APPEAL NO. 980429

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 January 6, 1998, with a hearing officer. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease with a date of injury of _____; that the claimant timely reported her injury to her employer; that she is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and that she had disability as a result of her compensable injury from March 26, 1997, through the date of the hearing. In its appeal, the appellant (carrier) appeals the Findings of Fact and Conclusions of Law corresponding to those determinations; however, the only argument detailed in its brief concerns the hearing officer's determination that the claimant timely notified her employer of her injury. In her response, the claimant urges affirmance.

DECISION

Affirmed.

The claimant testified that she began working as a travel agent for (employer) on March 1, 1988. She stated that she worked at home and that she made travel reservations for corporate travelers. She testified that she worked from 7:00 a.m. to 4:00 p.m., Monday through Friday, with two 15-minute breaks and an hour lunch break. She testified that there are 105 items that she had to address on each reservation that she makes and that she handled between 30 to 45 calls per day. She stated that she wears a headset and that, at all times with the exception of the time she is on a break or at lunch, she is sitting at a computer and keyboarding the information required to complete the travel reservations. She testified that in late 1996 she noticed that her shoulders became stiff and tight while she was working. She stated that her problems became progressively worse and that by February 1997 her pain was much worse. She noted that her pain began in her right arm and elbow and that by March 1997 it had moved into her shoulders and left arm as well. She testified that she stopped working on March 26, 1997, because she was no longer able to handle the pain and that she was still unable to work at the time of the hearing because of the continued severity of her symptoms.

The claimant first sought medical treatment on or about _____, with (Dr. W), her primary care doctor. Dr. W was apparently not available and the claimant was seen by his assistant, (Ms. M). The claimant stated that Ms. M advised her that she had tendonitis and gave her a splint for her right elbow. The claimant was also referred for physical therapy. The claimant stated that on February 28, 1997, Rhonda Thurman (Ms. T), her supervisor, came to the claimant's home to give the claimant her performance review. The claimant testified that at that meeting she told Ms. T that she had "excruciating" pain in her right arm

and elbow when she worked on the keyboard. She stated that she could not state with certainty that she told Ms. T that her work was causing her injury; however, she stated that she did tell Ms. T that she had severe pain in her arm when she used the keyboard to perform her job duties. Ms. T testified that she was the claimant's supervisor at the time of her alleged injury. She stated that she went to the claimant's house on February 28, 1997, and that they discussed both performance and personal issues. She stated that the claimant told her that she was having pain and was concerned about it; however, she further testified that the claimant did not indicate that she had a work-related injury. Rather, Ms. T testified that she first learned that the claimant was alleging a workers' compensation injury when the claimant called Ms. T on July 1, 1997, to tell her that she would not be returning to work on July 7th as they had arranged. On cross-examination, Ms. T testified that the claimant did tell her in their February 28, 1997, conversation that she had pain in her right elbow when she used her keyboard, which was accompanied by numbness and tingling in her right hand.

On cross-examination, the claimant acknowledged that she initially sought benefits under a group health policy. She stated that she did not pursue a claim for workers' compensation benefits until July 1997, when she learned that she needed additional treatment and therapy and the group carrier indicated that they would no longer pay for her work-related injury. Ms. T stated that during the July 1, 1997, conversation, the claimant told her that she was going to file a workers' compensation claim so that she could receive the additional treatment she needed for which the group health carrier had denied payment.

Dr. W referred the claimant to several doctors in an attempt to diagnose what was causing the problems in her arms and shoulders. Dr. W and the doctors who consulted with him eventually ruled out diagnoses of tendonitis, epicondylitis, rotator cuff tear, cervical herniation and carpal tunnel syndrome. In a report dated May 1, 1997, (Dr. L), an orthopedic surgeon to whom the claimant was referred by Dr. W, noted that the claimant "has a lot of aching in both upper extremities. This is almost like a repetitive use type syndrome." In a June 4, 1997, report, Dr. L noted that "[a] lot of her problems come from the type of work she does. She is going to have to consider modifying that work or changing jobs." On July 1, 1997, Dr. W diagnosed the claimant's problem as "severe fibromyalgia of the neck and shoulders." Dr. W further noted "I know it is probably a Workers Compensation injury in light of the keyboard work seeming to set this off." In a letter dated October 31, 1997, Dr. W provided the following causation opinion:

> Briefly, I feel that she has very severe fibromyalgia and that this is primarily secondary to the ergonomics of her job and work positioning. In other words, the position of her head and arms while working on the keyboard and booking flight reservations, puts repetitive stress on her neck and shoulder muscles which has resulted in much myofascial dysfunction.

The carrier introduced a June 21, 1995, report from Dr. W noting that the claimant had "tenderness over the lumbar spine with much tenderness of the lumbar muscles. This is consistent with some fibromyalgia." In addition, it introduced a June 24, 1996, progress report from Dr. W which noted complaints of pain and stiffness in her neck which radiated down her left arm. On cross-examination, the claimant acknowledged that her doctors have told her that the financial and personal stressors in her life were contributing factors to her fibromyalgia.

The carrier challenges the hearing officer's injury, notice, and disability determinations. Each of those issues present factual questions for the hearing officer to resolve. Under the 1989 Act, the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). It is the hearing officer's responsibility to resolve conflicts and inconsistencies in the testimony and evidence and to enter findings of fact and conclusions of law accordingly. As an appellate body, we are not fact finders and, as such, we do not pass on the credibility of the witnesses or substitute our judgment for that of the hearing officer. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

In this instance, there was conflicting evidence on the issue of whether the claimant reported her injury within the 30-day time limit established for doing so. The claimant maintained that she told Ms. T on February 28, 1997, that she had excruciating pain when she used her keyboard and that the pain became more severe every time she worked on the computer. Ms. T testified on direct examination that in February 1997 she only knew that the claimant had pain but that the claimant did not attribute the pain to any work activity. On cross-examination, Ms. T acknowledged that the claimant told her that she had pain when she used her keyboard. The hearing officer resolved the conflict in the evidence by crediting the testimony of the claimant and Ms. T on cross-examination that the claimant had reported her pain and attributed it to her work activities during the February 28th conversation, over Ms. T's direct testimony. The hearing officer was acting within his province as the fact finder in so doing. The determination that the claimant timely notified her employer of her injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for reversing it. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer also determined that the claimant sustained a compensable occupational disease injury and that she had disability from March 26, 1997, through the date of the hearing. The claimant testified about how she repetitively used her hands to input information in the computer to make travel reservations and that her performance of those duties caused her to develop excruciating pain in her right arm, which eventually moved into her shoulders and left arm. Dr. W opined that the claimant's fibromyalgia was work-related and Dr. L noted that the claimant's problems resulted from the type of work she was doing. That evidence provides sufficient evidentiary support for the hearing

officer's determination that the claimant sustained a compensable occupational disease injury. With respect to disability, we note that generally it can be established by the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992. The claimant testified that she had to stop working on March 26, 1997, because she could no longer handle the pain and that she continued to be unable to work through the hearing. The hearing officer accepted that testimony as he was permitted to do. Nothing in our review of the record indicates that either the injury or disability determinations are so against the great weight and preponderance of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra*.

Finally, we consider the carrier's challenge to the hearing officer's determination that the claimant did not make an election of remedies by initially seeking benefits under a group health plan. As noted above, the carrier made no specific argument in its appeal relating to the election of remedies issue; rather, it merely appealed the factual finding that the claimant did not make an informed choice when she initially filed for medical care benefits under her group health insurance policy and the legal conclusion that she is not barred from pursuing workers' compensation benefits. In the absence of any articulation as to how the hearing officer's election of remedies determination is against the great weight and preponderance of the evidence, we are hard pressed to conclude from our review of the record that it is. Accordingly, we will not disturb the hearing officer's decision and order on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Christopher L. Rhodes
Appeals Judge