APPEAL NO. 001765

Following a contested case hearing held on June 29, 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 determining that on _____, the respondent (claimant) sustained a compensable back injury while in the course and scope of his employment with (employer); that the claimant timely reported the injury to the employer as required by Section 409.001; that the claimant has had disability as a result of the compensable injury from May 13, 1999, through August 15, 1999, and from January 27, 2000, through the date of the hearing; and that the claimant is not barred from pursuing Texas workers' compensation insurance benefits since he did not make an informed election of remedies. The appellant (carrier) has appealed the timely notice of injury and disability determinations, asserting that the claimant did not provide the employer with notice of his injury until June 1999 and that he did not have disability after January 27, 2000, because he was laid off due to a reduction in force. The claimant responds that the challenged determinations are sufficiently supported by the evidence and should be affirmed.

DECISION

Affirmed.

The claimant testified that on _____, he had been employed by the employer since September 1997 as a customer service representative; that his duties included working with subcontractors hired by the employer to make homeowners warranty repairs on houses bought by customers of the employer; and that on _____, he was riding in the vehicle of one of the subcontractors, Mr. C, as they were proceeding from a house where repairs had been made to another house to make repairs and the vehicle was "rear ended" while stopped at a traffic light. The claimant said he then called the employer's project coordinator on a cell phone and told her to tell the project manager, Mr. H, his immediate supervisor, about the motor vehicle accident (MVA) and that he was going to see a doctor because he "felt something" in his low back. He said that later that afternoon, he told Mr. H directly about the MVA and that he was going to the doctor and that Mr. H told him to report back to him about what was going on and also to get information on Mr. C's insurance. The claimant further stated that he soon thereafter learned that Mr. C did not have insurance; that when he mentioned this to Mr. H, the latter suggested that he talk to a lawyer; that he then discussed the matter with a lawyer who advised him to file a workers' compensation claim on his own; and that since he did not know how to go about filing a claim, he talked to the employer's insurance manager, Ms. C. He said that it was just a few weeks and definitely within a month of the MVA when he talked to Ms. C and that she told him the accident was not covered by workers' compensation insurance and that he needed to use Mr. C's insurance or his own health insurance. The claimant said he thereafter used his health insurance to pay for the doctors' visits and testing. The claimant also indicated that he used "comp time" for the doctors' appointments and that after his two-level lumbar

spine surgery on May 13, 1999, he was advised by the employer to use the Family and Medical Leave Act to cover his time off for recovery from the surgery.

According to the affidavit of Mr. C, the day after the MVA, he discussed the MVA with Mr. H and Mr. H "was aware of the wreck, how it happened and the fact that [the claimant] was injured in the wreck." He further stated that during the following days he was present on many occasions when the MVA and the claimant's injury were discussed among the employer's office personnel.

As for having disability after January 27, 2000, when he was laid off by the employer, the claimant testified that after his May 13, 1999, surgery, he "begged" his surgeon, Dr. C, to give him a release for light-duty work because he was in dire financial straits; and that he then returned to his job in August 1999 at his preinjury wage but was unable to climb ladders to look at roof repair needs nor could he climb scaffolds, crawl into attics, and engage in similar activities as he had before the MVA. He also stated that Dr. C has never given him a release to return to full-duty work and has him limited to lifting not more than 20 pounds. He also said he has been going to a lot of interviews in an effort to find a job consistent with his physical limitations but that he keeps getting turned down and feels it is because his "workers' compensation issue" is unresolved.

The carrier did not contend that the claimant was not in the course and scope of his employment when he was in the MVA. Rather, the carrier took the position that the claimant failed to provide the employer with timely notice of an "injury," arguing that the claimant provided the employer with, at the most, notice that he was in an MVA and that he had pain, which is not an injury. The carrier contended that the claimant did not notify the employer of an "injury" until he filed his June 17, 1999, Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41). As for disability, the carrier urged that the claimant was laid off by the employer on January 27, 2000, due to a reduction in force and that it was for that reason, and not as a result of a compensable injury, that the claimant was unable to obtain and retain employment at his preinjury wage level.

The claimant was required to prove that he notified the employer of the injury within 30 days of its occurrence. Section 409.001. The claimant also had the burden to prove that he had disability as that term is defined in Section 401.011(16). 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. That holds true as well for the disputed issue of timely notice. 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 that she credited the evidence that on the day of the MVA, the claimant left a message for Mr. H about the MVA and that later that evening spoke directly to Mr. H, informing him that he was injured in the MVA and needed medical attention. The claimant's testimony to this effect was not only unrefuted but was corroborated by the affidavit of Mr. C. The claimant further testified, again without contradiction, that within 30 days of the MVA he discussed workers' compensation coverage with Ms. C and was told he had to file under either Mr. C's insurance or under his health insurance. As for disability, the hearing officer noted that the claimant continued to have a light-duty release after January 27, 2000. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Susan M. Kelley
Appeals Judge