APPEAL NO. 002472

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 26, 2000. With respect to the issues 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 because she did not sustain a compensable injury. In her appeal, the claimant asserts that the hearing officer's injury, notice and disability determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, she was lifting two 30-packs of beer and she developed a sharp pain in her low back. She stated that she completed her shift that day and went to the emergency room at the hospital, but was not able to see a doctor because she had to leave the emergency room to pick up her children from school. She stated that on October 15, 1999, she returned to the emergency room and was diagnosed with muscle spasms in her back. The claimant testified that she told the doctors in the emergency room that she had injured her back lifting cases of beer at work; however, the records from that visit do not reflect a history of the claimant's having been injured at work. Indeed, those records state that the onset date of the claimant's pain was October 9, 1999, and the space provided for listing the mechanism of injury is blank.

The claimant testified that she was taken off work for two days at the emergency room on October 15, 1999, and that after she left the hospital she took the off-duty slip to her employer and gave it to Ms. P. The claimant stated that she told Ms. P that she had injured her back at work. In addition, the claimant maintained that she had reported her injury to Mr. S on _____, shortly after it occurred. Ms. P testified that she recalled the claimant's having given her the off-duty slip on October 15, 1999; however, Ms. P maintained that the claimant did not tell her that she had been injured at work. Mr. S denied that the claimant had reported a work-related injury to him on _____, insisting that he did not learn that the claimant was alleging she had been injured at work until January 2000, when he received a telephone call from a chiropractor's office so advising him.

The claimant acknowledged that she did not seek medical treatment in the period from October 16, 1999, to January 25, 2000, and that she continued to work during that period. On October 26, 2000, the claimant began treating with Dr. L, a chiropractor. Dr. L testified at the hearing that he has diagnosed the claimant with an acute traumatic lumbar sprain, lumbar subluxation, lumbar radiculitis, and sciatica due to disc involvement. Dr. L stated that he took the claimant off work on January 26, 2000, and that he continues to

have the claimant off work. Dr. L opined that the claimant's low back complaints are due to her work-related injury of _____, which resulted from her lifting cases of beer. Dr. L stated that he could not give an opinion as to when the claimant could return to work because he had not been able to refer the claimant for testing and an orthopedic consultation; however, he acknowledged that the claimant's MRI was normal. The claimant testified that her condition is "much improved" under Dr. L's care and that she did not know why Dr. L had not released her to return to work.

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. The hearing officer simply was not persuaded that the evidence presented by the claimant established that she sustained damage or harm to the physical structure of her body as a result of the activity of lifting cases of beer at work on _____. In making his determination, the hearing officer noted the claimant's lack of medical treatment in the period between October 15, 1999, and January 26, 2000, and the claimant's normal MRI. The hearing officer also indicated that he did not find Dr. L's testimony credible. The hearing officer was free to consider each of those factors in making his credibility determinations. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not sustain a compensable injury 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.

Next, we consider the hearing officer's determination that the claimant did not timely report her alleged injury to her employer. There was conflicting evidence on the issue of whether the claimant reported the injury to Mr. S on _____, and whether the claimant told Ms. P on October 15, 1999, when she gave her a copy of the off-work slip, that she had sustained an injury at work. The hearing officer resolved those conflicts by accepting the testimony of Ms. P and Mr. S over that of the claimant. He was acting within his province as the fact finder in so doing. Nothing in our review of the record demonstrates that his 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.

Given our affirmance of the determination that the claimant did not sustain a compensable injury and that she did not timely report her alleged 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's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Robert W. Potts
Appeals Judge