

APPEAL NO. 980236  
FILED MARCH 16, 1998

Following a contested case hearing (CCH) held in (City), Texas, on December 16, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by concluding that (1) respondent (claimant) is not barred from pursuing workers' compensation benefits due to an election of remedies; (2) claimant sustained a compensable injury on \_\_\_\_\_; (3) claimant had disability from August 27, 1997, through the date of the CCH; and (4) claimant had good cause for failing to timely report her injury to her employer. Appellant (carrier) appeals, challenging the sufficiency of the evidence to support these determinations. Claimant responds that sufficient evidence supports the hearing officer's determinations.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant sustained a work-related injury on \_\_\_\_\_. Carrier contends that claimant injured her back at home and that the delay in the manifestation of her symptoms shows that she did not sustain a work injury on \_\_\_\_\_.

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 as a disease naturally resulting from the damage or harm. Section 401.011(26). A claimant may meet the burden to establish an injury through the claimant's own testimony, if the hearing officer finds the testimony credible. See Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Our standard of review for challenges to the sufficiency of the evidence, the law regarding claimant's burden of proof, and other applicable law are set forth in Texas Workers' Compensation Commission Appeal No. 960672, decided May 16, 1996 (citing Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)).

Claimant testified that on \_\_\_\_\_, she was performing flight attendant retraining at work. She said she pulled on a window that weighed about 45 pounds, the window came out and hit her on the cheekbone, and fell on top of her. She testified that she ended up in a "crouched" position with the window on top of her. She said that a coworker pulled the window off her, that she and another coworker asked if claimant was all right, and that a coworker went to get some ice for her cheek. Claimant said

her cheek was hurting and she felt some embarrassment, but she did not think she had a severe injury. Claimant said she continued to work after that date and, alternately, said she did and did not feel back pain after the \_\_\_\_\_, window incident. Claimant then testified that on August 26, 1997, she stretched at home while waking up in the morning, that she felt a pop in her back, that she went to the emergency room (ER), and that she was treated for thoracic muscle spasms.

The record contains an off-work slip, apparently signed by an ER physician, dated August 26, 1997, that states that claimant is off work from August 26 to September 3, 1997. In a September 2, 1997, medical record, Dr. NE, claimant's treating doctor, stated that claimant is advised to stay off work. In a December 10, 1997, letter, Dr. NE stated:

I feel that there is reasonable medical certainty that the patient did sustain a significant thoracic strain injury at [flight attendant training] on \_\_\_\_\_, and that the stretch episode one month later that brought her to clinical attention was an exacerbation of this pre-existing injury. This far, the patient has been unable to return to work secondary to continued problems with back pain. [S]peculated date of return to duties, whether this be full or light duties, is somewhere around the first of the year 1998.

The hearing officer determined that: (1) claimant pulled on a window and it fell on her; (2) claimant was a very credible witness; and (3) claimant met her burden to show that she sustained an injury to her thoracic spine on \_\_\_\_\_.

In this case, the evidence conflicted regarding whether claimant was injured at work on \_\_\_\_\_. Claimant testified regarding the window incident, and medical evidence from Dr. NE supports a finding that the \_\_\_\_\_, incident caused her thoracic back problems. The hearing officer resolved the conflicts in the evidence. 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 challenges the sufficiency of the evidence to support the hearing officer's disability determination. 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). The applicable standard of review and the law regarding disability are more specifically set forth in Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. We apply the Cain standard of review to this challenge.

The letters from Dr. NE and an ER doctor stating that claimant has been off work since August 26, 1997, and is to be off work continuing after the date of the CCH support the hearing officer's disability determination. We will not substitute our

judgment for the hearing officer's because his disability 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, although claimant did not timely report her injury to employer within 30 days of the date it occurred, she had good cause for later reporting. Carrier asserts that the hearing officer's determination is against the great weight and preponderance of the evidence.

Claimant testified that the window fell on her on \_\_\_\_\_, but that she did not believe she had a work-related back injury until September 11, 1997. She said she thought about what could have caused her problems, talked to her doctor, and decided that she did sustain a back injury on \_\_\_\_\_. Claimant said that a few days after the \_\_\_\_\_, incident, she spoke with her supervisor on July 31, 1997, as claimant was leaving for a two-week vacation. She said that she told her supervisor about the incident, that her supervisor asked what happened, and that she told her "just exactly what we have just discussed [at the CCH]." Claimant said the supervisor asked if she was all right and if she had "[written] it up." Claimant said she replied that "to the best of [her] ability," she was all right and that she did not "write it up." Claimant said she reported her \_\_\_\_\_, injury on September 11, 1997, and that she did not realize she had a work-related injury until that time.

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 Company, 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. A claimant's *bona fide* belief that injuries are not serious can constitute good cause for delay in giving notice of injury to the employer. Texas Casualty Insurance Co. v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). The test for good cause is that of ordinary prudence, that is, whether a claimant has acted with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 (1948). Good cause for untimely notice of injury, once established, must continue up to the date that notice is given. Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991.

The hearing officer was the sole judge of the witnesses' credibility and expressly stated that claimant was credible. We will not substitute our judgment for that of the hearing officer because his good cause and timely notice determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Carrier next contend that the hearing officer erred in determining that claimant did not make a knowing election of remedies to pursue her group health insurance benefits. In order for the election of remedies doctrine to apply as a bar to the relief sought, it must be affirmatively shown that: "(1) one has successfully exercised 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." Texas General Indemnity Company v. Hearn, 830 S.W.2d 257 (Tex. App.-Beaumont 1992, no writ) (citing Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980)). See also Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995. A person's choice between inconsistent remedies or rights does not amount to an election that will bar further action unless the choice is made with a full and clear understanding of the problems, facts, and remedies essential to the exercise of an intelligent choice.

Claimant testified that she first filed for benefits under her group health insurance carrier. She said that when she first went to the ER, she gave them her group health insurance card because she was in so much pain. She said ER personnel asked for the card and she gave it to them. The hearing officer's determination that claimant did not make an informed election of remedies is supported by this evidence and by the evidence that claimant did not immediately realize that she had a work-related injury. The hearing officer was the sole judge of the credibility of the evidence and he determined what the evidence established. We will not substitute our judgment for the hearing officer's because his election of remedies determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

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Judy L. Stephens  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Christopher L. Rhodes  
Appeals Judge