

APPEAL NO. 002349

Following a contested case hearing held on September 7, 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) did not sustain a compensable injury on _____, that the claimant did timely report the alleged injury, and that the claimant has not had disability. The claimant has appealed the injury and disability determinations on evidentiary sufficiency grounds, asserting, in essence, that his evidence was the more credible. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged determinations. The timely-notice-of-injury determination has not been appealed and has become final.

DECISION

Affirmed.

The claimant testified that on _____ (all dates are in 2000 unless otherwise stated), while employed as a drain technician, he injured his low back while descending a ladder carrying the "junior" machine (auger machine) he had used on the house roof to unclog the kitchen sink drainpipe. As the claimant described it, he felt his legs shaking as he neared the bottom rung of the ladder and turned to put down the junior machine. He said he thought he had just pulled a muscle and, that being the last job of the day, went home and took a hot bath. According to the claimant, by the next morning, his back was extremely painful so he went to a hospital emergency room (ER) where he was told he had pneumonia and was taken off work. He said that he was seen by Dr. M, who referred him to Dr. A, an orthopedic specialist; that he has been unable to undergo the spinal surgery he needs because he has no health insurance; and that he has been unable to return to his job since _____.

Mr. L, a drain technician and the employer's safety supervisor, testified that the data on the invoices completed by the drain technicians are entered into the employer's computer; that he researched the claimant's invoices for the period of January 1 through 12; and that the last drain-clearing job the claimant performed on _____ did not involve going onto the roof to enter the drain pipe through the vent. He explained that the invoice reflected the job charge was for just clearing the drain pipes at the west-wall outlet and that an additional charge of \$10.00 would have been added had the claimant gone onto the roof.

The ER record of January 13 reflects that the claimant was diagnosed with acute pleurisy and viral syndrome and that he was medicated and taken off work for four days. Dr. M's diagnosis on January 18 included acute bronchitis, acute sinusitis, tobacco abuse, and abdominal pain, and that she took him off work pending reevaluation on January 24. On January 20, Dr. M's diagnosis stated "low back pain - no previous back sx [symptoms]." Dr. A's record of January 25 states the diagnosis as low back pain. Dr. A states the history as one of the claimant's having had back surgery about 20 years earlier, of his doing well

thereafter but continuing to have occasional discomfort, and of his condition's becoming worse over the past two weeks. On February 29 Dr. D assessment was lumbar radiculopathy and sacroiliac joint dysfunction. The history portion of this record recited that the claimant was coming off a roof and descended a ladder with a 60-pound machine on his shoulder and that when he hit the ground, his left leg began shaking. Neither the records of the ER, those of Dr. M, nor those of Dr. A stated this history.

In addition to the two dispositive legal conclusions, the claimant challenges the hearing officer's factual findings that on _____ the claimant did not injure any part of his body as a result of an alleged specific event of carrying equipment from a roof down a ladder and that his inability to obtain and retain employment at wages equivalent to his wages prior to _____ at any time since that date is because of something other than a compensable injury on that date.

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 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 hearing officer makes clear in his discussion that he did not find the claimant's evidence persuasive.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kenneth A. Huchton
Appeals Judge