

APPEAL NO. 002329

Following a contested case hearing held on September 13, 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 date of the claimed occupational disease injury is _____; that the respondent (carrier) is relieved of liability under Section 409.002 because of the appellant's (claimant) failure to timely notify the employer pursuant to Section 409.001; that the claimant did not sustain a compensable injury; and that the claimant did not have disability. The claimant has filed a request for review in which he does not specify which of the hearing officer's determinations he is disputing but in which he details the evidence favorable to his position and attaches research on carpal tunnel syndrome (CTS) and peripheral neuropathy. The carrier urges in its response that the evidence is sufficient to support the decision.

DECISION

Affirmed.

As noted above, the claimant has attached certain research materials on CTS and peripheral neuropathy. These materials were not introduced into evidence at the hearing and will not be considered for the first time on appeal. See Section 410.203(a) and Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993.

The claimant testified that he is HIV positive, has been "disabled" from gamma globulin deficiency since 1991, and draws Social Security disability benefits; that his peripheral neuropathy causes pain and numbness in only his feet; and that in January 1999 he commenced part-time employment with the employer as a telephone surveyor, working mostly three and one-half hour shifts in the evening but also some Saturdays and Sundays. He further stated that his work involved sitting at a workstation dialing calls on a touch tone telephone, circling numbers on the interview forms to record the responders' answers, and also some handwriting of answers to open-ended questions. The claimant indicated that some types of surveys involve more handwriting than others and that he made, variously, from 80 to 150 and from 70 to 80 calls per hour, depending on the number of times he had to redial and the type of survey being taken. He said that he is right-handed; that he uses multiple right-hand fingers in dialing the telephone numbers, similar to the way he uses a calculator; that in July 1999 he began to have cramping in his right hand and thought he had arthritis; and that in August 1999 he told his supervisor, Mr. P, about his problems with his hand at that time but did not indicate to Mr. P that it was related to his work because he thought it was arthritis. He said that Mr. P told him to use his other hand more. The claimant also stated that his right-hand pain was intermittent and present "when [he] did more work with his hand."

The claimant further stated that in July 1999 he saw a doctor for his right-hand pain at the hospital where he is treated for his other illnesses and was given pain medication; that in September 1999 he saw Dr. B about his hand pain but did not receive a diagnosis;

that the pain increased in October and November 1999; that on _____, the pain was so bad he saw Dr. B on an emergency basis, was taken off work, and was referred to a physical therapist; that on December 22, 1999, he saw a chiropractor, Dr. A, who took him off work, did some testing, and told him he had CTS; and that Dr. A advised that he would help him with a workers' compensation claim but failed to do so. The claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated December 22, 1999, states the date of injury as "_____" and a second TWCC-41 he signed on December 29, 1999, states the date of injury as "_____." He indicated that he changed the date of injury because Dr. A told him the date of injury was the last day he worked whereas he was informed by the Texas Workers' Compensation Commission (Commission) that the date of injury would be the date he knew his injury was actually work related. The claimant also testified that Dr. A gave him a form and letter to give to the employer; that he took it to the job site on December 22, 1999, and gave it to a "dark haired lady" who may be Ms. G, the employer's human resources manager; and that he told her he had been diagnosed and that the form needed to be filed with the carrier. The claimant further stated that Dr. A advised him on December 22, 1999, that he had CTS but that he, the claimant, did not know it was related to his work; that he called the employer and spoke to a person, possibly Ms. G, on December 31, 1999, and told her he had CTS from dialing the telephone and writing; and that he sent a letter to the employer by fax in mid-January 2000.

Ms. G testified that in late December 1999 the claimant left a letter and an Employer's First Report of Injury or Illness (TWCC-1) form on her desk; that the letter did not relate the claimant's CTS to his work; and that she assumed the claimant wanted the form sent to the Commission so she faxed it to the Commission on January 3, 2000, just "to be on the safe side." She indicated that at that point she still did not know that the claimant was asserting that he was injured on the job. Ms. G also said that the claimant faxed a letter to the employer on January 17, 2000; that later at a benefit review conference he changed a date in that letter from _____, to December 22, 1999; and that the letter did not relate his complaints to the job. In his January 17, 2000, typewritten letter to the employer, the claimant refers to the form the employer filed with the Commission and states that the date of injury should be _____, which is handwritten in ink over a typewritten date; that the injury is CTS; and that the form should reflect that the injury occurred from excessive writing and telephone dialing.

The January 12, 2000, note of Dr. B states that the claimant was seen on _____, for arm and shoulder pain and was referred for physical therapy. The March 30, 2000, report of Dr. J, a rheumatologist, states that the claimant appears to have probable rotator cuff tendinitis in the right shoulder; that CTS is a likely explanation of his hand complaints but that multiple other considerations are possible including arthritis, neuropathic pain, tendinitis, and ischemic pain, and that neuropathic pain from peripheral neuropathy or CTS seem the most likely. Dr. M, a neurologist, reported on August 8, 2000, that while the claimant may still have CTS despite normal NCS/EMG studies, his peripheral neuropathy may be contributing more than previously thought and his hand cramping may be just due to overuse syndrome and not to CTS.

The claimant introduced an unsigned copy of his letter of December 22, 1999, addressed to the employer and stating the subject as "Time Off Work," which states that he is experiencing pain in the right side of his body including his side, arm, hand, wrist, and shoulder and has been since mid-July; that the doctor has taken him off work as of _____; that he attempted to return to work on December 13, 1999, with the permission of his chiropractor but the pain in his arm and hand became unbearable; and that he will return to work when released by the doctor.

The hearing officer found that _____, is the date the claimant knew or should have known that the injury may be work related; that he failed to notify his employer of the injury within 30 days of _____, and failed to show good cause for not timely reporting the injury; that he was not injured in the course and scope of employment; and that due to the claimed injury the claimant was unable "to obtain or [sic] retain" employment at his preinjury wages from December 22, 1999, through September 13, 2000.

The claimant had the burden to prove that he sustained the claimed injury, that he timely reported the injury to the employer or had good cause for failing to do so, 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. This holds true for the timely notice and good cause issues as well. 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge