APPEAL NO. 990782

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 March 5, 1999. With respect to the issues before him, the hearing officer determined that: (1) the cross-appellant (claimant) sustained a compensable injury in the course and scope of his employment; (2) the date of injury is _____; (3) claimant timely reported his injury; and (4) claimant did not have disability. Claimant appeals the disability determination, contending that he had disability from his compensable injury. Cross-respondent (carrier) responds that the Appeals Panel should affirm the disability determination. Carrier appealed the injury and timely notice determinations on sufficiency grounds. Claimant did not respond to carrier's appeal.

DECISION

We affirm in part and reverse and remand in part.

Claimant contends the hearing officer erred in determining that he did not have disability. Claimant asserts that he established that he had disability from the compensable injury.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id*. Claimant testified that he continued to work driving a truck his regular hours after his injury, although he had pain and stopped to rest while working. He said he was terminated in November 1998 and that he was not sure why.[1] Claimant said that after he lost his job, he sought work as an equipment operator, but then he did not continue looking for work because he was not "at 100%." Claimant indicated that truck driving jobs were plentiful. Termination for cause does not necessarily preclude a finding of disability. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, it was essentially undisputed that the claimant had a conditional work release regarding the use of his left arm. The hearing officer noted that an MRI showed a tendon tear in his shoulder. A September 1998 medical report stated that claimant should drive with his right arm and avoid positions that would aggravate his condition. A December 1, 1998, off-work slip stated that claimant was to do no heavy lifting with his left arm, and none until he was evaluated by an orthopedic specialist. It also indicated that claimant had a weight limit for lifting. Claimant said he was unable to see the specialist because his claim was denied.

[1]There was evidence that claimant's employment was terminated because he did not take a direct route while driving.

The 1989 Act does not "impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his training, experience and qualifications." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The 1989 Act "is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of the injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer." The Appeals Panel has also stated, under the particular facts of the cases, that a restricted release to work is evidence that the effects of the injury remain and that disability continues; that where the medical release is conditional and not a return to full duty because of the compensable injury, disability, by definition, has not ended; and that an employee under a conditional work release does not have the burden of proving inability to work and is not required to look for work. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997.

We are unable to tell whether the hearing officer considered the applicable law regarding disability and conditional work releases. For this reason, we remand the issue of disability to the hearing officer for reconsideration.

In it's cross-appeal, carrier contends the hearing officer's determination that claimant sustained a compensable injury is not supported by sufficient evidence. Carrier asserts that on the alleged date of injury, claimant was not in the city where he alleged he was injured. Carrier contends that claimant changed the dates that he alleged the injury occurred on, apparently asserting that claimant was not a credible witness.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26).

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 or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he sustained a compensable injury to his shoulder and back when he slipped while getting out of his truck. An MRI report states that claimant has a tendon tear in his shoulder. The hearing officer resolved any conflicts in the evidence and determined that claimant sustained a compensable injury. We will not substitute our judgment for the hearing officer's because his determination is not so against the great

weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier next contends that the hearing officer erred in determining that claimant timely reported his injury to employer within thirty days of the date it occurred. Carrier asserts that the hearing officer's determination is against the great weight and preponderance of the evidence.

Claimant testified that he was injured on _____, and that he reported the injury to his supervisor, Mr. L. Claimant said he was not sure of the date, but he went to Mr. L's office and told him about the injury. He said Mr. L told him to tell the office secretary, Ms. T, to make a doctor's appointment for him. Claimant said he asked Ms. T if Mr. L had mentioned it, that the secretary said he had not, and that Ms. T made a doctor's appointment for him. Claimant said that he went to see the "company doctor" on August 25, 1998. Mr. L indicated that he paid the bills for claimant's medical treatment, but stated that he was not aware of what he was paying. The medical reports indicate that employer arranged for claimant to receive medical care.

Generally, a claimant must report an injury to his employer within the requisite 30 day period, Section 409.001, unless there is good cause for the failure to timely report the injury. Section 409.002(2). The purpose of the notice provision is to give the insurer an opportunity to immediately investigate the facts surrounding an injury. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). To fulfill the purpose of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related. The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Section 409.001(b)(2). Where the claimant offers evidence that the supervisor was notified of the injury, but the supervisor testifies he or she was not notified, a question of fact exists for determination by the trier of fact. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991.

The hearing officer was the sole judge of the witnesses' credibility and obviously decided that the credible evidence showed that an injury was reported. We will not substitute our judgment for the hearing officer's in this regard because his determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, 709 S.W.2d at 176.

We affirm that portion of the hearing officer's decision that determines that claimant sustained a compensable injury and that he timely reported the injury. We reverse the hearing officer's disability determination and remand this case to the hearing officer for reconsideration of that issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge