APPEAL NO. 990135

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 November 30, 1998. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) did not injure her low back at work on _____; that the respondent/cross-appellant (carrier) failed to timely contest the compensability of the claimant's low back injury and, thus, it became compensable as a matter of law; that the claimant did not make an election of remedies barring her from receiving workers' compensation benefits by filing for and receiving short-term disability benefits under a group policy; and that the claimant did not have disability as a result of her compensable back and abdominal injury. In her appeal, the claimant asserts error in the hearing officer's determination that she did not injure her back in the lifting incident at work and in his finding that she did not have disability as a result of her compensable injury. In response to the claimant's appeal, the carrier urges affirmance. In its cross-appeal, the carrier asserts error in the hearing officer's determinations that it waived its right to contest the compensability of the claimant's back injury and that the claimant did not make an election of remedies. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury, including an abdominal injury. The claimant testified that on _____, she was working for (employer) on a production line that was running rolls of insulation, weighing about 43 pounds and that she had to pick up the rolls from the line and stack them on a packing table. She testified that as she was lifting a roll, she felt a sharp pain in her abdomen and a "twist-like feeling" in her low back. She stated that she reported her injury Mr. M, her supervisor, immediately after it happened and that he asked her if she wanted to go to the hospital and she did. Records from the emergency room note complaints of abdominal pain and contain a diagnosis of a strain of the inguinal area. However, the discharge instructions from the emergency room refer to both abdominal complaints and low back pain/strain. The claimant testified that she developed back pain on the morning of (day after injury); that she went to work; that she told Mr. M she had also injured her back in the lifting incident of the previous day; and that Mr. M assured her that he would add the back injury to her accident report. She stated that she began missing time from work on March 11, 1997, and that she has not returned to work since that date because of her injury.

The claimant acknowledged that on (date of unrelated previous injury), she was injured when she slipped and fell getting out of a bathtub at a hotel. She testified that she injured her neck, head, shoulder and mid-back in that incident, but denied that she had

injured her low back. The claimant treated with Dr. R for her 1996 injury and his records reflect that she had complaints of low back pain following that injury. The claimant testified that she also treated with Dr. R after her _____, injury at work. In his Initial Medical Report (TWCC-61) for a February 24, 1997, visit, Dr. R diagnosed abdominal pain and hematuria, noting that the claimant was injured lifting a bag of insulation. The claimant testified that when Dr. R took her off work, she was contacted by Ms. C, a disability case manager who assists employer's employees in filing for disability benefits under group policies. The claimant testified that Ms. C told her that she was only eligible for short-term disability benefits and not workers' compensation because her back condition was not work related. On cross-examination, the claimant testified that Ms. C told her that she was not eligible for workers' compensation benefits even though her injury had happened on the job. In other testimony, the claimant stated that she understood that when she signed the short-term disability application she was declaring that her abdominal injury, and not her back injury, was non work related, insisting that she understood that she applied for and received those benefits for her abdominal injury. However, the claimant also testified that no one told her that she could not get disability benefits for an injury that was work related. The claimant acknowledged that she received short-term disability benefits from March 11, 1997, to September 30, 1998.

With respect to her claim for disability, the claimant testified that she has been unable to work because of her injury from March 11, 1997, through the date of the hearing. She testified that Dr. R took her off work and, to the best of her knowledge, did not release her to return to work. Dr. R's progress notes of May 12, 1997, state that the claimant has been experiencing "blackouts" due to stress related to possible probation violation and various personal problems. She stated that she changed treating doctors from Dr. R to Dr. M because the medication that Dr. R was giving her was causing her to "black out" and he would not change it. She testified that she heard that Dr. M was a good doctor. On cross-examination, the claimant acknowledged that she had heard from other patients of Dr. M that he would take her off work. Dr. M has diagnosed the claimant as having an abdominal strain and a lumbar sprain/strain, which he attributes to the lifting injury at work. An October 2, 1997, MRI of the claimant's lumbar spine revealed a left posterolateral disc bulge at L3-4 which was interpreted as being "a suspected site of minor herniation."

Mr. M testified that he recalls that the claimant reported an injury to her lower stomach to him in _____. He stated that he did not remember her having told him that she also injured her back in the lifting incident and that he first learned about a year later from Ms. C that the claimant was alleging that she sustained a back injury at work in _____.

Ms. G, who currently holds the position once held by Ms. C, testified that she did not have any personal knowledge as to what happened between Ms. C and the claimant with regard to the claimant's application for short-term disability benefits. Ms. G stated that disability benefits under the group policy are not paid for work-related conditions; that short-term disability benefits last for 18 months and then the employee must apply for long-term

benefits; that there was an application for long-term benefits in the claimant's file; and that the claimant was not eligible for long-term benefits under the group policy because she had not been employed with the employer for a five-year period, a prerequisite for receiving those benefits.

Concerning the question of whether the carrier timely contested compensability of the claimant's low back condition, the hearing officer found that the carrier received its first written notice that the claimant was alleging a work-related back injury on _____, the date Dr. R's Specific and Subsequent Medical Report (TWCC-64) of August 5, 1997, was date-stamped as having been received by the carrier's third-party administrator. On the TWCC-64, Dr. R diagnosed back pain and noted that the claimant had been doing regular physical therapy for her back. The carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting the compensability of the back on January 23, 1998.

Initially, we will consider the claimant's argument that the hearing officer erred in finding that she did not injure her back in the lifting incident at work. The question of whether the claimant's compensable injury extended to her back was a question of fact for the hearing officer to resolve. He is the sole judge of the relevance, materiality, weight, and credibility of the evidence under Section 410.165(a). As the fact finder, the hearing officer could have found injury on the basis of the claimant's testimony alone, if he had deemed it credible. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, he was not bound to accept the claimant's testimony in this instance. The hearing officer specifically noted that the claimant's testimony was inconsistent. In addition, the hearing officer was not bound to accept Dr. M's opinion that the claimant's back injury was work related. The hearing officer indicated that he discounted Dr. M's opinion because it was not made based on an accurate medical history in that Dr. M was not apprised of the claimant's 1996 back injury. Our review of the hearing officer's determination that the claimant did not injure her back in the lifting incident does not reveal that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Next, we consider the hearing officer's determination that the claimant's back injury is compensable as a matter of law, in that the carrier did not timely contest the compensability of the back injury in accordance with Section 409.021. As noted above, the hearing officer found that the carrier received its first written notice of the back injury on _____, when it received Dr. R's TWCC-64 diagnosing back pain. The carrier argues that Dr. R's TWCC-64 was not sufficient to serve as written notice triggering its obligation to dispute within 60 days of the date it received that document or waive its right to do so because at that time the carrier was not being asked to pay for either medical or income benefits in this case. The carrier argues that the claimant was receiving short-term disability benefits and that a group health carrier was paying for medical treatment. The claimant testified that she received group disability benefits; however, there is no evidence

in the record as to whether the medical bills were being paid, and if they were, who was paying them. We find no merit in the carrier's assertion. Whether or not the carrier was being asked to pay or was paying benefits in this case, there is no question that a claim had been made by the claimant, which was being processed by the Texas Workers' Compensation Commission. In addition, the carrier's receipt of the TWCC-64 demonstrates its knowledge of and participation in the claim. The hearing officer determined that Dr. R's TWCC-64 contained the information required in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)) to constitute written notice of injury such that the carrier had 60 days to contest compensability of the back injury or waive its right to do so. That determination is not so contrary to the great weight of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra*. Accordingly, the hearing officer properly determined that the carrier had waived the right to contest compensability of the claimant's back injury because the TWCC-21 contesting the back was not filed until January 23, 1998, well beyond 60 days after _____. In its response to the claimant's appeal the carrier argues that the back injury is not compensable as a matter of law, citing Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). The carrier's reliance on Williamson is misplaced. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is no damage or harm to the physical structure of the body, as opposed to cases where, as here, there is an injury, a lumbar sprain/strain and a disc bulge at L3-4 per an MRI, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 982446, decided December 2, 1998; Texas Workers' Compensation Commission Appeal No. 982161, decided October 26, 1998; and Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998. Thus, in affirming the hearing officer's determination that the carrier did not timely contest compensability of the claimant's back injury, we likewise affirm his determination that the claimant's back injury has become compensable as a matter of law.

The hearing officer also determined that the claimant did not make an election of remedies in this instance by applying for and receiving short-term disability benefits. In Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), the Texas Supreme Court stated that an election of remedies would act as a bar to workers' compensation where a claimant has: (1) successfully exercised an informed choice; (2) between two or more rights of action, remedies, or states of facts; (3) which two or more rights are inconsistent; and (4) the inconsistency would constitute manifest injustice. The hearing officer determined that the claimant did not make an election in this case. As noted above, there is evidence, namely the claimant's testimony, to support a determination that she did not make an informed choice to pursue disability benefits under the group policy rather than workers' compensation benefits. To the contrary, as the hearing officer notes, it appears that the claimant believed she was pursuing consistent, alternative remedies. The determination that the claimant did not make an election in this instance which precludes her pursuit of workers' compensation benefits is not so contrary to the great weight and preponderance of

the evidence as to be clearly wrong or manifestly unjust and, as such, we will not disturb it on appeal.

Finally, we consider the claimant's challenge to the hearing officer's determination that she has not had disability as a result of her compensable injury. In making that determination, the hearing officer found that the claimant did not sustain her burden of proving that she was unable to obtain and retain employment at wages equivalent to her preinjury wage because of her compensable injury. Specifically, he determined that the claimant's inability to earn her preinjury wage was "caused by personal factors at home and non-work related condition and symptoms as well as an incredible exaggeration of the severity of any pain." The hearing officer also emphasized that the claimant continued to work for several weeks after her injury and that there was scant medical evidence supporting the disability claim. From a review of the hearing officer's decision, it is apparent that the hearing officer simply was not persuaded by the claimant's testimony that she was not able to work in the period from (day after injury), through the date of the hearing. He was acting within his province as the fact finder in so assigning weight and credibility to the testimony and evidence before him. Our review of the record does not reveal that the hearing officer's disability determination is subject to reversal under our standard of review. In his decision, the hearing officer seemingly determines that the claimant's receipt of short-term disability benefits in this instance is inconsistent with a finding of disability. In so doing, the hearing officer appears to be giving effect to an election of remedies which he found, and we affirmed, was not made in this case. Thus, although we affirm the determination that the claimant did not have disability, we specifically reject the premise that the claimant's receipt of short-term disability benefits under a group policy mandated that outcome.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge