APPEAL NO. 94242

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on January 11, 1994, with (hearing officer) presiding. In response to the issues before her, the hearing officer held that the claimant, who is the appellant in this action, was not injured in the course and scope of his employment on (date of injury); that he did not report an injury to his employer on or before the 30th day after the injury and did not have good cause for such failure to timely report; and that the claimant did not have disability from March 5, 1993, through the present resulting from an injury sustained on (date of injury).

The claimant in his appeal calls our attention to evidence in the record, including certain of his own, unrefuted testimony, that would support a decision in his favor, and he asks that this panel reverse the hearing officer's decision. The carrier responds that the hearing officer's decision is supported by sufficient evidence.

DECISION

We affirm the hearing officer's decision and order.

The claimant, who had worked for (employer) for approximately 12 years, testified that he was injured on (date of injury), while he was removing a flywheel off a motor. His testimony was that the flywheel dropped on the fingers of his left hand, cutting them, and that he reflexively yanked up the wheel with his right hand, thus hurting his back and shoulders. The claimant said he went to employer's shop office and told his supervisor, (Mr. JT), that he had "really hurt myself bad this time." He said Mr. JT assisted in bandaging his hand. Thereafter, as he was resting in the office, claimant said (Mr. MT), the general manager and Mr. JT's father, came by and claimant told him about the injury.

Claimant said he went home that night and told his wife about his accident, including the injury to his back and shoulders. He said he came in the following day but was unable to work because of the pain. He received permission to leave from Mr. MT, who asked that he stop by a dock on the way home and check on some trucks. Claimant said he remembers going to check the trucks, but remembers nothing else until after he had been in the hospital for two weeks.

Medical records in evidence show claimant was seen in the emergency room, Hospital, on March 6th with complaints of pain in his shoulder, back, and neck beginning the day before, accompanied by fever and vomiting. The claimant was released with instructions concerning bed rest, fever control, and a clear liquid diet. Although claimant said he could not remember this event, the records indicate claimant's speech was coherent; he was also accompanied by his wife who he said was aware of the incident at work.

Further medical records show claimant was admitted to Hospital on March 13th and discharged on April 7, 1993. Again, his testimony was that he remembered nothing until

Mr. MT and (Mr. K), employer's vice-president, came to visit him in the hospital. Claimant said they talked about his accident, and told him he would be taken care of.

The history taken upon claimant's admission to the hospital shows complaints of nausea, vomiting, muscle pain (including shoulder pain), and weakness of one week's duration. It also stated that claimant's wife noted increasing confusion within the past few days. The medical reports from claimant's hospitalization show extensive testing for a variety of conditions. As the discharge summary notes, he saw a private doctor subsequent to the ER visit, and was diagnosed with a viral infection, bronchitis, and hepatitis. The claimant was admitted to the hospital upon complaints of dehydration after having been unable to tolerate anything orally. His complaints of back pain were addressed by spinal films and an orthopedic consult, which indicated degenerative changes, and a Gallium scan which indicated an abscess. His discharge diagnosis was bilateral psoas abscess, staphylococcus aureus, bacteremia, anemia of chronic disease, and degenerative joint disease.

Mr. JT testified that he had no knowledge of claimant having suffered an injury on (date of injury); he also did not recall bandaging claimant's hand and stated his belief that he would have remembered such an event. He knew claimant left work the following day, but said that was due to claimant's fever and flu-like symptoms. He said he was first aware claimant was claiming a work-related injury when Mr. MT and Mr. K asked him about it; he said he thereafter questioned employer's other mechanics and was told no one was aware of such injury.

The claimant on appeal states that the medical evidence shows claimant was treated for back, shoulder, and neck pain, and states that his unrefuted testimony was that he discussed the accident with Mr. MT and Mr. K within 30 days of its occurrence.

We have reviewed the evidence adduced below and hold that it is sufficient to support the hearing officer's decision on both issues. It is true that the medical evidence mentions claimant's complaints of back and shoulder pain, but the medical evidence does not tend to show or even address that claimant or his wife reported that these were injuries incurred in the course and scope of claimant's employment. Further, the reports of back and shoulder pain were accompanied by other symptoms, such as vomiting and fever, that would tend to discount an indication that the back and shoulder pain came from a discrete lifting incident rather than another cause, such as a virus. Although the claimant testified to the events leading up to the symptoms and to the fact that he discussed the accident with persons in a supervisory capacity, Mr. JT testified that he had no knowledge of such event, and that he believed claimant became ill and left work due to the flu. By the claimant's own testimony, and as reflected in some medical reports, he had problems with confusion and memory loss.

The claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that an injury occurred in the course and scope of his employment. Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The 1989 Act provides that the hearing officer is the

sole judge of the relevance and materiality of the evidence and of its weight and credibility. Further, the hearing officer is not required to accept without question the testimony of the claimant, which raises issues of fact to be determined by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Section 410.165(a). Where there are conflicts and inconsistencies in the evidence, the hearing officer is entitled to resolve them. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). We will not overturn the decision and order of the hearing officer where, as here, there is evidence to support it and it is not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

Based upon the foregoing, we affirm the decision and order of the hearing officer.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge