnesses acknowledged having received a copy of the BRC report. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(a) (Rule 142.7(a)) provides that a dispute not expressly included in the statement of disputes will not be considered by the hearing officer. Rule 142.7(b) provides that the statement of disputes includes the BRC report; the parties' responses, if any; additional disputes added by unanimous consent; and additional disputes presented by a party if the hearing officer determines that the party has good cause. There was no response to the BRC report in evidence and the claimant opposed the motion. The adjuster conceded having taken no action on the BRC report after receiving it and the attorney said he did not try to get the BRC report corrected and assumed the report certified the timely notice issue since that is what he included in his report to the self-insured. Rule 142.7(e) provides, in part, that if a party is represented, the request shall be made in writing; identify the dispute; state the reason for the request; and be sent to the Texas Workers' Compensation Commission no later than the 15th day before the hearing. No written request to add the timely notice issue was in evidence. We are satisfied that the hearing officer did not abuse his discretion in denying the self-insured's motion. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge