APPEAL NO. 002305

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 September 8, 2000. With respect to the issue before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that she did not timely report her alleged injury to her employer; and that she did not have disability within the meaning of the 1989 Act because she did not sustain a compensable injury. In her appeal, the claimant challenges each of those determinations as being against the great weight of the evidence. In addition, the claimant asserts error in the hearing officer's having denied her motion to add an issue of whether the respondent (self-insured) timely and sufficiently contested compensability in accordance with Section 409.021(c). In its response to the claimant's appeal, the self-insured urges affirmance.

DECISION

Affirmed.

The claimant testified that she began working as a custodian for the self-insured in December 1990. She stated that on _____, she and her coworkers were removing the table from a school cafeteria to strip the floor and that when she moved one of the tables, she felt a sharp pain in her right arm/shoulder. The claimant testified that she told her supervisor, Mr. B, about her injury shortly after it happened; that he did not respond and acted like he did not hear her; and that, as a result, she also reported her injury to Mr. J, the lead man. The claimant introduced a handwritten statement dated May 19, 2000, signed by Mr. J stating that he remembered the claimant's having told him she hurt herself "on _____."

The claimant testified that she thought she had just pulled a muscle so she continued working. The claimant acknowledged that she did not seek medical attention until November 8, 1999; however, she stated that the problems with her right shoulder persisted and worsened. The claimant saw Dr. N on November 8, 1999. In a record from that visit, Dr. N's diagnosis was "sprain both shoulders." On January 10, 2000, Dr. N noted that the pain in the claimant's right shoulder was worsening and referred her to (clinic). The claimant stated that she was not able to schedule an appointment with the clinic because they would not accept a workers' compensation patient. On March 10, 2000, the claimant began treating with Dr. G, a chiropractor. On April 28, 2000, Dr. G referred the claimant for an MRI of her right shoulder, which revealed a rotator cuff tear.

Initially, we will consider the claimant's assertion that the hearing officer erred in denying her motion to add the issue of whether the self-insured timely and sufficiently disputed compensability in this case. The claimant filed her motion to add the issue in response to the benefit review conference (BRC) report. The self-insured filed a response objecting to adding the issue; however, the Texas Workers' Compensation Commission (Commission) did not rule on the motion prior to the hearing. At the hearing, the claimant

reurged the motion and the self-insured objected to adding the issue. Both parties agreed that the issue had not been discussed at the BRC. The hearing officer denied the motion; however, he did not state the grounds for his denial. Nonetheless, based on the fact that the parties agree that the issue was not discussed at the BRC, we can infer that the hearing officer denied the motion because the claimant did not show good cause to add the issue, as is required under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)) when the parties do not agree to add the issue. At the hearing, the claimant did not advance any good-cause argument or evidence. As such, we cannot agree that the hearing officer erred in failing to add the issue.

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 moving furniture. The hearing officer simply was not persuaded that the evidence presented by the claimant established that the rotator cuff tear in her right shoulder was caused by an injury at work. 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 a compensable injury 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. Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer further determined that the self-insured would be relieved from liability if the claimant had sustained an injury in the course and scope of her employment in accordance with Section 409.002 because of the claimant's failure to timely report her alleged injury to her employer. As the fact finder, the hearing officer was free to discount the claimant's testimony that she reported her alleged injury to Mr. B and Mr. J on the date

it occurred. With respect to the written statement from Mr. J stating that he remembered the claimant's having reported an injury to him "on August 8, 1999," the hearing officer discounted that evidence based on the use of the August 8th date rather than August 10th, the date of injury claimed by the claimant. The claimant explained that the person who assisted her at one of the BRCs prepared the statement for Mr. J to sign and that her assistant inadvertently listed the incorrect date in the statement. However, the hearing officer was not required to accept that explanation and he was acting within his province as the fact finder in deciding to discount the statement and in determining that the alleged injury was not timely reported. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal. Pool; Cain.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge