APPEAL NO. 002132

Following a contested case hearing held on August 18, 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's (claimant) compensable _____, injury is a producing cause of his current low back condition and that he has not had disability as a result of his compensable injury from _____, through the date of the hearing. The claimant requests our review of the disability determination, asserting that after his injury he returned to work with physical restrictions and that those restrictions were still in effect when his employment was terminated. The respondent (self-insured employer) contends in its response that the evidence is sufficient to support the hearing officer's determination of the disability issue because it establishes that the claimant's job duties as the self-insured employer's risk manager were within his restrictions when his position was abolished in a reorganization and that he was seeking new employment within his field of experience.

DECISION

Affirmed.

The parties stipulated that on _____ (all dates are in 2000 unless otherwise stated), the claimant sustained a compensable low back injury while in the course and scope of his employment with the self-insured employer.

The claimant testified that when he was hired by the self-insured employer in July 1999 to be its central risk manager, he kept the phone number and address of the insurance agency, which he had operated for years, for the purpose of receiving residual premiums on policies he had sold and to refer potential customers to other insurance agents at that location; that he had to basically develop the self-insured employer's central risk manager job because it was a recently created position; that he did a great deal of inspecting of the self-insured employer's real and physical property looking for hazards that could be a source of exposure to claims, apparently until sometime in December when the inspection was completed; and that such inspecting involved some sporadic physical activities such as moving or tilting some object to see behind it, climbing into an attic or onto a roof, and so on. He also said that his responsibilities as the risk manager included filing workers' compensation claims.

The claimant further testified that he injured his back on _____, a Monday, when, as he was descending a staircase, he turned around upon hearing a loud noise and stepped down hard on the next step. He further stated that he saw Dr. M on the following Thursday, that he told Dr. M he was going back to work the next day and did so, and that Dr. M issued a slip restricting him from heavy lifting. The claimant also stated that he saw Dr. A for chiropractic treatment on March 17. Dr. A's Initial Medical Report (TWCC-61) for that visit reflects that the claimant can return to "limited type of work" as of that date. Dr. M's return-to-work slip of March 17 states "light duty - no heavy lifting." Also in evidence

is a return-to-work statement of Dr. M dated July 20 stating that the claimant may return to work but with restrictions against lifting more than 20 pounds and against squatting, crawling, and ladder climbing. Another form signed on that date by Dr. M limits standing and sitting to four to six hours and bending, stooping, kneeling, pushing, pulling, and reaching to one to four hours, and restricts twisting altogether.

The claimant said he continued working within his restrictions until March 31 when he was informed that the risk manager position had been eliminated. He did not indicate having any difficulty in continuing with his work as a result of his compensable injury. The claimant further stated that he was given a "severance" payment in the amount of one month's wages; that he subsequently applied for and has received unemployment benefits from the Texas Workforce Commission (TWC); and that, consistent with the representations he made in his application for unemployment benefits about his ability and willingness to work, he has been seeking employment in the insurance field including risk management, in both the private and government sectors, by sending out resumes and using the internet. The hearing officer took official notice of a TWC publication describing the unemployment insurance and claim process. This document states that a claimant must make an active search for work, be physically able to work full-time in the claimant's usual type of work, be available for full-time work, and apply for and accept suitable work.

Dr. A testified that he treated the claimant's neck and upper back from February 7 through _____ when he released the claimant to return only as necessary; that the claimant returned on March 17 with a new injury to his low back; that the claimant returned to work on March 17 with the restriction of no heavy lifting and to do normal office work; and that he last treated the claimant on May 8.

Mr. B, the self-insured employer's deputy manager, testified that the risk manager job the claimant filled was a "white collar" job and that in December 1999 the self-insured employer required the claimant to do much more work in the central office and spend less time at the self-insured employer's various agencies and entities. He further stated that the self-insured employer decided to eliminate the central risk manager position; that the claimant's employment was terminated effective April 3; and that the self-insured employer decided to pay the claimant his regular wage through April out of a sense of fairness. Mr. B also stated that the self-insured employer did not contest the claimant's application for unemployment benefits because the claimant's employment had been terminated. The TWC notice of the claimant's application states that the self-insured employer paid the claimant "his full salary for the month of April 2000."

The self-insured employer introduced the investigative report of Mr. L which stated that a telephone registered in the name of the claimant's insurance agency has a recorded message asking callers to leave their names and telephone numbers for a call back. He further reported that he visited the address of the agency and determined that the claimant is selling insurance from a suite shared with other insurance agents.

The claimant contended that he has disability because he still has restrictions and is looking for work within those restrictions, and that his disability began, variously, on April 1 and April 3, because the money paid him in April by the self-insured employer was "severance" pay and not "wages." The self-insured employer contended that after his compensable injury the claimant was able to perform his risk manager duties and that he did so until the position was eliminated and thus his inability to obtain and retain employment after that date was due to the elimination of the position and not to his compensable injury.

The claimant had the burden to prove by a preponderance of the evidence that he had disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee (Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992); that objective medical evidence is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992); that pain can be considered to the extent that it prevents the performance of work (Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991); and that the compensable injury need not be the sole cause of the disability (Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996). The Appeals Panel has also stated that a restricted release to work is evidence that the effects of the injury remain and that disability continues (Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992), and that where the medical release is conditional and not a return to full-duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage (Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991).

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 a challenged factual determination of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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 could consider that, notwithstanding the restrictions of Dr. M, after his compensable injury the claimant was actually able to continue performing his job duties until his position was eliminated and that he thereafter commenced looking for similar employment in the insurance field. In Texas Workers' Compensation Commission Appeal No. 962601, decided January 31, 1997, the Appeals Panel stated that "[t]he fact

is that claimant chose to work in spite of a doctor's off-work slip and that off-work slip does not trump or overcome the fact that claimant was working." The hearing officer could conclude from all the evidence that the claimant failed to prove that his inability to obtain and retain employment at wages equivalent to his preinjury wages was due to his compensable injury.

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