

APPEAL NO. 990376

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 25, 1999. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable repetitive motion injury to her right upper extremity, that she did not have disability, and that claimant timely reported her injury to her employer. Claimant appeals the injury and disability determinations on sufficiency grounds. The respondent/cross-appellant (carrier) replies that the Appeals Panel should affirm the hearing officer's decision. In a cross-appeal, carrier contends that the hearing officer erred in determining that claimant timely reported her claimed injury. Claimant did not respond to the cross-appeal.

DECISION

We affirm.

Claimant first contends the hearing officer erred in determining that she did not sustain a compensable injury. Claimant asserts that the hearing officer erroneously stated that she was treating for right shoulder pain before _____. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and as disease or infection naturally resulting from the damage or harm. Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. See Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that she sustained a compensable injury to her right shoulder doing repetitive work as a sewing machine operator. She said she reported the injury to her supervisor in May 1998 and that she went to the company nurse on (two weeks after date of injury), when she could not take the pain any longer. She said she had a lump under her arm and that she told the nurse she had been having pain. Claimant stated that she had had a prior right shoulder injury in (prior date of injury), but said it had resolved. She denied that she had been treated in May 1997 for right shoulder pain.

A May 25, 1995, Employer's First Report of Injury or Illness (TWCC-1) for a prior injury states that claimant reported a right shoulder injury and that the date of injury was (prior date of injury). A May 8, 1997, medical record from Dr. B states that in May 1997 claimant reported pain in her right shoulder, that she had decreased strength and reflexes in that arm, and that she underwent acupuncture treatment in the neck and right shoulder. The date of injury stated for that medical record of treatment for the right shoulder was "7-24-96."

The hearing officer determined that claimant's testimony was inconsistent and not persuasive, that claimant did not suffer a compensable injury, and that she did not have disability. He was the judge of the credibility of the witnesses and medical evidence. As the fact finder, he considered the issue of whether claimant sustained a compensable repetitive trauma right upper extremity injury in the spring of 1998 and resolved this issue against claimant. We will not substitute our judgment for his in that regard because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review we will not overturn the hearing officer's decision. *Id.*

Claimant contends the hearing officer erred in determining that she did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Because there was no compensable injury, there can be no disability.

Carrier contends the hearing officer erred in determining that claimant timely reported her injury to the employer. The applicable law and our standard of review are stated in Section 409.001; Texas Workers' Compensation Commission Appeal No. 92397, decided September 21, 1992; Section 410.165(a); and Cain.

Claimant testified that she reported her alleged injury a week before (two weeks after date of injury). She also said she reported it two weeks before (two weeks after date of injury). It is not clear from claimant's testimony whether, at that time, claimant merely reported pain, or whether she reported an alleged work-related injury.

The hearing officer determined that "claimant notified her employer on (two weeks after date of injury), of [an alleged] work-related injury, which was within 30 days from the day she knew she had [an alleged] work related injury." In this case, there is a letter from claimant's doctor, Dr. B, in which he states that he saw claimant on (two weeks after date of injury), regarding a repetitive trauma right shoulder injury sustained "on" _____. Dr. B indicates that it is a new injury. Therefore, there was evidence that on (two weeks after date of injury), Dr. B told claimant that her shoulder problems in May 1998 were work related. Apparently, (two weeks after date of injury), is the date of injury found by the hearing officer. The hearing officer determined that on (two weeks after date of injury), claimant timely notified her employer of the injury, and that this was within 30 days of the

date she knew or should have known that she sustained an alleged new right shoulder injury. In light of claimant's testimony and our standard of review, we will not disturb the hearing officer's finding in this regard because it is not against the great weight and preponderance of the evidence. Cain. We note that, even if the hearing officer found that the date of injury was _____, two weeks before (two weeks after date of injury), a (two weeks after date of injury), report of injury would still be timely.

Carrier contends that claimant was complaining to Dr. B of pain in her shoulder in May 1997 and in February 1998, and that she did not timely report an injury 30 days from those dates. However, a claimant's duty to report an occupational disease injury arises when the claimant knew or should have known that it may be a work-related injury. Again, the hearing officer could have determined from the evidence that (two weeks after date of injury), was the date that claimant knew or should have known that she sustained an alleged new right shoulder injury. We perceive no error.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge