

## APPEAL NO. 002162

Following a contested case hearing held on August 31, 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) injury of \_\_\_\_\_, does not extend to include an injury to his right elbow, right wrist, right ring and pinky fingers, bilateral lower extremities, and headache disorder; and that he is not entitled to lifetime income benefits (LIBs). The claimant generally appeals all adverse factual findings and legal conclusions as being against the great weight of the evidence. The respondent (carrier) urges that the evidence is sufficient to support the challenged determinations.

### DECISION

Affirmed.

We note at the outset that in evidence are three Appeals Panel decisions involving these parties. In Texas Workers' Compensation Commission Appeal No. 94883, decided August 12, 1994 (Unpublished), the Appeals Panel affirmed the decision of the hearing officer that the claimant reached statutory maximum medical improvement on November 12, 1993, and that his impairment rating (IR) cannot be determined until he is examined by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In Texas Workers' Compensation Commission Appeal No. 950903, decided July 13, 1995 (Unpublished), the hearing officer's determination that the claimant's injury extends to his cervical spine and left shoulder but not to his right shoulder was not appealed and the Appeals Panel affirmed the determination that the claimant's IR is 10% (for the lumbar spine only) based on the designated doctor's report. In Texas Workers' Compensation Commission Appeal No. 000519, decided April 19, 2000, the Appeals Panel affirmed a hearing officer's determination that the claimant's 10% IR had become final and that the Commission lost jurisdiction over the IR when Appeal No. 950903 became final.

The hearing officer's Decision and Order contains a summary of the evidence with which neither party takes issue. Accordingly, we will set out only so much of the evidence as is necessary to support this decision.

The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury to his lumbar spine, groin, neck, and left shoulder. According to the claimant's testimony, interrogatory answers, and medical records, the claimant slipped on some onion juice at the canning plant where he worked and fell to the floor, with his legs separated, onto his left upper extremity attempting to break his fall. He stated that he initially claimed injuries to his neck, right shoulder, and low back; that he has since undergone two operations on his neck, one in Mexico and the other by Dr. N, as well as an operation on each shoulder and on his right elbow, all by Dr. N; and that he now claims that having to sleep on his right side after the left shoulder surgery resulted in injuries to his right shoulder, right elbow, and the ring and pinky fingers on his right hand which do not

completely curl when he closes his hand. He further stated that his legs are injured as a result of the failure to properly treat his low back injury; that his knees are injured necessitating his using knee braces and a cane for ambulation; and that he also has headaches which he has been told are a result of his neck and shoulder surgery. He said he has to use a walker at home when he gets out of bed until he gets his knee braces on and indicated he walks with a cane. When asked how he was able to walk from the counsel table to the witness stand without the cane the claimant responded that he does not need it for short distances. He also said that he no longer has to wear a neck brace but does wear a low back brace for driving and that the carrier paid for his various neck, back, and knee braces. With regard to the LIBs issue, the claimant stated that he believes his legs have been injured by the problems with his low back and sciatic nerve and leave him with no capacity to work; but he conceded that Dr. N has not stated this opinion.

Dr. N's records reflect that his diagnoses include lumbosacral sprain, cervical sprain, impingement syndrome of both shoulders, rotator cuff tear, and right elbow cubital tunnel syndrome. On January 10, 2000, the day that Dr. N operated on the claimant's right elbow to transpose the ulnar nerve, he wrote that the claimant is 55 years old "with multiple injuries due to work-related injuries." Dr. N's Specific and Subsequent Medical Report (TWCC-64) of September 9, 1999, reflects that the claimant wears knee braces "for control of referred knee pain secondary to back injury." The May 12, 1999, report of Dr. E, a neurologist to whom the claimant was referred by Dr. N, stated that the results of an EMG were normal and that the claimant, who tends not to be cooperative, has normal strength throughout but demonstrated give-way weakness which appeared exaggerated. The claimant did not favor the record with the identification of any of his voluminous medical records which he feels relate the injuries he now claims to his original injury and which he feels support his contention that he is entitled to LIBs.

Section 408.161(a) provides, in part, that LIBs are paid until the death of the employee for loss of both feet at or above the ankle, loss of both hands at or above the wrist, loss of one foot at or above the ankle and one hand at or above the wrist, or an injury to the spine that results in permanent and complete paralysis of both arms, or legs, or one arm and one leg. The total and permanent loss of use of a body part is equivalent to loss of that part. Section 408.161(b). See *a/so Travelers Insurance Co. v. Seabolt*, 361 S.W.2d 204 (Tex. 1962).

The hearing officer found that the evidence is insufficient to establish a causal relationship between the claimant's \_\_\_\_\_, injury and his problems with his right elbow, right wrist, right ring and pinky fingers, bilateral lower extremities, and headache disorder; that the claimant has some use of his legs and upper extremities and has some ability to work; that the condition of his legs, as a result of his compensable injury, is not such that he has lost substantial use of his legs and is not such that he cannot get and keep employment requiring the use of his legs; and that he has failed to provide sufficient evidence to satisfy the requirements of Section 408.161 for entitlement to LIBs.

The claimant had the burden to prove with a preponderance of the evidence that he sustained the claimed injuries and that he was entitled to LIBs. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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 record, particularly the medical evidence, does not establish by a great weight of the evidence that the claimant's compensable injury extends to the additional body parts he now claims nor does it establish by a great weight of the evidence that he has experienced a total and permanent loss of the use his of hands at or above the wrists, or of his feet at or above the ankles, or any combination thereof.

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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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge