APPEAL NO. 992797

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 19, 1999. He (hearing officer) determined that the respondent/cross-appellant (claimant) sustained a compensable left shoulder injury on _____; that she timely reported the injury; and that she had disability from February 15 to July 1, 1999. The appellant/cross-respondent (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The claimant replies that these determinations are correct and should be affirmed. In a separate appeal, the claimant contends that the beginning and ending periods of disability are not supported by the evidence. The carrier replies that while it disagrees with the determination of disability, the findings of no disability before and after the period found by the hearing officer is sufficiently supported by the evidence. Another issue of average weekly wage was resolved by agreement of the parties.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant worked as a nurse's assistant for the employer hospital. She described the position as lower than a licensed vocational nurse and registered nurse (RN). According to the claimant, on _____, she felt a pop in her shoulder, but no immediate pain, while moving a patient. She continued her shift that day and was off the rest of the week. She said that on Saturday night at home, as she tried to get up from the floor, she could not lift her left arm. She said she continued to have problems with it when she went back to work on December 22, 1998. Upon her arrival at work, she said, she went to the briefing room where the outgoing and incoming charge nurses were present, and told them about her pain and the incident at work on _____. According to the claimant, one of the charge nurses present was Ms. S. The claimant also said that the charge nurses give her instructions about what to do at work and she has to follow these instructions. She first received medical treatment on February 2, 1999, from Dr. R. The diagnosis was left shoulder impingement syndrome with rotator cuff partial tear.

The hearing officer considered this evidence and found that she suffered a compensable left shoulder injury as claimed on _____. The carrier appeals this determination, arguing that the claimant did not meet her burden of proving a compensable injury, *see* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ), and that the hearing officer improperly placed the carrier's credibility in issue because of its actions in investigating this claim. Whether the claimant sustained an injury in the manner claimed presented an issue of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer considered the delay in the manifestation of an injury and claimant's ability to work at her regular job at least through the day of the injury and still found the claimant credible in her assertions of an injury. While much unnecessary time

was spent at the CCH going over what the carrier did or did not do to track down potential witnesses, we cannot conclude from the record before us that by finding a compensable injury the hearing officer was, in effect, penalizing the carrier for its adjusting practices. Under our standard of appellate review, we find the evidence that is, the claimant's testimony deemed credible by the hearing officer and the medical diagnosis, sufficient to support the finding of a compensable injury. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Section 409.001 requires an injured employee to report the injury by the 30th day after it happens. Notice is effective if given to an employee of the employer who holds a supervisory or management position. Section 409.001(b)(2). Failure to do so, with certain exceptions, renders the carrier and employer not liable for benefits. Whether and, if so, when notice is given are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The claimant testified that she reported both an injury and that the injury occurred while lifting the patient on _____, at a meeting with the charge nurses on December 22, 1998. Whether she, in fact, did so was for the hearing officer to decide. The carrier asserts that, in any case, a charge nurse was not a supervisory or management employee eligible to receive notice of an injury. Rather, it describes the charge nurse as simply another employee who happened to make more money than the claimant. The director of human resources testified and, surprisingly, was unable to shed any light on this question. In Texas Workers' Compensation Commission Appeal No. 960855, decided June 17, 1996, the Appeals Panel discussed at length, with numerous citations, the concept of supervisor or manager in the context of notice of injury, including our early decision in Texas Workers' Compensation Commission Appeal No. 92694, decided February 8, 1993, which urged a "less grudging reading and application" of Section 409.001. We have also noted that a supervisor to whom notice is given need not be the claimant's supervisor, Texas Workers' Compensation Commission Appeal No. 951457, decided October 11, 1995, and that a subjective belief by a claimant that the person to whom notice is given is a supervisor does not make notice to that person sufficient absent actual supervisory status. Texas Workers' Compensation Commission Appeal No. 950430, decided May 4, 1995. We have also discussed whether a "lead operator," lead clerk," or "dispatcher" was a supervisor, and determined that the lack of ability to hire, fire or discipline is not necessarily controlling on this issue. *See* Texas Workers' Compensation Commission Appeal No. 94028, decided February 14, 1994; Appeal No. 92694, *supra*; and Texas Workers' Compensation Commission Appeal No. 950396, decided April 25, 1995. Ultimately, it was up to the hearing officer to decide if the claimant established that the charge nurse met the concept of supervisor. Certainly, he could have concluded from the evidence that the claimant was the lowest ranking person and from common sense that a charge nurse, described as an RN, could assign duties to a nurse's aide. Even were we to assume, as the carrier suggests, that at most the charge nurse was merely a conduit for instructions, this would still not, as a matter of law, exclude the charge nurse from being a supervisor. *See also* Texas Workers' Compensation Commission Appeal No. 950455, decided May 9, 995. We find no merit in this assertion of error.

Finally, the carrier argues that because there was no compensable injury, there could be no disability. Having affirmed the findings of timely notice and a compensable injury, we also find no merit in this position on appeal.

The claimant appeals the hearing officer's determination that disability only began on February 15 and ended on July 1, 1999. Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant testified that she received additional pay for working the night shift. At some point in time, not made clear, she was placed on light duty. She appeared to assert in her testimony that on light duty she lost the night pay differential and worked fewer hours.[1] In a transcribed telephone conversation with an adjuster, the claimant said she was only claiming disability as of June 15, 1999, the date she was terminated because, she said, on this day the carrier denied compensability and the employer refused to continue to provide light duty for a nonwork-related injury. In Finding of Fact No. 10, the hearing officer found that the claimant "worked a light duty schedule until June 15, 1999 at reduced wages." (Emphasis added.) We are unable to deduce from the remaining findings of fact or discussion of the evidence, why the hearing officer settled on February 15, 1999, as the date to begin disability.

The hearing officer based his determination that disability ended on July 1, 1999, on the following report of Dr. R of a May 11, 1999, visit: "The patient will continue on light duty status avoiding heavy lifting and carrying as well as overhead reaching with the left shoulder to prevent exacerbation of her symptoms. . . . The patient will return to the clinic in six weeks for a re-evaluation at which point it is anticipated that she would have reached the point of maximum medical improvement [MMI]." The claimant testified that she never returned to Dr. R in six weeks, but believed her next appointment was not until December 1999. In Finding of Fact No. 11, the hearing officer found: "Claimant could have been released to full duty no later than July 1, 1999 based on the May 11, 1999 report of her treating doctor." We believe this finding confuses the distinct concepts of MMI and the end of disability. While the payment of temporary income benefits requires both disability and the non-attainment of MMI, the two are not the same. We also do not believe that a statement of reevaluation and anticipated MMI provide sufficient evidence on which to base an end of disability.

For the foregoing reasons, we reverse the findings that disability began on February 15 and ended on July 1, 1999, and remand the issue of the beginning and ending dates of disability for further express findings based on the evidence already submitted that the claimant was or was not able to earn her preinjury wage before February 15 and after July 1, 1999. We affirm the findings of a compensable injury and timely notice of the injury.

[1]Pay records were in evidence, but were largely unintelligible without explanations.

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.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge