APPEAL NO. 991208

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 13, 1999. She determined that the appellant (claimant) did not sustain a compensable repetitive trauma injury to her left shoulder; that the date of the claimed injury was (alleged date of injury); that the claimant, without good cause, failed to give her employer timely notice of the injury; and that the claimant did not have disability. The claimant appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence and that the notice determination was erroneous as a matter of law. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a secretary/administrative assistant. She testified that her job duties involved the repetitious overhead lifting of heavy manuals some 15 to 20 times a day. She said that she felt the pain every time she lifted the manuals; that it got "really bad" in mid-September 1997; and that she started feeling the pain a couple months before September 1997. According to the claimant, she also noticed the pain when she participated in employer-sponsored exercise classes in the afternoon. At some undisclosed time, she said, she discussed her pain problem with her supervisor and they speculated that it might be caused by bone spurs. She said she had "no idea" the pain came from lifting manuals even though she had the pain every time she lifted the manuals. The claimant was terminated from her employment on November 27, 1997, but continued to collect her salary through December 31, 1997. She then received unemployment benefits for the following six months. She said she believed she injured her shoulder lifting the manuals and not in doing other personal activities.

The claimant saw Dr. C on _____. His impressions were left shoulder impingement and bursitis tendinitis. The subjective history contained in his report of this visit refers to the claimant's noticing this pain "a month or so again [sic] as they did the ergonomic exercises. . . ." The claimant testified that Dr. C told her that her condition was probably caused by repetitive motion and she believed this could only come from work. On December 15, 1997, she reported a work-related shoulder injury to her employer and on December 18, 1997, was told the carrier had denied the claim. By December 23, 1997, Dr. C's diagnosis became left shoulder impingement. On April 1, 1998, he wrote "I do believe that her shoulder problem is directly related to her activities at work."

The claimant then saw Dr. B, who on August 21, 1998, diagnosed adhesive capsulitis. Based on the history provided by the claimant, Dr. B wrote that the lifting of heavy manuals at work "caused rather significant shoulder pain." In letters of December 17, 1998, and April 13, 1999, Dr. B wrote that his initial opinion of causation was based on

the history provided by the claimant of lifting heavy manuals, but that he later learned that the claimant was claiming that her participation in exercises caused this injury. He then concluded that "I do not think that either mechanism of injury would have caused this problem and that it most likely was not a work-related injury."

Mr. A, the manager of industrial hygiene, testified that he conducted the ergonomic exercise classes and that the claimant never participated in them and never complained to him about a shoulder injury. The claimant, in rebuttal testimony, said she did participate in the exercises and did complain to Mr. A about her shoulder pain.

The claimant had the burden of proving that she sustained a repetitive trauma injury from work-related activities as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing office to decide and could be proved by the claimant's testimony alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer was not persuaded that the claimant met her burden of proving a compensable injury. In this regard, the hearing officer noted in her discussion of the evidence that the claimant seemed to have presented two different reasons for her injury (the heavy overhead lifting and the exercise classes), both of which were rejected by Dr. B as causes of a shoulder injury. In her appeal, the claimant argues that her evidence did establish a compensable injury and that the carrier did nothing to rebut this evidence. The claimant further asserts that only after contact with the carrier's attorney did Dr. B "change his tune" about causation and that "[o]ne must assume that either he is lying or his is committing fraud." Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. The carrier had no obligation to present evidence that an injury did not occur as alleged. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the evidence relied on by the hearing officer, particularly the later opinion of Dr. B, sufficient to support the determination that the claimant did not sustain a compensable repetitive trauma injury.

Section 408.007 provides that the date of injury of an occupational disease, which includes a repetitive trauma injury, is "the date on which the employee knew or should have known that the disease may be related to the employment." This date is critical because the failure of a claimant, without good cause, to report the injury to the employer by the 30th day after it occurs relieves the employer and carrier of liability. In this case, the parties agreed that notice was given on December 15, 1997. The date of injury of an occupational disease is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 931028, decided December 23, 1993. As the claimant points out in her appeal, the determination of this date can be an imprecise

exercise. *See* Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 1994. The date need not be as early as the first symptoms, nor as late as a definitive diagnoses and statement of causation by a treating doctor. Texas Workers' Compensation Commission Appeal No. 94521, decided June 13, 1994. The claimant testified that in mid-September 1997 she experienced severe pain, that she had similar pain some months before and that the pain occurred while lifting the manuals. Based on this evidence, the hearing officer found the date of injury to be (alleged date of injury), some three and one-half months before the claimant reported the injury.

In her appeal of the date-of-injury determination, the claimant argues that (alleged date of injury), is incorrect because the claimant said she first felt the pain "sometime" in September. We question why this evidence does not support a (alleged date of injury), finding of the date of injury. In any case, the claimant referred to severe pain in September and an experience of pain months earlier. Furthermore, any date of injury in September would have resulted in untimely reporting. The claimant also argues on appeal that all she experienced was pain, that pain in itself is not an injury, and that it was error as a matter of law to determine that a "feeling of pain constitutes awareness of an injury." We agree that as an abstract proposition, pain is not the equivalent of an injury defined as "damage or harm to the physical structure of the body." Section 401.011(26). The critical question here is not actual knowledge of an injury, but whether, on the one hand, the claimant was credible in her assertion that she never connected the pain with damage or harm to the physical structure of her body, even though she admitted to considering that bone spurs may have been the cause of her pain. On the other hand, the critical question was whether she should have known from the experience of severe pain when she performed certain activities at work, that these activities were causing an injury. The hearing officer apparently found the claimant was not credible in asserting that despite experiencing pain each time she lifted a manual she did not connect the pain to an injury from lifting. We believe the evidence, particularly the testimony of the claimant herself, was sufficient to support the date-of-injury determination in this case and under our standard of appellate review affirm that determination. Because the injury was not reported no later than 30 days after the date of injury, and no good cause for the delay was asserted, the carrier would be relieved of liability had there been a finding of an injury.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge