

## APPEAL NO. 991068

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 27, 1999, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that the respondent (claimant) had sustained a compensable injury on \_\_\_\_\_, and has had disability beginning December 14, 1998, and continuing through the date of the CCH.

Appellant (carrier) appeals the adverse findings and conclusions, pointing to inconsistencies in the evidence regarding what claimant may have told his doctors and the conversations with Ms. CR, employer's personnel manager. Carrier, on appeal, argues an election-of-remedies defense (which was not an agreed-upon issue at the CCH), and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

### DECISION

Affirmed.

Claimant was employed as a "customer service representative" by (employer) loading food carriers onto aircraft. Claimant testified that his job was to remove food from a cooler, load it on a truck, drive the truck to the aircraft and load the food carriers onto the aircraft. Claimant testified that on Sunday, \_\_\_\_\_, as he was loading a particular flight he felt "a little sting" from the calf of his left leg up to his thigh. Claimant said that he "had immediate pain." Claimant said that he did not work the following day because he had a dental appointment and the two days following that were his days off. Claimant testified that the pain in his left leg became progressively worse and by Wednesday, December 16, 1998, he "was hurting too bad [to go to work]" and that he sought medical attention at the clinic where he had coverage through his group health plan.

Claimant said that on December 16th, he saw another doctor rather than his regular primary care doctor and was given muscle relaxers and pain medication. A handwritten office note dated December 16, 1998, notes complaints of "[left] leg pain & [left] back X 6 days," severe left sciatica and "(Does heavy lifting)." Claimant was seen at the clinic for a follow-up on December 23, 1998, by (Dr. J), claimant's regular doctor. A note recites the December 16th visit "with a six day history of severe pain in the left leg. No recall of trauma, although he does a lot of lifting in his work" and that claimant's symptoms and exam are "consistent with herniated disc and lumbar radiculopathy." Claimant was released to light duty effective December 26, 1998. An Initial Medical Report (TWCC-61) dated January 6, 1999, by Dr. J comments "Patient reports of a lot of heavy lifting at work and while doing so on \_\_\_\_\_ injured back." Claimant was referred to Dr. H and in a report dated January 29, 1999, Dr. H refers to an MRI performed on January 12, 1999, which shows "a very large extruded disk fragment at L5-S1 on the left with left sensory radiculopathy S1." Dr. H recommended surgery in the form of a "simple microdiscectomy."

In the meantime, claimant testified that he called the employer's personnel manager, Ms. CR, on January 4, 1999; however, other testimony and Ms. CR's notes, indicate claimant called on December 30, 1998. (The ombudsman agrees that claimant is "not the best historian.") Exactly what was said is in serious dispute. Claimant, and his girlfriend, Ms. TR (also written as nickname) testified that he reported a work-related injury lifting food carriers onto flight 2176. Ms. CR testified that she asked claimant at least three times whether the injury was work related and that claimant said no. There seems little doubt that workers' compensation was at least discussed at that time. Ms. CR testified she told claimant:

Because that's two different ways you get paid, whether it's workers' compensation or whether it's your disability insurance. At that time, he made the comment, he just said – he said, "no, I'm coming back to work. It's disability."

Ms. CR then sent claimant an "A & S" (nonwork-related Accident and Sickness) form to complete, which claimant received on December 31, 1998. On the form, claimant checked the box saying the injury was work related and described the injury as "catering flight 2176 at 1:45 p.m." It is undisputed that Ms. TR then took the A & S form back to Ms. CR on January 4, 1999. Also undisputed is that when Ms. CR saw the form showed a work-related injury, Ms. CR told Ms. TR that is not what claimant had told her (Ms. CR) and that claimant could not get "disability" benefits if he listed a work injury. Also undisputed is that Ms. TR then took the form out to her car and marked out portions which indicated a work-related injury and checked the box that it was not a work-related injury. Claimant testified that Ms. TR had this authority to act for him. Ms. CR then "whited out" the marked form and wrote "[claimant] stated he misunderstood question & said again it did not happen at work." It is also undisputed that claimant called Ms. CR on January 6, 1999, from the doctor's office, apparently asking about medical benefits, and that later on on January 6th, claimant went to the employer's premises, met with Ms. CR and other supervisory personnel and reported a work-related injury on \_\_\_\_\_. (Although timely notice is not an issue, carrier points to this sequence of events arguing that claimant had consistently maintained that his injury was not work related.) In evidence is another A & S form dated January 20, 1999, indicating a nonwork accident. Ms. CR's notes indicate that claimant told her about a knee injury that he received playing basketball. Carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 11, 1999, stating it received written notice January 7, 1999, and denied liability because "claimant initially informed the employer that it was not work-related and filed for disability under the sick leave policy."

The hearing officer made a finding that claimant "was performing his job duties . . . [and] sustained an injury to his back and left leg as he was lifting food carriers to carry them through a doorway and into an airplane." The hearing officer also found a preponderance of the credible medical evidence to be consistent with claimant's testimony. Carrier appeals those findings, pointing to contradictory testimony and medical evidence (a history of the leg hurting six days prior to December 16, 1998, and failure to give a history of a specific incident). Carrier also cites the testimony of Ms. CR which contradicts portions

of claimant's and Ms. TR's testimony as showing the evidence "was factually insufficient" to support the hearing officer's decision. As should be obvious, the evidence was clearly in conflict and subject to different interpretations or inferences. In such a case, we have many times held that the 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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 overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find sufficient evidence to support the hearing officer's decision based on claimant's testimony.

Carrier, in its appeal, also cites an Appeals Panel decision for the proposition that where a claimant "successfully exercises an informed choice, and receives disability insurance benefits, the Claimant is barred from receiving workers' compensation benefits" and that claimant "should not be allowed to knowingly recover both disability benefits and workers' compensation benefits." There are a number of problems with that contention. First, the case cited is an election-of-remedies case and, as claimant notes, election of remedies was not a disputed issue and we decline to consider it as an issue now for the first time on appeal. Secondly, our brief recitation of the evidence should make amply clear that there was no "informed choice," that the hearing officer could, and apparently did, believe that claimant was alleging a work injury "catering flight 2176" and that there was a good deal of confusion regarding eligibility for benefits. Lastly, because claimant has received group health disability benefits does not necessarily mean that he is entitled to both group disability and workers' compensation temporary income benefits at the same time.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Tommy W. Lueders  
Appeals Judge