

## APPEAL NO. 001927

Following a contested case hearing held on July 21, 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 the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_; that the claimant did not have disability; and that the respondent (carrier) did not waive its right to dispute the compensability of the injury by not contesting it in accordance with Section 409.021. The claimant has appealed, asserting that while the carrier's videotape evidence could result in the adverse determination of the disability issue, the hearing officer erred in using that evidence to find against the claimant on the injury issue. The claimant further asserts that the hearing officer erred in failing to find in his favor on the carrier waiver issue based upon the decision in Downs v. Continental Casualty Co., Cause No. 04-99-00111-CV, (Tex. App.-San Antonio August 16, 2000). The carrier urges in response that the evidence is sufficient to support the hearing officer's injury and disability determinations. As for the waiver issue, the carrier contends that the Downs decision does not apply to the rules of the Texas Workers' Compensation Commission (Commission) in effect on \_\_\_\_\_, and that, in any event, because there was no injury to the claimant, there cannot be a waiver pursuant to the decision in Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.).

### DECISION

Affirmed.

The claimant testified that while operating a forklift at the employer's distribution center on \_\_\_\_\_, he lifted a pallet of boxes to insert into a slot; that the load was too large for the slot and it appeared that boxes were going to fall off the pallet; that he "turned to write down that the boxes were going to fall"; and that one box did fall, striking the top of his head and injuring his head, neck, and upper back. At another point, the claimant stated that he "bent down to write that it was going to happen," referring to his sense that boxes were going to fall, and "all of a sudden the boxes fell," he "felt a big boom," his "glasses flew off," and he "was dazed." The claimant acknowledged that the top of the forklift has a grill over the area where the operator stands and that he did not wear a hard hat during its operation. The carrier introduced photographs of the fork lift depicting the grill and also a vacuum box on the grill, obviously unable to get through the grill bars. In the statement he wrote about the incident on \_\_\_\_\_, the claimant stated that "a box fell off the pallet and hit me on the top of the head." He surmised that the box, which contained a vacuum cleaner, may have ricocheted off something in order to strike his head. He said that his supervisor had him sit in the cafeteria and apply ice to his head; that he went home early; that the next day he saw the employer's Dr. P ; that Dr. P gave him some over-the-counter medication and released him to return to his regular work; and that on that same day he began treating with Dr. G, a chiropractor to whom he was referred by a friend. The claimant stated that both Dr. P and Dr. G diagnosed cervical strain.

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 evidence lacking in credibility and not persuasive.

As for the carrier waiver issue, it was undisputed that the carrier disputed the claimed injury more than seven and less than sixty days after receiving written notice thereof. The claimant contended that the Downs decision, *supra*, must be followed in the counties within the jurisdiction of the Fourth Circuit Court of Appeals citing Texas Workers' Compensation Commission Appeal No. 000433, decided April 12, 2000. However, on August 28, 2000, the Commission issued Advisory 2000-07 which states, in part, as follows: "After consultation with the Office of the Attorney General and in light of §410.205(b) of the Texas Labor Code, the Commission understands that the August 16th decision in the Downs case should not be considered as precedent at least until it becomes final upon completion of the judicial process. In addition, the related Commission's rules, such as those found at 28 TEX. ADMIN. CODE §§124.2, 124.3, and 132.17, remain in effect." We decline to accept the claimant's challenge to apply the Downs case.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Robert E. Lang  
Appeals Panel  
Manager/Judge

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Tommy W. Lueders  
Appeals Judge