APPEAL NO. 001605

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 June 26, 2000. The hearing officer determined that the appellant (claimant) suffered a recurrence of symptoms from a prior injury but did not sustain an occupational disease injury while in the course and scope of employment on _____; that the claimant did not have disability resulting from the alleged injury; and that the claimant's average weekly wage (AWW) for the alleged injury was $350.20. The claimant has appealed the injury and disability determinations on sufficiency of the evidence grounds. The hearing officer's determination of the claimant's AWW is not appealed and has become final. Section 410.169. The respondent (carrier) has filed a response detailing evidence it contends shows many inconsistencies and contradictions in the claimant's testimony and which supports the hearing officer's clearly stated problems with the claimant's credibility.

DECISION

Affirmed.

The hearing officer's decision contains a detailed recitation of the evidence with which neither party takes issue. Accordingly, this decision will set out only such evidence as is germane to the appealed issues.

The claimant testified that on _____, while working as a forklift driver, his neck "locked up" and he "experienced discomfort" in his neck and low back. He said he continued to work after the injury but sought medical attention at an emergency room (ER) on February 18, 2000; that he thereafter received treatment from Dr. E on one occasion before commencing a course of physical therapy (PT) at a (clinic); and that he went to the clinic because they assisted him with his claim and did the PT on the premises. The claimant, who said he had been driving the forklift for approximately one year, estimated that he had to twist his neck backwards when backing up the forklift, a maneuver he said he performed 500 to 600 times a day. He further stated that the ER doctor took him off work for two days and that when he attempted to return to work the employer advised him that a release to full duty would be required.

The claimant conceded that on his job applications with both the employer and a previous employer, he failed to disclose his multiple prior workers' compensation claims and a felony conviction. He acknowledged these omissions, explaining that he "had to try to get a job." He was also confronted with omissions in the medical records made after his claimed injury of mention of his previous neck and back injuries.

Dr. R, with the clinic, wrote on April 27, 2000, that the claimant is required to make repetitive, almost continuous twisting motions of the neck and upper back and that in his medical judgement the claimant's injuries "were directed and causally related to his employment."

Dr. S testified that on May 2, 2000, he performed an independent medical examination of the claimant and that based on his examination, he determined that there was no damage to the claimant's cervical spine or musculature and that the claimant had no range of motion, strength, or sensory deficits in his cervical region and upper extremities. He said he could find no damage to muscles, the spine, the discs, or the nerve structures in the claimant's neck and upper extremities and that although pain may have been emanating from muscles in that region, such pain does not reflect actual damage to the physical structures. Dr. S also testified that neither the ER records nor Dr. E's records indicate actual physical damage. He also explained that a diagnosis of a sprain is a diagnostic convention or "presumptive" diagnosis frequently employed when there is complaint of pain with no objective or clinical findings. Dr. S also noted that the claimant manifested Waddell's signs during a functional capacity evaluation.

The 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 makes clear in his discussion of the evidence that he found the claimant's testimony neither persuasive nor credible.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge