

APPEAL NO. 002340

Following a contested case hearing held on September 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 concluding that the respondent (claimant) sustained a compensable injury to his low back "in addition to his right knee [sic] on _____"; that the employer did not make a bona fide offer of employment to the claimant; and that the claimant has had disability resulting from the _____, injury beginning September 19, 1999, and continuing through the date of the hearing. The appellant (carrier) has requested our review of these conclusions, asserting the insufficiency of the evidence to support them. The claimant urges in response that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed as reformed.

The claimant testified that on _____, he was working in the employer's plant as a machine operator and as he descended a ladder on a machine, the bottom step broke when he stepped on it and he fell down to the floor, flat on his back, twisting his right ankle in the process. He said that his ankle was the focus of treatment as it was very painful; that after about a week or so he began to have low back pain and thought he had pulled a muscle and that the pain would resolve; that he continued to work for several weeks and the back pain increased; and that he saw Dr. H on July 15, 1999. The claimant further stated that he was referred to Dr. R who informed him that he has two bad lumbar discs and will someday require spinal surgery; that he has undergone work hardening and has had injections for his low back pain; and that he has had chiropractic treatment from Dr. T.

The claimant further testified that his machine-operator duties require him to climb ladders, bend and twist, lift up to 100 pounds including 65-pound pallets, and push rolls of paper which weigh 1,000 pounds, and that he cannot do this work because of his injury. He also said that in late August 1999, after some time off for vacation, he returned to work and was assigned to work as a quality control inspector, checking the production quality of variously sized cardboard boxes, folded flat in large boxes; that he had to pull some of the folded boxes out to inspect them; that the lifting, bending, pulling, and twisting exceeded his work restrictions; and that Dr. T took him off work and has not released him to return. An undated record of Dr. T states that the claimant last worked on September 17, 1999, and that he is to remain off work until September 27, 1999, and is pending a lumbar epidural injection. The claimant indicated that he last worked on September 17, 1999.

Mr. P, the plant manager, testified that most of the inspecting of the boxes was done on a table. He also said that he was told by two other employees, who were not permitted to testify, that the claimant was not at work much of the summer after sustaining his injury because he did not want to do the assigned inspecting work and that in September 1999

the claimant just walked off the job.

Dr. R, a neurologist, wrote on June 2, 2000, that he is treating the claimant for degenerative disc disease at L5-S1 and for mechanical low back pain and that when he saw the claimant on August 24, 1999, the claimant gave a history of falling down stairs at work and twisting his right ankle which subsequently led to his mechanical low back pain. Dr. R further stated that it is not unusual for low back pain to present some three weeks after a fall; that the low back pain was caused by the jarring motion at the time of the injury; and that in his opinion, the low back pain is part of the original fall or the result of the injury to the claimant's leg which forced him to walk in a peculiar manner. Dr. R concluded that the claimant has been unable to work from _____, to April 10, 2000, when he was returned to work full-time but with restrictions.

Dr. T wrote on July 31, 2000, that in his opinion, the claimant's back was injured either in his fall or from the severe ankle injury causing him to walk in an unusual manner.

The claimant also testified that on September 1, 1999, Mr. N gave him a paper to sign concerning modified job duties and that he would not sign it because it did not conform to his doctor's notes. This document, titled "Modified Duty" and signed by Ms. T on September 1, 1999, states that the claimant is being offered modified duties described as the inspecting and sorting of flat cartons for printing and cutting errors and that the claimant will be on the first shift. Neither Mr. N nor Ms. T were permitted to testify because their identities as witnesses for the carrier were not timely exchanged with the claimant.

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. We are satisfied that the evidence sufficiently supports the extent-of-injury and disability findings. 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). We do, however, reform Conclusion of Law No. 3 to change the word "knee" to "ankle" and similarly reform the Decision. This reformation corrects probable typographical errors and conforms the conclusion and order to reflect Findings of Fact Nos. 2, 3, and 4 and the evidence.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §129.5(a) (Rule 129.5(a)), in effect on September 1, 1999, provides that in determining whether an offer of employment is bona fide, the Texas Workers' Compensation Commission shall consider the expected duration of the offered position; the length of time the offer was kept open; the manner in which the offer was communicated to the employee; the physical requirements and accommodations of the position compared to the employee's physical capabilities; and the distance of the position from the employee's residence. Rule 129.5(b) provides that a written offer of employment, delivered to the employee during the period for which benefits are payable, shall be presumed to be a bona fide offer if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating doctor have authorized the employee to return to work, the maximum physical requirement of the job, the wage, and the location of the employment. The hearing officer's factual findings detail several of the requirements of this rule which the employer's written offer failed to satisfy. These findings are sufficiently supported by the evidence.

The decision and order of the hearing officer, as reformed, are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge