APPEAL NO. 92563

This appeal arises under the Texas Workers' Compensation Act, TEX. CIV. STAT. ANN. arts. 8308-1.01 et seq. (Vernon Supp. 1992)(1989 Act). A contested case hearing was held on June 23, 1992 at (city), Texas, (hearing officer) presiding. We reversed and remanded the decision of the hearing officer because the tape which recorded the proceedings below had a significant portion which was blank. *See* Texas Workers' Compensation Commission Appeal No. 92379, decided September 4, 1992.

Following a September 30th hearing on remand in which the missing portion of the record was reconstructed but no additional evidence taken, the hearing officer issued a decision adopting in its entirety her earlier decision and order. In that document, the hearing officer held that the claimant was injured in the course and scope of his employment and that he timely notified his employer of his injury. The hearing officer accordingly ordered claimant's employer's workers' compensation insurance carrier and appellant herein (carrier) to pay claimant's medical benefits and temporary income benefits when and as they accrue.

On appeal, the carrier disputes those findings of fact and conclusions of law which state that claimant's injury arose out of and in the course and scope of his employment on (date of injury), that he reported the injury to his employer the same day, and that carrier is liable for compensation benefits for this claim. No response was filed by the claimant.

DECISION

We affirm the decision and order of the hearing officer.

Claimant was employed as a delivery driver for (employer) and was making deliveries on (date of injury), when the truck he was driving collided with another vehicle at an intersection. The claimant testified that he stood up to hit the brakes, and on impact he fell back against the seat. He called his employer to report the accident and spoke with (Mr. A), the parts and service director. He said he told Mr. A his neck was bothering him from the accident, and said he also told his supervisor, (Mr. T), the same thing that evening. He continued to work following the accident, although beginning in October he began seeing (Dr. R), a dentist, for treatments (hot packs and injections) on his lunch hour. He stated that he told Mr. T that he was seeing Dr. R because of problems from the accident. Dr. R's narrative report dated February 15, 1992, confirms that the claimant was first seen on October 17, 1991 with complaints of headaches, neckaches, upper and lower backaches, pain behind eyes, eyes sensitive to light, clicking of jaw joint, ear pain and ringing/buzzing in ears, and numbness. Dr. R also referred claimant to (Dr. E) who performed an initial neurological examination on January 30, 1992.

In the report of that examination, Dr. E recited claimant's history in part as follows:

[claimant] presents with symptoms of neck pain starting about three weeks

> ago. He saw a physician who noted that he had muscle spasm. He has received physical therapy; also, had trigger point injections performed by [Dr. R] which resulted in some relief. However, he is still complaining of lower cervical pain with weakness and numbness in his right arm.

Dr. E also noted that claimant had had cervical pain in the past, off and on. He stated his impression as "cervical radiculopathy and pain secondary thereto."

Claimant testified that his symptoms worsened to the point where he could not move his arm to pick up a glass of water. On February 3rd he was admitted to the Methodist Hospital. Dr. E's notes on admission state, in part, that claimant "underwent a car accident in 11/91 (sic), with cervical injury. No documented whiplash at that time, that (sic) improved over the next several days and then he started experiencing excruciating cervical pain and right upper extremity weakness with right upper extremity generalized numbness." On cross-examination, claimant said the (date of injury) accident was the only motor vehicle accident he had in 1991.

On February 4th claimant underwent cervical and lumbar myelograms which disclosed minimal spondylosis in the lower cervical spine, probable central herniated nucleus pulposus at the L4-5 level, and right-sided herniated nucleus pulposus, with superiorly directed fragment at the L2-3 level. An MRI and CT of the cervical spine found probable small disk herniation right C6-7, as well as minimal to moderate spondylosis at C4-5 and C5-6.

While in the hospital, claimant was seen by (Dr. S) as part of a neurosurgical consultation because of claimant's right arm pain. Dr. S's examination revealed the possibility of a diffuse right arm deficit, which he said "may include multi-level root or even spinal cord involvement and possibly brachial plexus as well." Dr. S's report also said, "[a] delayed progression of his symptoms from his motor vehicle accident complicates the differential diagnosis, in that this may represent the progression of nerve root contusion or brachial plexitis or brachial plexus contusion. However, the time between the accident and his current level of symptoms makes this somewhat less likely."

After an April 2nd follow-up visit, Dr. E noted that the claimant remained "significantly distressed," and he recommended cervical laminectomy. The doctor's notes also said, "[t]he patient does relate that, although he has had neck pain on and off, he did not have neck pain prior to October of 1991, and this neck pain started after a MVA. The most severe bout of pain, however, began in early January and has persisted since."

Mr. T, employer's parts manager and claimant's supervisor, testified that on the day of the accident claimant said nothing to him about any problems with his body, and did not ask to see a doctor or to take off work because of any problems. Mr. T said he was aware that claimant was seeing a doctor on his lunch hour, although he said he first knew about

claimant's physical problems on February 25, 1992 when claimant called him to say his doctor said he needed to be off work two to three weeks because his neck and shoulder were hurting. Mr. T said he did not ask and claimant did not state why he was in pain. In early March, when claimant called Mr. T to ask him to give the doctors some information, was when he said he was first aware that claimant's injury arose from the accident. The employer's first report of injury shows that claimant initially lost time from work on January 7, 1992, although claimant testified that he had also missed work due to the accident before that date.

On appeal, the carrier first challenges Finding of Fact No. 6 and Conclusion of Law No. 5 that the claimant on (date of injury) reported to his employer that he had hurt his neck in the course and scope of his employment. The carrier says the only evidence to support this is claimant's own testimony, and that controverting evidence--including Mr. T's testimony and the facts that the claimant did not begin to miss work until early 1992 and that no mention of an automobile accident was contained in Dr. R's narrative report--is to the contrary. We find, however, that the hearing officer's determination on this issue is supported by the evidence of record. Claimant testified that he told both Mr. T and Mr. A that his neck was hurting because of the accident when he returned to employer's place of business, but that their concern was with fixing the other vehicle. He also stated he mentioned his physical problems to Mr. T on other occasions. Moreover, by his own testimony claimant acknowledged that he continued to work and did not begin to seek medical treatment immediately. We note also that Dr. R's February 15th report does mention claimant's (month) accident. While this evidence is in conflict with other evidence in the record, when presented with conflicting evidence, the hearing officer may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). As trier of fact, the hearing officer may believe all, part, or none of any testimony; judge credibility; assign weight; and resolve conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied).

Carrier also disputes Finding of Fact No. 5 and Conclusion of Law No. 4, that claimant suffered an injury that arose out of and in the course and scope of his employment on (date of injury). Carrier cites evidence in support of this contention, such as the police report's failure to note an injury, claimant's failure to miss work immediately, medical reports noting prior problems and dating the auto accident as occurring in November, and Dr. S's report. The carrier also challenges Finding of Fact No. 7 which states that the claimant's testimony was found to be credible. Clearly, the credibility of the witnesses was a key component of this case. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given. Article 8308-6.34(e). Judging a witness' credibility is clearly within the hearing officer's province. With regard to the existence of an injury, a claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). Where there is expert medical testimony, the trier of fact also judges the weight to be given such testimony, and may resolve conflicts and inconsistencies in the testimony of expert medical witnesses.

Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will not substitute our judgement for that of the hearing officer if a challenged finding is supported by some evidence of probative value and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-El Paso 1991, no writ).

Finally, carrier disputes Conclusion of Law No. 6 which states that the carrier is liable for compensation benefits on this claim. The carrier refers first to its arguments regarding on the job injury, which we have already addressed. It additionally argues that the claimant, by initially seeking benefits under a group health policy, made an informed choice between two available remedies, citing Smith v. Home Indemnity Company, 683 S.W.2d 559 (Tex. App.-Fort Worth 1985, no writ), and thus claimant's rights to workers' compensation benefits are barred.

The court in Smith, *supra*, cited the test for determining whether an election of remedies has occurred, as articulated by the Texas Supreme Court in Bocanegra v. Aetna Ins. Co.. 605 S.W.2d 848 (Tex. 1980):

> The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4)constitute manifest injustice. *Id* at 851.

The court added that a choice between inconsistent remedies or rights does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of intelligent choice.

The claimant testified that while he knew the employer had insurance coverage on his vehicle, he was not aware that employer had workers' compensation insurance. He said that on a date he could not remember, he called his employer to ask about seeing the company doctor, and was told that doctor only treated "cuts and bruises." At that point, he said his wife suggested he go through her insurance carrier to see a doctor; he said that was when he saw Dr. R. Under these circumstances we do not find that claimant's actions demonstrated such a clear, informed, and intelligent choice as to bar relief in this case.

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz

Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

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Stark O. Sanders, Jr.
Appeals, Judge