

APPEAL NO. 001682

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 27, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury and had disability. The appellant (carrier) appeals, asserting that the hearing officer erred in denying its motion for a continuance of the hearing and that the hearing officer's determinations of the disputed issues are against the great weight of the evidence because the claimant's testimony lacks credibility. The claimant's response states several reasons why the assigned error on the continuance ruling lacks merit and asserts that the challenged factual determinations are sufficiently supported by the evidence.

DECISION

Affirmed.

The claimant testified that on _____ (all dates are in 2000 unless otherwise stated), he was employed as a produce manager at one of the employer's grocery stores; that after working about five hours unloading a truck of produce and stacking the boxes, which weighed approximately forty pounds, in stacks approximately seven feet high, he began to experience low back pain. He said he finished working his shift and went home and self-treated his back pain; that the next morning he was seen at an emergency room for his back pain and was told he had a back strain; that he thereafter commenced treatment with Dr. B; that he has low back pain which radiates down his right leg; that the carrier has refused to authorize an MRI and x-rays; and that Dr. B has kept him off work pending further diagnostic testing and has also told him he cannot return to work because his back is still hurting. Dr. B's Initial Medical Report (TWCC-61) of February 17 reflects the diagnosis of lumbar intervertebral disc syndrome and thoracic myofasciitis. Dr. B's records also include slips taking the claimant off work from February 17 through June 30.

Notwithstanding that there was no disputed issue concerning the claimant's having provided the employer with timely notice of his injury, the carrier presented evidence that the claimant told certain employees only that his back was hurting and not that his work caused the injury. The carrier also presented evidence concerning the claimant's having cashed some checks from a third party which "bounced," having been late to work, and having borrowed money from one of the store's co-owners. One of the store's owners testified that the claimant called him from a medical clinic and asked him for a loan to buy medicine for his back. This witness indicated that the claimant had frequently borrowed money from him and that he denied this request and also a request that the claimant be given his paycheck a day earlier. The carrier's theory of the case was that the claimant's injury was not witnessed and that the claimant was not a credible witness and should not be believed.

The carrier also introduced the two-page, single-spaced typewritten statement of Mr. M, a store manager, detailing the claimant's requests for a loan or cash draw to purchase medicine, his frequent previous cash draws and slow repayments, his record of tardiness and long lunch hours, his cashing of third-party checks which "bounced," and so on.

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 states that she found the claimant's testimony credible and supported by the medical records.

The carrier asserts error in the hearing officer's denial of its motion for a continuance of the hearing so that Mr. M, who was attending a cousin's funeral, could testify. No such motion was made during the hearing nor was there documentary evidence of such motion. Error not having been preserved in the record, we have no basis for reviewing the assigned error.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge