APPEAL NO. 990779

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 March 10, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that she did not have disability. In her appeal, the claimant argues that those determinations are against the great weight of the evidence. In its response, the respondent (carrier) asserts that the claimant's appeal was untimely. In the alternative, the carrier urges affirmance.

DECISION

Affirmed.

Initially, we will consider the carrier's assertion that the claimant's appeal was untimely. Records of the Texas Workers' Compensation Commission (Commission) demonstrate that the hearing officer's decision and order was distributed to the parties on March 23, 1999. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant is deemed to have received the hearing officer's decision five days after it was mailed or on Sunday March 28, 1999, in this instance. Because the last day of that period fell on a Sunday, the period extends to Monday, March 29, 1999. In order to be timely filed, the claimant's appeal had to be filed 15 days after March 29th, or by April 13, 1999. The claimant's appeal was mailed on April 12th and received by the Commission on April 14, 1999. Therefore, it was timely.

The claimant testified that on _____, she was working as an assembler associate for (employer) and had been so employed for over 12 years. She stated that on _____ she was working on a machine that cut plastic tubing into uniform pieces according to specifications. She testified that she was required to bend and twist in order to route the tubing through the machine and to dislodge the tubing from the machine when it became stuck. She stated that shortly after lunch, she developed a dull, burning sensation in her right hip, buttock, and down her leg. The claimant testified that she did not know whether she was injured after a specific incident of bending and twisting or whether her injury was caused by the repeated twisting and bending over the course of the morning. However, she stated that at one point when she straightened up, she felt a "distinct burning and abrupt stiffness" on the lower right side of her body.

On October 27, 1998, the claimant sought medical treatment with Dr. F. In his treatment notes, Dr. F gives a history of the claimant's having "hurt her back two weeks ago during the course of her employment as she was having to do the repetitive motion of bending over and twisting to clear out a machine used to cut tubing." Dr. F diagnosed a possible herniation in the lumbar spine, noting that he would order an MRI. In progress notes of November 10, 1998, Dr. F states:

> [Claimant] comes back after her MRI, which is essentially clean. She had a host of questions about disability and concerns about raising one child, being a single parent. My gut feeling is that there is more than symptom pathology, rather that there is symptom amplification going on [here]. She has slight degeneration in the 4-5 and 5-1 discs but this is to an early degree. I am going to send her to the chiropractic physicians for manual medicine and place her on Lodine. Other than that, I do not think any further treatment is warranted. Certainly she has no surgical pathology.

In a progress note of December 10, 1998, Dr. F stated that Dr. T, the chiropractor to whom he referred the claimant, would make a decision in two weeks about the claimant's return to work. Dr. F further noted that he saw "no further need to follow up from my standpoint."

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the testimony and evidence before him and decides what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Generally, an injury can be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the hearing officer is not bound to accept the claimant's testimony; rather, it only presents an issue of fact for him to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). In this instance, the hearing officer determined that the claimant did not sustain her burden of proving that she was injured at work on _____. In so doing, the hearing officer noted that the claimant's evidence was not credible and that it was insufficient to demonstrate that she sustained an injury traceable to a definite date, time, and place or that she sustained a repetitive trauma injury. The credibility of the testimony and other evidence was a matter left solely to the hearing officer's discretion as the fact finder. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the testimony and the evidence presented by the claimant was sufficient to prove that she sustained a compensable injury. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not demonstrate that the hearing officer's injury determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; accordingly, no sound basis exists for us to reverse that determination on appeal. Pool, *supra*; Cain, *supra*.

In her appeal, the claimant asserts that the hearing officer erred in considering the question of whether she sustained a repetitive trauma injury; however, we find no merit in this assertion. The claimant stated that she was not certain whether a specific incident of bending and twisting or "repeated" bending and twisting caused her injury. Thus, she seemed to pursue alternative theories of recovery. It was appropriate for the hearing officer to consider and resolve the issue of compensability under both theories. We perceive no error.

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm his determination that the claimant did not have disability within the meaning of the 1989 Act. The existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge