

## APPEAL NO. 002434

Following a contested case hearing (CCH) held on October 2, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant's (claimant herein) date of injury was \_\_\_\_\_; that the claimant not did sustain a compensable injury; that the claimant did not timely report his injury without showing good cause for not timely reporting; that the respondent (carrier herein) was relieved of liability; and that the claimant's injury was not compensable and the claimant did not have disability because the carrier was relieved of liability. The claimant appeals all adverse findings by the hearing officer as being contrary to the evidence. The carrier responds that the decision of the hearing officer was sufficiently supported by the evidence.

### DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he suffered a repetitive trauma injury from lifting pallets at work, which he was required to do because the lift on the machine he was operating was broken. The hearing officer found that the claimant suffered an injury and this is not appealed. The case turns on the question of whether the claimant gave timely notice, which in turn partly turns on the claimant's date of injury. The claimant testified that he did not remember when he first started suffering shoulder pain, but that he began treating with his family doctor for shoulder pain in late December of 1999. The claimant was referred to Dr. B, who diagnosed a rotator cuff tear on \_\_\_\_\_. The claimant underwent a right rotator cuff repair on February 24, 2000.

The claimant testified that he first became aware that his injury was work-related on \_\_\_\_\_, when he was informed of this by Dr. B. The claimant testified that he reported this injury to Mr. S on February 16, 2000. Mr. S denies that the claimant reported a work-related injury on February 16, 2000, although the claimant told him on January 17, 2000, that his machine was broken and "someone might get hurt." Ms. L with the employer testified that the claimant discussed insurance coverage with her on March 2, 2000. The claimant's first written report of injury was dated March 7, 2000, and lists the date of injury as January 3, 2000. Dr. B's report of \_\_\_\_\_, states as follows:

This 59-year old gentleman presents for orthopedic evaluation of bilateral shoulder pain that has been present over the last two to three months. He thinks it has been aggravated with work activities.

Section 401.011(26) states that an injury means damage or harm to the physical structure of the body and that the term includes an occupational disease. Section 401.011(34) defines occupational disease to include repetitive trauma injuries. Section 408.007 provides that the date of injury for an occupational disease "is the date on which

the employee knew or should have known that the disease may be related to the employment." The hearing officer determined that the claimant's date of injury for his occupational disease was \_\_\_\_\_, being the date he first knew that his occupational disease or condition was related to his employment. The claimant contends that he did not know his occupational disease was related to his employment until \_\_\_\_\_. The carrier asserts that the evidence showed the claimant should have known that his shoulder problem was related to work by January 3, 2000. The date of injury under Section 408.007 is a question of fact for the hearing officer to resolve. 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 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard, we find that the hearing officer's determination regarding the date of the injury was sufficiently supported by the evidence, particularly the January, 24, 2000, report of Dr. B.

The hearing officer's resolution of the timely reporting issue was closely related to her resolution of the date of injury. The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. Failure to comply with this provision relieves the carrier of liability. Section 409.002. There was conflicting evidence concerning when the claimant reported his injury to the employer. The claimant contended that he reported his injury on February 16, 2000. The carrier contended that the claimant did not report his injury until March 7, 2000. There was evidence that the claimant discussed his shoulder problem with Ms. L on March 2, 2000. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). In light of the conflicting evidence we do not find legal error in the hearing officer's finding as a matter of fact that the claimant reported his injury on March 2, 2000. Given a date of injury of \_\_\_\_\_, his report of injury was clearly untimely.

The claimant's attack on the hearing officer's finding of no disability is predicated on his challenge to the hearing officer's resolution of the timely report of the injury issue. Having affirmed the hearing officer's finding the injury was not timely reported, we likewise reject the claimant's challenge to the hearing officer's disability finding.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge