APPEAL NO. 002537

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 October 10, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury as a result of repetitive activities performed at work; that the date of the alleged injury is _____; and that the claimant did not timely report her alleged injury to her employer. In her appeal, the claimant asserts that the hearing officer's injury, notice and date-of-injury determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. In its response, the carrier also seeks to appeal Findings of Fact Nos. 5 and 6; however, the response was not timely filed to serve as an appeal. Records from the Texas Workers' Compensation Commission (Commission) demonstrate that the carrier's Austin representative signed for the hearing officer's decision on October 18, 2000. Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)) provide that in order to be timely an appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. The 15th day after October 18, 2000, was Thursday, November 2, 2000. The purported appeal was sent to the Commission by Federal Express on November 7, 2000, and therefore is untimely to serve as an appeal.

DECISION

Affirmed.

The claimant testified that in December 1999, she sustained a repetitive trauma injury to her low back from "rocking" a dumpster in an attempt to empty it. She stated that in _____, she strained her back performing the same activity; however, she believes that she herniated a lumbar disc performing the activity in December and thus, that her date of injury was in December. She maintained that she reported her injury to her supervisor in December, just as she had told her supervisor in September that she believed she had injured her back emptying the dumpster.

The claimant sought medical treatment from her family doctor, Dr. R, on December 14, 1999, with complaints of diarrhea and vomiting, as well as low back pain. Dr. R's report from that visit does not contain a history of the claimant's having been injured at work and the claimant acknowledged that she did not tell Dr. R that she had been injured at work. On February 14, 2000, the claimant underwent a lumbar MRI that revealed a left paracentral disc protrusion at L5-S1 and small posterior annular tears at L3-4 and L4-5. On May 4, 2000, Dr. P, to whom the claimant was referred by Dr. R, performed a lumbar discogram which identified L4-5 and L5-S1 as the pain generators in the claimant's lumbar spine. In a July 12, 2000, "To Whom it May Concern" letter, Dr. R stated that the claimant's disc protrusion at L5-S1 and the annular tears at L3-4 and L4-5 were "consistent with her line of employment as a lift truck driver."

With respect to the date of her injury, the claimant gave conflicting testimony at the hearing. On direct examination, she stated that she did not realize that her back injury was work related until December 1999. However, on cross-examination, the claimant stated that she realized that she had injured her back at work in _____. In addition, the claimant stated on her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which she completed on February 17, 2000, that she first knew that her occupational disease may be related to her work in _____. Two occupational nurses for the employer testified that the claimant did not report that she had injured her back at work until February 2, 2000.

The claimant had the burden to prove that she sustained a compensable injury. 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 sustained a compensable injury to her lumbar spine. 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 performing repetitively traumatic activities at work. The hearing officer rejected the claimant's testimony as to the repetitive nature of the work duties she performed. The hearing officer was acting within his province as the finder of fact in so doing. 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 it on appeal. Pool, *supra*; Cain, *supra*.

There was also conflicting evidence on the issue of date of injury and that date the claimant reported her injury to her employer. The hearing officer resolved those conflicts by giving more weight to the evidence demonstrating that the claimant first knew or should have known that her alleged injury was work related by _____, and that the claimant did not report her alleged injury to her employer until February 2, 2000. The resolution of those conflicts was a matter left to the hearing officer as the fact finder. Our review of the record does not demonstrate that the hearing officer's date-of-injury or notice determinations are so contrary to the great weight and preponderance of the evidence as to compel their reversal on appeal. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury and did not timely report her alleged injury to her employer, 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:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge