APPEAL NO. 991337

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 June 4, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury, whether the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy, and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury on _____, that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy, and that the claimant had disability from February 11, 1999, through May 14, 1999, and from May 19, 1999, through the date of the CCH. The appellant (carrier) appeals, urging that the decision is against the great weight and preponderance of the evidence and should be reversed. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant, a corrections officer, testified that he sustained an injury to his back on _____. On that day, his shift started late because of a problem with the prior shift, and this caused his shift to have to hurry to perform their job duties. The claimant testified that he was going up and down the stairs to perform his job duties, either running or skipping every other step, and while doing this, he landed on his right leg, while pivoting to the left, and felt a "pop" in his back. According to the claimant, he had no pain at that time and continued to work, but over the next two days he felt that he had a pulled muscle. The claimant testified that on February 10, 1999, his pain got worse, he could not feel his right leg, and he called his employer and told them that he had sustained an injury and could not work.

The claimant was examined by Dr. T on February 11, 1999. Dr. T took the claimant off work for one week and ordered a lumbar MRI. The MRI indicated herniated discs at L4-5 and L5-S1. On March 3, 1999, the claimant had an L4-5 and L5-S1 hemilaminectomy with excision of the ruptured disc. Dr. T states that in reasonable medical probability, the claimant was injured running down the stairs and the injury necessitated surgery.

The claimant testified that he was off work until May 15, 1999, when Dr. T released him to return to light duty. He returned to work, but due to a misunderstanding, the employer assigned him to regular duties, which he attempted to perform for four days. On May 19, 1999, Dr. T again released the claimant to light duty for six weeks. The claimant testified that he was told by his employer that light duty was not available, and that he could only return to work if he had a full duty release, or if he was approved for workers' compensation coverage.

The claimant testified that in 1994 he sustained a prior nonwork-related injury, which resulted in a lumbar laminectomy at L5-S1, and he fully recovered. In 1995, he filed a workers' compensation claim in another state. The claimant testified that he knew how to file a workers' compensation claim. On February 17, 1999, the claimant signed a "Refusal to File a Workers' Compensation Claim" form for his employer which states:

> This is to verify that I do not wish to submit a Notice of Employee's Work-Related Injury or Illness. I understand that failure to document the incident at this time may preclude my opportunity to claim workers' compensation at a later date and my personal insurance may not accept liability for payment of bills relating to this injury or illness.

The claimant testified that at the time he signed the form, he believed that he had only a pulled muscle which he thought would get better, and he wanted to return to work. The claimant testified that he was told by personnel that he was only refusing to file a workers' compensation claim "at that time" and had the option to file it as workers' compensation at a later date.

The hearing officer determined that the claimant did not make an election of remedies by receiving benefits under a group health insurance policy. 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. 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. 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 stated that there was simply not a choice of one remedy over the other, but an effort to preserve both remedies pending further developments.

In this case, the hearing officer found that at the time the claimant signed the "Refusal to File a Workers' Compensation Claim" form, he did not have a clear

understanding of the nature of his injury or the remedies available to him, and he did not make an intelligent choice between two inconsistent remedies. The claimant's testimony did not indicate that he made an informed choice of using his group health insurance as opposed to workers' compensation benefits. The claimant testified that he did not fully know the extent of his injury when he signed the form after the injury and prior to an MRI, and believed that he could file for workers' compensation benefits in the future if his condition did not resolve. We find the evidence sufficient to support the hearing officer's determination that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy.

The carrier asserts that the claimant failed to prove a causal connection between his work and his alleged injury through medical evidence rising to the level of reasonable medical probability. The carrier cites Texas Workers' Compensation Commission Appeal No. 92331, decided August 28, 1992, for the proposition that a medical condition such as a back problem is something that is beyond the category of common experience such that it cannot be established through lay testimony alone. We disagree. In Appeal No. 92331, we stated that a hiatal hernia and toxicity from a medication taken for epilepsy allegedly caused by a slip-and-fall incident did not involve matters within the category of common experience such that the compensability could be established through lay testimony alone. In this case, the mechanism of back injury is running down stairs and a pivot to the left. We have previously stated that where the subject of an injury is not so scientific or technical in nature as to require expert evidence, lay testimony and circumstantial evidence may suffice to establish causation. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. In this case, expert testimony is not required as we do not consider the question of causation to be beyond common knowledge. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The claimant's testimony raised a fact issue and the hearing officer was entitled to and did believe claimant's testimony over the other evidence. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Regarding causal link, the trier of fact may find a causal link between the injury and employment from the claimant's testimony alone. Texas Workers' Compensation Commission Appeal No. 951246, decided September 11, 1995. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the hearing officer's determination that claimant sustained a compensable injury on _____.

The carrier appeals the hearing officer's determination that the claimant had disability, asserting that the claimant did not sustain a compensable injury and therefore did not have disability. Given our affirmance of the hearing officer's determination that the claimant sustained a compensable injury on _____, the claimant could establish

disability. The claimant testified that as a result of his back injury, he was unable to work beginning February 11, 1999, through May 14, 1999, and was released to work light duty from May 19, 1999, through the date of the CCH, but no light duty work was provided by his employer. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We note that generally a light-duty release is evidence that disability continues. Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998; and Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997. We find the evidence sufficient to support the hearing officer's finding of disability.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge