APPEAL NO. 002458

Following a contested case hearing held on September 28, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the appellant (claimant) failed to establish a subsequent period of disability after July 29, 1999. The claimant has appealed, asserting that this determination is not supported by the evidence and that the hearing officer erred in permitting Mr. P to testify. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged determination of the hearing officer.

DECISION

Affirmed.

The claimant testified that on _____, while employed by (employer) in a job which required heavy lifting from time to time, he lifted a very heavy steel plate which slipped in his hands and felt pain in his left wrist, and that he was diagnosed with a fractured bone in the left wrist for which he later underwent surgical repair. In evidence is the Decision and Order of another hearing officer, signed on December 6, 1999, which determined that the claimant sustained a compensable injury on _____, and had disability from that injury from December 19, 1998, to July 29, 1999. The claimant testified that his treating doctor, Dr. L, released him for work with certain lifting restrictions on July 8, 1999; that he thereafter attempted to return to work for the employer but that the employer had no light-duty work for him; that sometime later, his employment was terminated because the employer could not accommodate his lifting restrictions; and that Dr. L iterated the lifting restrictions on October 15, 1999, November 22, 1999, and May 22, 2000. This testimony is supported by Dr. L's records. The claimant further testified that he commenced employment as a welder for a different employer on September 11, 2000, trying to keep the work as light as possible, because he needed the employment. He insisted, repeatedly, that he did not work at any job and had no earnings from employment from December 19, 1998, until he commenced his new job on September 11, 2000.

When Mr. P was called to testify for the carrier, the claimant objected on the grounds that although he received timely notice of Mr. P's identity as a witness, the carrier did not produce before the hearing any videotapes and written report of the surveillance by Mr. P. The carrier responded that it did not intend to introduce into evidence any such videotape and report but rather the testimony of Mr. P which could, obviously, be tested by the claimant's cross-examination. The hearing officer, noting that the claimant apparently failed to exercise any prehearing procedure to obtain any videotape and written report, overruled the objection. To the extent that the claimant's appeal can be read as raising this ruling as an issue on appeal, we are satisfied that the hearing officer did not abuse his discretion with his ruling.

Mr. P testified that he began the surveillance of the claimant's activities in the Fall of 1999; that he determined the location of the claimant's residence; that on January 20, 2000, he followed the claimant, who drove a pickup truck to a site where a new residence was being constructed; saw the claimant take a tool belt out of the truck; and watched the claimant work on the house until he, Mr. P, was observed. He said he went twice more in January 2000 to the site and observed the claimant at work. Mr. P further stated that on March 8, 2000, he again followed the claimant who drove to another new house construction site and commenced working there. The claimant's cross-examination and rebuttal testimony attempted to suggest that Mr. P was mistaken in his identity of the claimant.

The claimant had the burden to prove that he had disability, as that term is defined in Section 401.011(16), and the period of disability he claimed. 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 found that between July 30, 1999, and September 11, 2000, the claimant was able to work and did, in fact, work, and that the claimant failed to establish each material element of his claim by a preponderance of the credible evidence. 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). As the hearing officer stated in his discussion of the evidence, the relative credibility of the witnesses was central to his resolution of the disputed issue.

We must comment on another matter raised by the claimant in his appeal. The claimant asserts that, as the hearing record tape will reflect, the hearing officer was "very rude" to him, wanted to know why he did not speak English, and, in effect, departed from his duties to resolve the disputed issue and instead concerned himself with "solv[ing] the English problem in the USA." At the outset of the hearing, after the hearing officer administered an oath to the Spanish language translator, he asked the claimant, who testified to having obtained a fifth grade education in Mexico, how long he had lived in Texas. The claimant responded (all of his testimony was translated from Spanish) that he

had lived in Texas for 26 years. The hearing officer then asked the claimant if he spoke English to which the claimant responded, "a little." The hearing officer then stated, "Twenty-six years you've lived in the State of Texas and you don't speak English? You're not trying very hard, are you?" The claimant, who is pro se on appeal, does not seek a new hearing before another hearing officer nor does he specifically state that the hearing officer's adverse decision was based on bias against him and not on the evidence. The claimant does contend that the evidence before the hearing officer does not support the adverse determination, a contention with which we disagree. Based on our review of the entire record, we are satisfied that the hearing officer's inappropriate comments did not result in reversible error.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

Robert W. Potts
Appeals Judge