

APPEAL NO. 990262

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 January 14, 1999. He (hearing officer) determined that the respondent (claimant) did not make an election of remedies and was not barred from receiving workers' compensation benefits. The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant worked as an office manager for an ophthalmologist. She said she spent little time doing administrative work and assisted mostly in surgeries. It was not disputed that she injured her left shoulder on \_\_\_\_\_, while assisting her employer in a surgical procedure. Her immediate symptoms, she said, were tightness in the shoulder, a burning sensation, and discomfort. She also admitted that she knew from the date of injury that the injury was work related. She kept working, accommodating her pain and first sought medical care from Dr. B in December 1997. She said she told Dr. B how her injury occurred. Dr. B prescribed anti-inflammatories and physical therapy. He referred the claimant to Dr. S for a nerve study on December 16, 1997. She filed with her group health carrier for this care, made the required co-payments, and said she was not aware that this could possibly preclude her receiving workers' compensation benefits.

According to the claimant, she discussed her condition with her employer and in August 1998 decided to file a workers' compensation claim. She said she did this at this time because by then her pain had become chronic and her employer wanted her to have coverage in future years. She completed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on September 15, 1998.

The claimant also testified that she was responsible for completing paperwork for workers' compensation claims, but that the office had none since she had been office manager. She denied any training in workers' compensation, but admitted she had a prior, presumably "Old Law," claim. At another point in her testimony she stressed that she believed workers' compensation was for "major" injuries and apparently did not consider this injury serious until it became chronic in the summer of 1998 even though she said she considered her pain severe when she began treatment with Dr. B.

The carrier argues that by using group health benefits, the claimant is precluded under the election of remedies doctrine from pursuing workers' compensation remedies in certain circumstances. Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) provides the following test for establishing the common law defense of election of remedies:

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.

We have observed that election of remedies is not a favored doctrine and its scope will not be extended beyond the test of Bocanegra. The carrier has the burden of proving an effective election of remedies and whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Critical to a finding of an election of remedies is the determination that the election of non-workers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998.

In the case we now consider, the claimant testified that she was not aware of the scope and nature of workers' compensation in general and, in particular, that she thought these benefits were for serious injuries. The carrier argues that the great weight of the evidence establishes that the claimant lacked credibility in these assertions and that, by virtue of her position as office manager and prior work-related injury, she knew about workers' compensation benefits. It also argues that the claimant was not credible in claiming she believed at first that her injury was minor, because she reported pain at a significant level.

The evidence of what the claimant knew about workers' compensation coverage and about how serious she believed her injury to be was subject to varying inferences. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. See Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999. In Texas Workers' Compensation Commission Appeal No. 980024, decided February 13, 1998, we affirmed the finding of the hearing officer that the claimant did not make an election of group health benefits to the exclusion of workers' compensation benefits. The claimant had a history of minor work-related injuries. He then sustained a low back lifting injury and told his employer that he would use his wife's group health insurance, at least initially, so it would not cost him or the employer and if it turned out to be more serious than a muscle strain, he would file a workers' compensation claim. The Appeals Panel agreed that in this case there was simply not a choice of one remedy over the other, but an effort to preserve both remedies pending further developments. Similarly, in the case now before us, we do not believe that the evidence established anything more than that the claimant sought to preserve her options depending on the seriousness of her injury, rather than prematurely exercising one option to the exclusion of the other. Thus, the use of the distinction between major and minor injury did not as a matter of law serve compel the application of an election of remedies to this claimant. In addition, the carrier points to no "manifest injustice" in not finding an election of remedies. See Appeal No. 990022, *supra*.

This case ultimately came down to the question of whether the claimant was credible in her assertion of limited knowledge of workers' compensation benefits which would prevent the exercise of an informed choice. The hearing officer believed she was credible. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and 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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the claimant for that of the hearing officer. Rather, we find her testimony, deemed credible and persuasive by the hearing officer, sufficient to support his determination that the claimant did not make an election of remedies and is not barred from pursuing workers' compensation benefits.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge