

APPEAL NO. 001468

Following a contested case hearing held on March 23 and June 7, 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 concluding that the appellant (claimant) did not sustain a compensable injury on _____, or on any other relevant date; that the respondent (carrier) is relieved of liability under Section 409.002 because of the claimant's failure without good cause to timely notify his employer pursuant to Section 409.001; that the claimant has not had disability resulting from an injury sustained on _____, or on any other relevant date; and that the claimant did not have good cause for his failure to appear at the hearing on March 23, 2000. The claimant challenges these conclusions and certain underlying factual findings on sufficiency of the evidence grounds. The file does not contain a response from the carrier.

DECISION

Affirmed.

The claimant testified that on _____, near the end of the workday at the concrete company where he was employed as a yardman, he climbed into a large tank in which concrete slurry is mixed to clean it out and that while in the tank, Mr. S, a plant operator, who was in the office building area, activated a water switch and water poured into the tank and on top of him knocking him to the side where he struck his back. He said he exited the tank and in so doing struck his left knee. The claimant further testified that when he got out of the tank, Mr. S was standing there laughing; that Mr. S asked him if he wanted to go to a doctor and that he responded, "no, that's all right" and said he would "work it out"; and that he continued to work the remainder of that day and on the following workdays until his employment was terminated on August 16, 1999. He also stated that he went to the office to change clothes and told Mr. M, his immediate supervisor, what had happened and that on August 13, 1999, he told Mr. M that he needed to see a doctor and that Mr. M responded by telling him to take the weekend off.

The claimant testified that he first saw his treating doctor, Dr. B on August 17, 2000; that Dr. B treated his low back and left knee injuries, advising that he had a dislocation in his low back and that his left knee requires surgery; and that Dr. B took him off work and released him to return to work as of January 17, 2000, but that he has been unable to return to work because of his back injury and also because of burns unrelated to his injuries of _____. The claimant also stated that he sought treatment at a hospital emergency room one night before his employment was terminated because he was having nightmares about drowning but acknowledged not having introduced any documentation of that visit into evidence.

Mr. M testified that when the claimant came into the office with wet clothing on _____, he asked the claimant if he was injured when the water was turned on and that the claimant responded "[n]o," changed his clothes, and continued working. Mr. M further

stated that when he met with the claimant on August 13, 1999, to discuss issues concerning the claimant's job performance, the claimant never mentioned any injuries from the _____, incident. He also said that the claimant's employment was terminated for cause on August 16, 1999, and that it was not until September 29, 1999, that the employer first became aware that the claimant was alleging he was injured on _____.

Mr. S testified that on _____, after he had turned the water on for a concrete truck driver and realized that the claimant was still in the tank, he shut off the water and ran over to the tank; that the claimant was standing outside the tank with wet clothes; and that he asked the claimant if he was all right and that the claimant responded that he was "fine." He further stated that the claimant then changed his clothes and continued working. The truck driver, Mr. K, testified that when he went over to the tank with Mr. S, he heard the claimant state that he was "fine." Both Mr. M and Mr. S testified that below the tank's water inlet is a deflector shield to disperse the water at all angles in the tank.

The claimant had the burden to prove that he sustained the claimed injury, that he timely reported the injury to the employer pursuant to Section 409.001, and that he had disability as that term is defined in Section 401.011(16). Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); 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 makes clear in a finding of fact that he did not find the claimant's testimony persuasive. We also do not find that the hearing officer abused his discretion in determining that the claimant did not have good cause for his failure to appear for the hearing on March 23, 2000. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); *and see* Texas Workers' Compensation Commission Appeal No. 92005, decided February 20, 1992, and Texas Workers' Compensation Commission Appeal No. 92055, decided March 30, 1992. As the hearing officer notes, the claimant's

letter requesting a new hearing date merely indicates that the claimant was confused about the March 23, 2000, hearing date.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge