

APPEAL NO. 011854
FILED SEPTEMBER 25, 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 was held on July 16, 2001. The hearing was held jointly with Docket No. _____. The hearing officer determined that the respondent (claimant) sustained a compensable injury to his low back on _____; that he has had continuing disability from September 28, 2000, through the date of the hearing; and that he is entitled to temporary income benefits beginning on September 28, 2000, and continuing until he no longer has disability or until he reaches maximum medical improvement (MMI), whichever comes first.

The appellant (carrier) has appealed, asserting that the claimant failed to establish a new injury by a preponderance of the evidence and that the medical evidence indicates that the claimant's current back problems are due to a 1999 staph infection, which was not work related. In his response, the claimant urges that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

The claimant has been a truck driver for the employer since 1992. The parties stipulated that on _____, the claimant fell from his truck and sustained a compensable injury to his low back area, and, further, that he reached MMI for the injury on June 25, 1996, with a seven percent impairment rating. The medical records reflect that the claimant was hospitalized in February of 1999 because of pneumonia and was subsequently found to have a staph infection which migrated to his lumbar spine. At this time he also received treatment for a torn rotator cuff. The claimant was readmitted to the hospital in May of 1999 for back pain, which was diagnosed as diskitis secondary to the staph infection. The claimant testified that on _____, while he was driving a truck to city 1 for the employer, he leaned over to shift gears and got a sharp pain in his lower back. He further testified that he felt pain for the remainder of the drive, and that upon returning from city 1, he immediately reported the injury to the employer. Additionally, he testified that he has been unable to work since _____.

The medical records support the claimant's position that he fully recovered from his 1995 injury. In a letter dated, June 25, 1996, Dr. N, the neurosurgeon who treated the claimant for his 1995 injury, stated that at that time that the claimant had "no symptoms, except some residual mild numbness of the big toe on the right." The claimant testified at the hearing that he completely recovered from his 1995 injury, and it is undisputed that the claimant returned to work at full duty in April of 1996.

There is conflicting medical evidence regarding the cause of claimant's current injury. In an office note dated November 10, 2000, Dr. B, the claimant's initial treating

doctor, stated "this would appear to be a mechanical problem, a new problem." The evaluation report from Dr. T, the physician who performed the carrier's required medical examination, dated February 15, 2001, found that the claimant's current medical condition was not related to the infection the claimant suffered in 1999. In a subsequent report dated March 8, 2001, Dr. T concluded that the degenerative condition in the lumbar spine was not created by that specific event on _____. The peer review report completed by TN, stated "the fact that [claimant] had diskitis which was a result of a prior septic condition, coupled with the aging process and the development of degenerative spinal stenosis, more likely is contributing to his current low back pain and imaging findings than any incident of being jostled around in a truck or to his prior claim from 1995, which as the records clearly reflect, resolved without incident." After considering the inconsistencies in the medical records and the conflicting evidence, the hearing officer found the testimony of the claimant to be credible.

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 decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Judge