APPEAL NO. 990720

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 March 10, 1999. She determined that the appellant (claimant) did not sustain a compensable injury, that he did not timely report a work-related injury, that he did not have disability, and that he made a knowing election of remedies. Claimant appeals these determinations on sufficiency grounds. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

Claimant first contends the hearing officer erred in determining that he did not sustain a compensable injury. 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 a disease or infection naturally resulting from the damage or harm. Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he sustained a lifting injury at work on or about _____, and that his coworker, Mr. B, was present. Claimant said he reported the injury to his supervisor that day but that his supervisor did nothing. Claimant said Mr. B helped him with his work and that he saw the doctor the next day. Mr. B testified that he saw the injury and that he heard claimant report the injury to his supervisor, Mr. G. Mr. G denied that claimant reported to him that he injured his back in _____. Claimant said that on July 9, 1998, he signed a form on which he applied for short-term disability benefits, but said he did not type out that portion that stated that he strained his back lifting around the house. The form also indicated that the injury was not work related. Claimant said he did not understand before July 1998 the difference between applying for private insurance benefits and applying for workers' compensation benefits. Ms. H testified that she handles workers' compensation claims for claimant's employer and that she had a meeting with claimant in December 1996 during which it was explained to claimant the difference between workers' compensation claims and group

health insurance claims. She said they had this meeting because she overheard claimant complaining that employer was not paying for a bill even though he had a work-related injury.

The hearing officer was the judge of the credibility of the witnesses and medical evidence. As the fact finder, she considered the issue of whether claimant sustained a compensable back injury, and resolved this issue against claimant. The hearing officer stated that claimant's testimony about the date of the injury and the employer's records regarding when claimant was working indicated that claimant was not credible in his testimony. We will not substitute our judgment for the hearing officer's regarding credibility because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain. Given our standard of review we will not overturn the hearing officer's decision. *Id*.

Claimant contends the hearing officer erred in determining that he did not have disability. 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). Because there was no compensable injury, there can be no disability.

Claimant next contends that the hearing officer erred in determining that claimant did not timely report that his back pain was work related. Claimant asserts that the hearing officer's determination is against the great weight and preponderance of the evidence.

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 Co., 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. Where the claimant offers evidence that the supervisor was notified of the injury, but the supervisor testifies he or she was not notified, a question of fact exists for determination by the trier of facts. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991.

The hearing officer was the sole judge of the witnesses' credibility and decided that claimant may have reported back pain, but that he did not tell his supervisor that the condition was alleged to be work related. However, both claimant and Mr. B stated that claimant told Mr. G that he hurt his back and both said that they related it to work-related activities. This is not a case where the hearing officer merely chose to believe the supervisor rather than the claimant. In this case, the hearing officer stated that the report of injury that was made was not complete. The hearing officer said there was no testimony showing that a work-related injury was reported. Because there was testimony in that regard, we reverse the hearing officer's timely notice determination and we render that claimant timely reported his injury to his employer. We conclude that the hearing officer's timely notice determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. We

note, however, that because there is no compensable injury, this does not change the outcome in this case.

Claimant contends the hearing officer erred in determining that he made a knowing election of remedies. Claimant asserts that carrier failed to prove that manifest injustice would result from his initial election to pursue his private health insurance benefits. At the CCH, carrier asserted that claimant knowingly elected to pursue private health insurance benefits rather than workers' compensation benefits.

In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court stated that the election of remedies 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 fact (3) which are so inconsistent as to (4) constitute manifest injustice. *See also* Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999. In Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999, the Appeals Panel stated:

> However, the Bocanegra case is equally significant for its entire discussion concerning the equitable underpinnings of the election of remedies doctrine, and it makes clear that election should be imposed sparingly, reserved for instances where the "*assertion of a remedy, right, or state of facts is so unconscionable, dishonest*, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust." *Id.* at 851. This, in our opinion, calls for a situation in which there is more than the mere filing of health care claims through a regular group insurance policy, even if there is a subjective appreciation that regular health insurance does not usually cover work-related injuries. There is no manifest injustice when a workers' compensation insurer is asked to pay for a work-related injury which it has agreed to cover in return for premiums from the employer, and none to the health insurer who has the subrogation right to the money paid out. [Italics added.]

In this case, the hearing officer determined that the injury was *not* sustained in the course and scope of employment. Therefore, we fail to see how it was "dishonest" or "unconscionable" for claimant to elect to pursue his *private health insurance benefits*. The evidence in this case does not meet the standards set forth in Bocanegra for finding a binding election. Accordingly, we reverse the hearing officer's decision that claimant is barred from pursuing workers' compensation benefits based on an election to receive benefits under a health insurance policy, and we render a decision that claimant is not barred from pursuing workers' compensation benefits based on an election of remedies.

We affirm that part of the hearing officer's decision and order that concludes that claimant did not sustain a compensable injury and that he did not have disability. We reverse that portion of the decision and order that concludes that claimant did not timely report his injury to his employer. We reverse that portion of the decision and order that concludes that there was an election of remedies in this case and we render a decision that there is no bar to the pursuit of workers' compensation benefits based on an election of remedies. The order that carrier is not liable for benefits in this case is unchanged.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge