

APPEAL NO. 990074

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 December 14, 1998. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on _____, whether he had disability, and whether he made an election of remedies. The hearing officer determined that the claimant sustained a compensable injury on _____, that the claimant had disability from August 5 through December 14, 1998, and that he did not make an election of remedies. The appellant (carrier) appeals, urging that the claimant has not sustained his burden of proving that he sustained a compensable injury on _____, thus he did not have disability, and that he further made an election of remedies. No response is on file.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth adequately and fairly the evidence and it will only be briefly summarized here. Succinctly, the claimant testified that he felt a sharp pain in his back on _____, when he removed a hydraulic lift from a cabinet. He went to his family doctor on August 3, 1998, for another matter but also complained of back pain. The medical notes from that date indicate the complaints of back pain but state "denies injury." He made out an accident report with the employer dated August 4, 1998, returned to the doctor on August 6, 1998, and an MRI was scheduled, which took place on August 12th, and which reflects that "[p]t. states that in retrospect he injured his back on _____ at 1:00 am at [employer] while attempting to lift a hydraulic lift out of a cabinet." The MRI showed disc herniation and the claimant subsequently underwent spinal surgery. He testified and medical records support that he was not able to work from August 5, 1998, to the date of the hearing, December 14, 1998. The claimant testified that he thought his group insurance paid for his initial medical visits, although the matter of payment was not discussed as he went to his regular doctor. Later medical bills have not been paid to the best of his knowledge, since the carrier disputed liability. He denied that he elected to use his group health coverage to the exclusion of workers' compensation.

The carrier introduced a medical record from August 1997 which included notation of "upper and lower extremity numbness and tingling—probable neuromuscular pain." Carrier also brought out in examination of the claimant that in his supervisory capacity he was aware of the difference between workers' compensation coverage and group health coverage.

The hearing officer apparently found the claimant to be credible and accepted his testimony and medical evidence in showing a compensable injury occurred on _____, and that the claimant was not able to work starting August 5, 1998. The hearing officer is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence. Section 410.165(a). The hearing officer also resolves any conflicts

or inconsistencies in the testimony and evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The carrier urges that the claimant had a previous back problem, that the claimant denied any injury at the time of his first medical visit on August 3, 1998, and that he used his group insurance, all of which discount any new compensable injury on _____. While this may be some evidence tending to negate a compensable injury having been sustained on _____, the claimant explained these matters in his testimony and the hearing officer obviously accepted his testimony. Whether or not a compensable injury occurred or whether there was disability are factual matters for the determination of the hearing officer. Texas Workers' Compensation Commission Appeal No. 982810, decided January 14, 1999. In any event, we have reviewed the evidence of record and cannot conclude that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer also determined that after hearing the claimant's testimony he was convinced that he did not fully understand his rights under the two benefit programs; that is, group health and workers' compensation, and thus did not make an election of remedies to bar recovery under workers' compensation. One of the elements in an election-of-remedies situation is that the party make an informed decision in electing one remedy over and to the exclusion of another. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998. There is sufficient evidence to support the hearing officer's determination on this issue.

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge