APPEAL NO. 991206

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 May 6, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that she did not report her alleged injury within 30 days of the date she knew or should have known that it may be work related; and that she did not have disability within the meaning of the 1989 Act because she did not sustain a compensable injury. In her appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that on February 21, 1998, she was hired by the employer as a full-time janitor. She stated that she was initially hired as a temporary employee and then was hired permanently. She testified that on Friday, (alleged date of injury), she noticed a "twinge" in her back when she was emptying the trash. She stated that she went to her supervisor and told her that she needed assistance in lifting the trash. The claimant testified that her supervisor told her on the following Monday that she (the supervisor) had checked with her supervisors but that the employer could not put any other employees on to assist the claimant in performing her job duties. The claimant testified that in July 1998 she felt a "twinge" or "possibly a strain" when she lifted the trash and she knew that her condition would get worse if she continued to empty the trash by herself. She stated that by late October 1998 she began to experience excruciating pain when she emptied the trash and when she mopped and that's when she realized that she had an injury to her back. She testified that she attempted to see Dr. A for her back on _____, but Dr. A would not see her because her injury was work related. At another point in her testimony, the claimant maintained that she did not realize that she had a work-related injury until Dr. A so advised her.

The claimant testified that she began treating with Dr. L, a chiropractor. Her initial appointment with Dr. L was on November 14, 1998. In progress notes of that date, Dr. L references complaints of low back pain "onset since summer '98" and suggests that this is a "possible w/c case." On November 20, 1998, Dr. L referred the claimant for a lumbar MRI, which revealed a "3 mm posterior central discal herniation" at L5-S1. In a "To Whom it May Concern" letter of January 25, 1999, Dr. L states:

> [Claimant's] job descriptions including cleaning, mopping, emptying trash cans, etc. have weakened her upper, mid, and lower back finally causing

> antalgic pain to develop. Since 11/14/98 I have been treating her upper, mid, and lower back conditions resulting from these work related repetitive stress injuries.
>
> Dr. L referred the claimant to Dr. W. Dr. W's report provides:
>
> In my opinion, all of her symptoms begin with her most recent job in the summer of 1998 and were presumably caused by the heavy lifting, bending, and straining involved in performing the duties of that job.

Dr. L also referred the claimant to Dr. NA for pain evaluation and treatment. Dr. NA stated that the claimant had "persistent pain as a result of repetitive stress injury due to her occupation."

The hearing officer determined that the claimant did not sustain a compensable occupational disease injury. The hearing officer could have found injury on the basis of the claimant's testimony alone. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, she was not required to accept the claimant's testimony; rather, it created a factual question for her to resolve. The hearing officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence. Section 410.165(a). As such, she was free to reject the claimant's testimony that her lumbar injury was caused by the repetitively traumatic work activities she performed as a janitor. As the fact finder, the hearing officer similarly could choose to reject the evidence from Drs. L, W, and NA, attributing the claimant's injury to her repetitively traumatic work activities. A fact finder is not bound by medical evidence of causation where the credibility of that evidence is manifestly dependent upon the credibility of the evidence imparted to the doctor by the claimant. Rowland v. Standard Fire Ins. Co., 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). Our review of the record does not reveal that the hearing officer's injury determination is so against the great weight 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 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 did not timely report her alleged injury to her employer and that she did not have good cause for her failure to do so. The hearing officer determined that the claimant knew or should have known that her injury may be work related on (alleged date of injury), when she associated the "twinges" in her back with the activity of emptying trash cans. The claimant testified that she did not realize that she had an injury in her back, as opposed to the "twinges" and "strains" until late October 1998; however, the hearing officer was not persuaded by that testimony. The hearing officer was acting within her province as the fact finder in finding that the date the claimant knew or should have known that her injury was work related was (alleged date of injury). In that regard, we note that both Dr. L and Dr. W reflect in their records that the claimant's low back pain began in the summer of 1998. The claimant acknowledged that

she did not report a work-related injury to her employer until _____, well beyond 30 days after (alleged date of injury). Thus, the hearing officer properly determined that if the claimant had sustained her burden of proving that she injured her low back in the course and scope of her employment, the carrier would be relieved of liability for workers' compensation benefits pursuant to Section 409.002. Given our affirmance of the hearing officer's injury and notice determinations, we likewise affirm her determination that the claimant did not have disability because the finding 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:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge