

APPEAL NO. 000743

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 17, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable repetitive trauma injury to the right shoulder; that the claimant did not have disability; that the respondent (carrier) is relieved of liability under Section 409.002 because of claimant=s failure to timely notify his employer of the alleged injury under Section 409.001; and that the date of injury is _____. The claimant appeals, urging that the date of injury is _____; that he sustained a compensable repetitive trauma injury; that he reported the injury to the employer on _____; and that he has had disability. The carrier replies that the hearing officer=s findings and conclusions are not in error and should be affirmed.

DECISION

Affirmed.

The claimant began working for the employer as an auto body technician in 1994. The claimant testified that in November and December 1998, he worked long hours, sanding and painting vehicles which involved the repetitive use of his upper extremities. On _____, the claimant sustained a compensable hernia injury and on _____, while in route to a company doctor at the request of the employer, he was involved in a motor vehicle accident and sustained a back injury. As a result of the back injury, the claimant was off work beginning January 30, 1999. The claimant testified that on _____, he had a sharp pain in his shoulder so he sought medical treatment with Dr. P. The claimant said that Dr. P asked him about his job duties, and after he described them, Dr. P told him that his shoulder condition was work related. According to the claimant, _____, was the date he first knew that his right shoulder condition may be related to his employment. The claimant testified that he called his manager, Mr. S, on _____, and reported the injury. The claimant asserted disability from June 30, 1999, through July 30, 1999, and December 28, 1999, through January 27, 2000.

The carrier presented the testimony of Mr. S, who testified that he did not recall receiving a phone call from the claimant on _____, and that based on the employer=s procedures, the injury was reported on June 17, 1999, as reflected on the Employer=s First Report of Injury or Illness (TWCC-1). On cross-examination, the claimant testified his shoulder was tired and sore in December 1998. Dr. P states that the claimant gave a history of his job requiring heavy lifting and him having limitation of motion in his right shoulder for seven months. Based on the claimant=s testimony and Dr. P=s history, the carrier argued that the claimant=s date of injury was sometime in December 1998.

Dr. P diagnosed the claimant with right shoulder impingement syndrome and bursitis. Dr. P opines that the claimant=s right shoulder condition is work related because his symptoms

are consistent with the type of work the claimant performed. The carrier had the claimant examined by Dr. N. In a report dated September 9, 1999, which reflects that he was aware that the claimant had not been working since January 29, 1999, Dr. N states that the claimant's symptoms could be related to his employment. Dr. N subsequently issued a report stating that since the claimant had not worked since January of 1999, the claimant's shoulder injury was not work related.

The claimant had the burden to prove that he sustained an occupational disease, repetitive trauma injury. Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Based on the evidence presented, the hearing officer concluded that the claimant did not meet his burden of proving he sustained a repetitive trauma injury to his right shoulder. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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 overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find there was sufficient evidence to support the hearing officer's determination that the claimant did not sustain a compensable repetitive trauma injury to his right shoulder.

The date of injury for purposes of an occupational disease is "the date on which the employee knew or should have known that the disease may be related to the employment. [Emphasis added.]" Section 408.007. The date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). While a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. See Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury. The key question is when the claimant knew or should have known that his work activities may be causing his injury. The hearing officer was presented with conflicting evidence and resolved that the claimant knew or should have known his right shoulder condition was work related at the end of December 1998. We find the evidence sufficient to support the hearing officer's determination that the date of injury is _____.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs or, if the injury is an occupational disease, the date

the employee knew or should have known that the injury may be related to the employment. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury.

Section 409.002. The hearing officer, after considering all of the evidence, found that the claimant did not report the alleged injury to the employer within 30 days of _____, and did not have good cause for failure to give timely notice to the employer. The claimant did not assert giving notice to the employer prior to _____, or good cause for late reporting. We find there was sufficient evidence to support the determination of the hearing officer that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to notify his employer pursuant to Section 409.001.

The claimant appeals the hearing officer's finding of no disability. Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge