

APPEAL NO. 991021

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 19, 1999. He (hearing officer) determined that: (1) appellant (claimant) did not sustain a compensable injury on _____; (2) claimant's average weekly wage (AWW) is \$220.00; (3) claimant did not have disability; and (4) claimant timely reported her alleged injury. Claimant appeals the determination that she did not sustain a compensable hernia injury and that she did not have disability. The timely notice and AWW determinations were not appealed. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends that claimant's appeal was not timely filed. Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant on April 21, 1999, with a cover letter dated that same date. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant is deemed to have received the decision and order five days after the date it was mailed, or on April 26, 1999. A request for review is timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and if it is received by the Commission not later than the 20th day after the date of receipt of the decision. Rule 143.3(c). In this instance, the 15th day after the deemed date of receipt was May 11, 1999. Claimant's request for review was mailed to the Appeals Panel on May 10, 1999, and was timely received. Therefore, the appeal was timely filed.

Claimant first contends the hearing officer erred in determining that she did not sustain a compensable hernia injury on _____. Claimant contends that she did not know she had a hernia when she went to see her doctor and that she thought she had a kidney infection. She contends that the medical reports show that she had a hernia.

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 a 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 on _____, she was working as a nurse's aide and she felt a sharp burning sensation in her left lower stomach while moving a patient. Claimant said she went to see her doctor, Dr. G, the next day. She said Dr. G thought she had a kidney infection but that he examined her and found a hernia. Claimant said she underwent repair of two hernias on August 25, 1998. Claimant testified that she injured her back in (prior date of injury) while moving patients, but that that was a different injury. She also said she has had kidney problems. In a handwritten statement dated September 16, 1998, claimant stated that she had helped people get up "in (prior date of injury)" and she felt a "pull" and pain in her stomach. Claimant then said that her stomach continued to bother her, that she saw a doctor the next day, that she had a kidney infection at the time, and that the doctor told her that she had a hernia and needed surgery. At the CCH, claimant stated that she did not file an incident report regarding her injury. Two employees that deal with such incident reports said that claimant told them she had given employer an incident report, but that one was never found.

In a February 27, 1998, medical report from Dr. G, the writing is barely legible but it appears to state either "exclude hernia" or "left side hernia." In an (a day after date of injury), medical report from Dr. G's office, it appears to state, "c/o kidney problem, discharge," and "LT side hernia." In a February 8, 1999, letter, Dr. G stated that he had seen claimant on (a day after date of injury), because she complained of kidney problems, but that he found a hernia "which was confirmed on August 19, 1998." In that letter, Dr. G did not mention an earlier hernia diagnosis.

The hearing officer 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 hernia injury on _____, and resolved this issue against claimant. In making his determinations, the hearing officer noted what he found to be inconsistencies in claimant's testimony and written statement. He said he did not find claimant's testimony regarding an _____ date of injury to be credible. 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 on _____, there can be no disability.

We note that claimant and the ombudsman both stated that the incident in (prior date of injury) involved her back and that the incident involving her stomach occurred in _____. The hearing officer stated that he did not address whether claimant sustained a (prior date of injury) injury, whether she timely reported such an injury, or whether she had good cause for late reporting of such an injury, because claimant specifically stated that her

hernia injury happened in _____. Dr. G also stated that claimant's employment involves continuous heavy lifting and that "the hernias have been caused by her employment." The hearing officer also did not address an occupational disease injury, as claimant did not claim such an injury. Given claimant's assertions at the CCH, we perceive no error in this regard.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge