APPEAL NO. 002207

Following a contested case hearing held on August 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 the appellant (claimant) was not in the course and scope of his employment when injured in a motor vehicle accident on _____, and that he did not have disability as a result of the injury of _____. The claimant has appealed, asserting that these determinations are against the great weight of the evidence. The respondent (carrier) urges in response that the evidence is sufficient to warrant our affirmance.

DECISION

Affirmed.

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

It was not disputed that, as the hearing officer found, the claimant sustained serious injuries to his back and left knee on _____ (all dates are in 2000 unless otherwise stated), when the pickup truck he was driving (which belonged to the employer) collided with a tree after he fell asleep. The claimant testified that at the time of the accident he was employed as a "working manager" for the employer, an oil field services company; that the employer disposed of its customers' waste salt water and other fluids generated in oil well drilling operations by collecting the fluids in vacuum trucks and transporting the fluids to the employer's holding tanks from which the fluids are pumped into the employer's disposal well; and that he had the use of a company pickup truck for work. He further stated that on April 4, he was supposed to meet another employee, Mr. LH, a mechanic, at the employer's disposal well for the purpose of overhauling a pump but that instead he drove to some communities between Houston and Dallas for the purpose of looking for another job. The claimant related that his boss, Mr. BH, was upset with him and had given him a written reprimand two weeks earlier for not being available on a day when he was supposed to be on call and that he felt his job with the employer was in jeopardy. He stated that while looking for another job on April 4 he also handed out the employer's business cards in an effort to obtain some new business for the employer; that when he called into the office later that day, Ms. L, the company secretary, told him that all that was left to do on the pump overhaul job was to put the valve cap back on; and that he told her he would finish up the job in the morning. He said he awoke early on _____, left the house about 3:55 a.m., and drove to the disposal well; that once there he realized that the18-inch and 24-inch pipe wrenches and "cheater bar" he needed to replace the valve caps were not in the pickup truck and realized they were at his house; and that while driving back to his house, a distance of approximately three miles, he fell asleep, drove off the road, through a fence, and struck a tree.

The claimant further testified that he declined an ambulance ride to the emergency room because he was not in that much pain, and was instead taken home; and that when he was later advised that the employer had scheduled him to take an alcohol and drug screen test at 9:30 a.m., he had already taken hydrocodone, left over from prior back operations, for his back and left knee pain and was in so much pain he needed the assistance of his sons to help him get out of the house, but his sons would not be available until later in the day. In her statement of April 9, Ms. B, the claimant's wife, stated that she left her night job to pick the claimant up at the sheriff's office; that it took herself, her two sons, and another man to get the claimant into the house; and that the claimant could not walk on his leg and his back would not hold him up. She further stated that she told Mr. BH on the telephone that she could not get the claimant out for drug testing scheduled for 9:30 a.m. and that it would have to be done later when she could get some help.

The claimant stated that he went to a medical center in _____ the next day, April 6, to see Dr. M, who had previously cared for his prior back injury with two operations; that he learned he sustained a compression fracture of the L1 vertebral body and a fracture of the left kneecap in the accident; and that he underwent surgery on the knee on April 7. He also said he has not returned to work since the accident and introduced photos showing him in full trunk and left leg casts.

Mr. BH testified that although there was some lighting at the disposal well site, the employer would never expect the claimant or any other employee to go out in the dark at 4:00 a.m. to do a job like that; that it was not necessary that the pump be operational before daybreak; that in 26 years in the business he had never heard of an employee going out at that time of day to do that type of a repair; and that he does not believe the claimant had the accident coming from the disposal well site but rather thinks the claimant was on personal business. He also stated that there was no business reason that he was aware of which required the pump to be operational by daylight. Mr. BH further stated that as a manager, the claimant knew that alcohol and drug screen testing is required by the employer and a government agency to be administered as soon as possible after an employee's accident.

Mr. LH testified that he finished up the repairs on the pump and that he had never worked on a pump for the employer at night. He also said that such work would be difficult at night.

In addition to the dispositive conclusions, the claimant challenges factual findings that he was driving the company pickup at 4:30 a.m., at a time when there was no need for him to be driving the pickup on company business; that he did not show he was in the course and scope of his employment when he had the accident on _____; and that he did not show that he was unable to "obtain or [sic] retain" employment at preinjury wages as a result of the injury of _____ since that injury was not compensable. This finding is not entirely correct. While the claimant did show that his injury prevented him from working, he failed to prove his injury was compensable.

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.). The hearing officer's discussion of the evidence makes clear that he did not find the claimant's evidence persuasive. 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge