

APPEAL NO. 001522

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 June 6, 2000. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that the appellant (carrier) is not relieved of liability under Section 409.002 because the claimant timely reported his injury to his employer; and that the claimant has had disability as a result of his compensable injury from September 21, 1997, through the date of the hearing, June 6, 2000. In its appeal, the carrier argues that each of those determinations is against the great weight of the evidence and asks that we reverse the hearing officer's decision and enter a decision in its favor on each issue. In his response to the carrier's appeal, the claimant urges affirmance. The parties resolved an issue as to whether the claimant timely filed a claim by stipulating that the claimant's period for filing a claim was tolled pursuant to Section 409.008 because of the employer's delayed filing of its Employer's First Report of Injury or Illness (TWCC-1). The parties also stipulated that the claimant's average weekly wage is \$505.38.

DECISION

Affirmed.

The claimant testified that on _____, he was working for the employer driving a "log skidder" and that he hit a stump, causing him to be thrown against the cab. The claimant stated that he injured his left shoulder and cervical spine in the incident. He further testified that he sought medical care at the emergency room on the evening of _____ and that he also sought follow-up care at the hospital in the following week; however, the medical records from that treatment could not be found. The first available medical record concerns a September 29, 1997, hospital visit. That record reflects complaints of numbness on the left side of the claimant's body but it does not contain a history of the claimant's having been injured in the incident at work. There are additional records from the hospital through October 27, 1997, concerning follow-up care for the left-sided numbness and those records also do not reflect a history of the claimant's having been injured at work. On October 21, 1997, the claimant had a cervical MRI which revealed a disc herniation at C3-4. In hospital treatment notes dated October 27, 1997, there are also references to left rotator cuff pain and possible brachial plexus involvement.

On January 28, 1998, the claimant was referred to another hospital for an evaluation of a reported cervical herniation. The report from that visit states that the claimant is a "truck driver and in _____ he hit his left arm against something and since that time he has had pain in his left neck that occasionally radiates down to his left arm. . . ." The report concludes that not all of the claimant's symptoms are consistent with a herniated disc. In an April 6, 1998, report from the same hospital, the claimant is diagnosed with a possible left rotator cuff tear. That report contains a history of the claimant's having sustained an injury to his left shoulder in _____ "where he was knocked against a wall." Treatment

notes dated April 15, 1998, state that the claimant's left shoulder MRI suggests a left rotator cuff tear. Those notes contain a history of the claimant's having injured his left shoulder "hitting it against wall of heavy machinery he was driving _____." On April 28, 1998, the claimant underwent left shoulder surgery, specifically an open subacromial decompression, a rotator cuff repair, and a distal clavicle resection.

Concerning the issue of whether the claimant timely reported his injury to his employer, the claimant testified that shortly after his injury he reported it to Ms. C, a secretary with the employer who completed the TWCC-1 on behalf of the employer. The claimant further testified that whenever he missed time from work, he contacted Ms. C and she relayed that information to Mr. G, the owner of the company. In her recorded statement, Ms. C stated that within two weeks after the claimant began missing time from work in September 1997, she knew that the claimant had hurt his arm, when he hit a stump while driving the skidder and was thrown against the side of the cab. However, Ms. C further stated that she thought that the pain in the claimant's left arm from that incident had resolved and that he was missing time from work because of a stroke which was not work related. In his recorded statement, Mr. G also stated that in September 1997 when the claimant began missing time from work, he understood that the claimant had suffered a stroke and did not know that the claimant was alleging that he sustained an injury at work.

The claimant had the burden to prove that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier contends that the hearing officer's injury determination is against the great weight of the evidence, emphasizing the absence of the medical records for the claimant's treatment prior to September 27, 1997, and the failure of the early medical records to include a history of the claimant's having been injured at work. The carrier emphasized those factors at the hearing and the significance, or lack thereof, to the hearing officer in making his credibility determinations was a matter left to his discretion. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence stating that the claimant sustained a cervical and left shoulder injury in the incident at work on _____. The hearing officer's injury determination is supported by sufficient evidence and our review of the record does not reveal that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse it on appeal. Pool; Cain.

The carrier also argues that the hearing officer's determinations that the claimant timely reported his injury to the employer and, thus that the carrier is not relieved of liability under Section 409.002 are against the great weight of the evidence. The hearing officer determined that the claimant timely reported his injury to Ms. C. The claimant's testimony and the statement of Ms. C provide sufficient evidentiary support for the determination that within two weeks after the _____, incident, Ms. C was aware that the claimant had hurt his arm when he hit a stump with the skidder and hit his left arm on the cab of the skidder. In its appeal, the carrier argues that the evidence does not establish that Ms. C was in a supervisory position within the meaning of Section 409.001 such that notice to her satisfied the notice requirements of the 1989 Act. The claimant testified that Ms. C was the person he contacted in order to relay information to Mr. G about missing time from work. In addition, as noted above, Ms. C is the employee who completed the TWCC-1 for the employer. That evidence provides a basis for the hearing officer to draw an inference that Ms. C was an appropriate person to receive notice of injury for purposes of the 1989 Act. Accordingly, we perceive no error in the hearing officer's determinations that the claimant timely reported his injury to his employer and that the carrier is not relieved from liability for workers' compensation benefits in this instance.

The success of the carrier's challenge to the disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury or that it is relieved from liability due to the claimant's failure to give timely notice of injury to the employer. Given our affirmance of those determinations, we likewise affirm the determination that the claimant had disability as a result of his injury from September 21, 1997, through the date of the hearing.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Section Manager/Judge

Judy L. Stephens
Appeals Judge