APPEAL NO. 002287

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 August 17, 2000, in ____, Texas, with (hearing officer) presiding as the hearing officer. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of her employment on _____; and that the respondent, (employer) "did not waive the right to contest compensability of Claimant's claimed injury." In her appeal, the claimant asserts error in each of those determinations and also argues that the hearing officer erred in retrieving some documents from the Texas Workers' Compensation Commission's (Commission) file and admitting them as hearing officer's exhibits. In its response to the claimant's appeal, the employer urges affirmance.

DECISION

The hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment is affirmed. The determination that the employer did not waive its right to contest compensability in this case is affirmed on other grounds.

The hearing officer's decision contains a lengthy factual recitation which will not be repeated here. We will only briefly summarize those facts most germane to our decision. The claimant testified that on _____, she was working as an assistant at a residential unit for mentally retarded adults and that she was assigned to work the night shift from 10:00 p.m. to 6:00 a.m. She acknowledged that in September 1999 she sustained a compensable injury to her low back, while lifting a resident. On _____, the claimant was working in a modified-duty position. The claimant testified that on that date she was instructed to change the diapers of three of the adult residents by her acting supervisor, Ms. T. The claimant stated that she successfully changed one of the diapers, but that while she was lifting the legs of the second resident, she felt a sharp pain in her neck, shoulders, and upper back. On March 31, 2000, the claimant sought medical treatment from Dr. S, a chiropractor. Dr. S's Initial Medical Report (TWCC-61) gives a history of the claimant's having injured her neck, arm and shoulder, lifting a patient at work. Dr. S further noted that his examination revealed pain in the neck, upper back, arm, and shoulder. The claimant testified that Dr. S took her off work; that she subsequently changed treating doctors to Dr. B, a chiropractor; that Dr. B referred her for an MRI; that the MRI revealed a bulged cervical disc; and that Dr. B has continued her in an off-work status.

The claimant testified that she reported her injury to Ms. T and to Ms. G, the residence director of the facility, on the day it happened. Ms. G testified at the hearing that she did not learn that the claimant was claiming that she sustained a work-related injury on _____, until April 5, 2000, when the claimant was making a presentation to Ms. G concerning complaints that had been made about the claimant's job performance by Ms. T and the claimant's coworkers.

In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated March 30, 2000, the body parts identified as being injured are the low back, hips, neck, and shoulder. The nature of the injury is listed as "hard pains all over back and neck." In a second TWCC-41 dated April 19, 2000, the body parts listed as being injured are the "neck, both shoulders, and the upper back."

With respect to the waiver issue, the hearing officer determined that the carrier in this case is the State Office of Risk Management (SORM); that the SORM had accepted liability in this case; that the employer was contesting compensability in accordance with Section 409.011(b); and that the 60-day dispute requirement of Section 409.021(c) is inapplicable in this instance because there is an employer contest of compensability and not a carrier or self-insured contest of compensability. As noted above, after both sides had rested but before the close of the hearing, the hearing officer examined the Commission's file; retrieved a file-stamped copy of the employer's contest of compensability, which reflects that it was filed in the field office managing the claim on May 8, 2000; and admitted that document in evidence as a hearing officer's exhibit over the objection of the claimant.

The claimant had the burden to prove that she sustained an injury in the course and scope of her employment on _____. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That question presents 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(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides what facts have been established. 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. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that the claimant did not sustain her burden of proving that she was injured at work on _____, while changing a resident's diaper. The hearing officer simply was not persuaded that the evidence presented by the claimant established that an injury occurred. In making his determination, the hearing officer emphasized several perceived conflicts and inconsistencies in the claimant's testimony and evidence. As the fact finder, the hearing officer was free to consider those factors in making his credibility determination. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment on _____, 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 that determination on appeal. Pool; Cain.

The hearing officer further determined that the employer had not waived its right to contest compensability in this instance. In so doing, the hearing officer accepted the argument advanced by the employer that its contest was not subject to the 60-day limitation contained in Section 409.021 because it was a contest made by an "employer" under Section 409.011. In his decision, the hearing officer noted that Section 501.023, which provided that the state is self-insuring with respect to an employee's compensable injury, was repealed for claims based on a compensable injury that occurs on or after September 1, 1997. Effective September 1, 1997, the SORM was created "to administer the government employees workers' compensation insurance and the state risk management programs." Section 412.011(a). Section 412.012(c) incorporates the language previously contained in Section 501.023 and specifically provides that the state "is self-insuring with respect to an employee's compensable injury." In Texas Workers' Compensation Commission Appeal No. 000078, decided February 28, 2000, we rejected an argument advanced by the attorney general's office that the state agency that employed the claimant in that case was not bound by a benefit dispute agreement executed by the claimant and the SORM at a benefit review conference. In that case, as here, the argument was advanced that the SORM was the "carrier" and the state agency was an "employer." Appeal No. 000078 stated that "[s]ince the SORM has statutory authority to administer the claims of [state agency] personnel and accepted liability for the injury, that is binding on the State of Texas, which is the ultimate self-insured employer." That same reasoning applies here to establish that the employer is not a separate entity such that it is permitted to file a contest of compensability under Section 409.011. Rather, the contest of compensability in this instance had to be filed within 60 days of the date written notice of the injury was received in accordance with Section 409.021(c). As such, the hearing officer erred in determining that the 60-day time limit to dispute compensability was inapplicable here.

Nevertheless, we can affirm the hearing officer's determination that the right to contest compensability was not waived in this case. The hearing officer reviewed the Commission file and admitted into evidence a document reflecting that the contest of compensability was filed on May 8, 2000. The claimant contends that the hearing officer abused his discretion in obtaining and admitting that evidence. We cannot agree that he did so. While it would have been a better practice for the employer to have offered an exhibit establishing the date that the contest of compensability was filed, the hearing officer was acting within his authority in obtaining this information. Section 410.163(b) states that a hearing officer "shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made." In order to resolve a waiver issue, a hearing officer must know the date written notice of the alleged injury was received and the date of the dispute. Accordingly, the hearing officer was permitted to develop the record to include information essential to the resolution of the issue before him. Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994. The hearing officer did not make a finding as to the date of first written notice; however, we need not remand for a determination of that date. It is axiomatic that written notice could not have been received prior to _____, the date of the alleged injury. Accordingly, the earliest date the 60-day period could have expired in this case is May 27,

2000. As such, the May 8, 2000, contest of compensability was timely filed and the injury did not become compensable as a matter of law under Section 409.021(c).

The hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment on _____, is affirmed. His determination that the right to contest compensability was not waived is affirmed on other grounds.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge