APPEAL NO. 011183
FILED JULY 9, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 3, 2001. The hearing officer determined that the respondent (claimant) sustained a compensable neck and left shoulder injury on _____, and had disability for one day, on August 24, 2000, and again from September 24, 2000, through the date of the CCH.

The appellant (carrier) appeals, complaining that the hearing officer's analysis was "cursory" at best and summarizing evidence which supports its position. The carrier also contends that since the claimant achieved maximum medical improvement (MMI) on February 28, 2001, the claimant cannot, "as a matter of law," have disability after that date. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant worked for a temporary staffing service and was assigned to work in a client company's warehouse. The claimant testified that on _____, as he was stacking solar panels, a solar panel fell, injuring his neck and left shoulder. The parties stipulated that on _____, the claimant had, in a separate incident, injured his right knee; that that injury had resolved; and that that claim is being handled through a separate claim. The claimant went to a hospital emergency room on _____, where a neck strain was diagnosed. The claimant apparently missed one day's work and then returned to work with the client company. In dispute is whether the claimant was performing his regular duties or lighter duties after he returned to work. Sometime in September 2000, the claimant was laid off. Subsequently, the claimant sought treatment with Dr. I. On September 25, 2000, Dr. I diagnosed a cervical strain and left shoulder injury (among other things) and took the claimant off work. A carrier doctor expressed reservations about the claimant's complaints, and noted inconsistencies in testing. The designated doctor noted "obvious malingering in several areas," giving specific reasons for his opinion. Diagnostic testing showed some disc bulges at several levels. The carrier points out that the claimant has had prior neck and left shoulder injuries.

The evidence is in obvious conflict and the carrier is, in essence, asking us to substitute our judgment for that of the hearing officer, something which we have frequently said we would not do. 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 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).

Regarding the issue of disability, which is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage, we note that is a separate concept than MMI as defined in Section 401.011(30). It is quite possible that an injured employee can continue to have disability after achieving MMI, although the employee would not be entitled to temporary income benefits. *See* Section 408.101. We find no error, as a matter of law, for the hearing officer to determine that the claimant had disability even if MMI has previously been achieved.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge