APPEAL NO. 001296

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 10, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury to his right shoulder; that the date of the claimed injury was _____; that the claimant did not have disability; that the respondent (carrier) is relieved of liability because the claimant without good cause failed to timely notify the employer of his injury; and that the claimant is not barred from pursuing workers' compensation benefits because he did not make an informed election of remedies. The claimant appealed, expressing his disagreement with the adverse determinations. The carrier replied that the decision is correct, supported by sufficient evidence, and should be affirmed. The election of remedies determination has not been appealed and has become final.

DECISION

Affirmed.

The claimant worked as a driver's helper on a beer truck. He testified that on _____, as he was pulling a loaded dolly over a curb at a customer's establishment, the load began to fall and he grabbed it with his right arm. In so doing, he felt pain in his right shoulder. He continued working until September 14, 1999, when, according to a stipulation of the parties, he reported the injury to his employer. He apparently has not worked since that date.

The claimant saw Dr. G on August 25, 1999, with complaints of right shoulder pain over the last three weeks. He admitted he told Dr. G that playing baseball seemed to make the pain in his shoulder worse. The claimant admitted he mentioned playing baseball to Dr. G. When he reported the incident on September 14, 1999, to Ms. S, he said he told her he hurt himself on _____. This was taken to mean the previous _____. He signed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on September 25, 1999, which listed a date of injury of _____. This portion of the form was apparently typed in by the employer. On November 30, 1999, he submitted a second TWCC-41 in which he listed _____, as the date of injury. When he reported the injury, he said, Ms. S said she would check into sending him to a doctor. He denied being told he would have to take a drug screen test. A memo of September 14, 1999, presumably from Ms. S, stated that she told the claimant he would have to take a drug screen test, but at that point he refused to go to the company doctor. A right shoulder MRI on September 2, 1999, suggested a tendon tear.

The claimant had the burden of proving he injured his right shoulder as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so presented a question of fact for the hearing officer to decide and could be proved based on his testimony alone if found credible.

Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer commented in his discussion of the evidence that the claimant's testimony was contradicted by the other evidence and that this "severely affected" his credibility. In particular, the hearing officer pointed out the mention of playing baseball as a cause of his right shoulder pain and the various dates put forth for the date of injury. In addition, he was unconvinced by the claimant's position on the correct date of injury, finding more credible Dr. G's report reflecting three weeks of pain before the visit on August 25, 1999. From this, the hearing officer found that the date of the claimed injury was _____.

In his appeal, the claimant asserts simply that he did establish a compensable injury was sustained on the date claimed. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. 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 claimant for that of the hearing officer. Rather, we find the evidence sufficient to support his determination that the claimant did not sustain a compensable right shoulder injury and that the date of the claimed injury was _____.

Because the parties stipulated that notice was given on September 14, 1999, this notice was untimely based on both the date of injury found by the hearing officer and the date asserted by the claimant. The claimant asserted good cause based on trivialization of the injury. The hearing officer did not find this position credible because the claimant had made three trips to Dr. G complaining about his shoulder; he was referred to another doctor for evaluation; and he had an MRI as discussed above. In his appeal of this determination, the claimant notes, correctly, that an express finding of no good cause was not made and adds that the hearing officer appeared to reject the notion that the claimant could trivialize a serious injury. We agree that no express finding of lack of good cause was made. From his discussion of the evidence, we infer that the hearing officer rejected claimant's contention of good cause. In particular, the hearing officer stated that the fact that the medical treatment proceeded to an MRI belied the notion that the claimant considered the claimed injury trivial. We cannot agree with the claimant's characterization of these statements by the hearing officer as reflecting a mistaken belief that a serious injury can never be trivialized.

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

Gary L. Kilgore
Appeals Judge