

APPEAL NO. 020434  
FILED MARCH 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 29, 2002, the hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_, or on any other relevant date; that the respondent (carrier) is relieved of liability since the claimant failed to provide timely notice of injury to his employer; and that the claimant did not have disability. The claimant also complains of the ineffective assistance of his counsel at the hearing. The claimant has appealed these adverse determinations on evidentiary sufficiency grounds. The carrier urges the sufficiency of the evidence to support the challenged findings and conclusions and the absence of reversible error in the hearing record.

DECISION

Affirmed.

The claimant testified through a Spanish language translator that "on the day [he] was hurt," he hurt his back when he picked up a heavy box of airplane parts. The claimant's supervisor testified that "in approximately \_\_\_\_\_" the claimant told him he had hurt his back lifting boxes. The supervisor later said he could not recall the date of claimant's conversation and that it could have been in October "or anytime." Though the claimant responded "yes" when asked if he had filed a Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on April 19, 2001, only after he no longer had group health insurance benefits, it was not entirely clear he understood the question. According to the TWCC-41, he hurt his back "moving paint drums." He explained that the heavy boxes contain "all kinds of things" including paint. The claimant was not able to say why he prepared a second TWCC-41 on June 25, 2001, which stated that he hurt his back lifting boxes.

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. This holds true as well for the disputed issue of timely notice. 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. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer's findings make clear that he did not find the claimant's testimony persuasive in view of certain inconsistencies.

The affidavit attached by the claimant to his appeal was not presented at the hearing below. This evidence is offered for the first time and we find that it does not meet the test required for our consideration of new evidence on appeal in that there is no showing that the affidavit could not have been obtained prior to the hearing below. See, *generally*, Texas Workers' Compensation Commission Appeal No. 012219, decided October 30, 2001. Further, we find no merit in the claimant's allegation that he did not receive effective assistance of counsel at the hearing. See, *generally*, Texas Workers' Compensation Commission Appeal No. 94660, decided July 7, 1994 (Unpublished).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **SAFECO INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**LINDA LEWIS  
1600 NORTH COLLINS BLVD., SUITE #300  
RICHARDSON, TEXAS 75080.**

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Susan M. Kelley  
Appeals Judge