APPEAL NO. 991707

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 July 14, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that he had disability as a result of his compensable injury from April 6, 1999, through July 14, 1999, the date of the hearing; and 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. In its appeal, the appellant (self-insured) argues that the hearing officer's injury, disability, and election-of-remedies determinations are against the great weight of the evidence. The appeals file does not contain a response to the self-insured's appeal from the claimant.

DECISION

Affirmed.

The claimant testified that on _____, he was working in the warehouse for the self-insured's discount retailer. He stated that in his position, he drives a forklift, "throws boxes on lines," and lifts pallets. He testified that on _____, a pallet got "jammed" on the line and as he pulled on the pallet to free it, he felt a "pull" in his left shoulder. He stated that after this incident, he had pain in his left shoulder, left arm and neck.

The claimant testified that he first sought medical treatment on _____, with Dr. G. He acknowledged that he told his supervisor that he was leaving work to go to the doctor and that he did not tell his supervisor that he had injured his shoulder at work. The claimant stated that he told his employer that his injury was work related on March 29, 1999. Dr. G diagnosed "left neck and shoulder pain secondary to muscle spasm." Dr. G also completed a return-to-work certificate, restricting the claimant from lifting over 50 pounds. The claimant stated that he returned to work on the day following the incident and continued to perform his usual job, which included lifting in excess of Dr. G's restriction. On March 20, 1999, the claimant sought medical treatment from a hospital clinic. The notes from that visit reference complaints of "pain and tingling from post. neck, across [left] shoulder & down [left] arm to elbow. No injury." The claimant was diagnosed with a cervical strain and given ibuprofen.

On March 25, 1999, the claimant saw Dr. E, who diagnosed left shoulder impingement syndrome and referred the claimant to Dr. H, an orthopedic surgeon. Dr. H saw the claimant on April 6, 1999, and diagnosed "probable impingement syndrome, with perhaps some mild instability." In addition, Dr. H noted that he "felt some crepitation with range of motion of his shoulder that would not be inconsistent with a rotator cuff tear. . . ." Dr. H recommended conservative treatment and a rehabilitation program and took the claimant off work for two weeks, noting that he would recheck the claimant in two weeks to see if he had improved enough to return to light-duty work. On April 7, 1999, the claimant

had an initial appointment with Dr. M, who is apparently overseeing his physical therapy. Dr. M took the claimant off work at his initial appointment and has continued him in that status.

The claimant testified that he initially paid for his medical treatment himself and then with group health insurance. He maintained that he was not aware that if he filed under his group health insurance, it could prevent him from receiving workers' compensation benefits. On cross-examination, the claimant testified that he did not initially report his injury as being work related because he thought his injury was minor and that the pain would go away. He stated that he thought he might be able to avoid filing a claim for workers' compensation, explaining that he wanted to do so because he wanted to avoid the paperwork associated with a workers' compensation claim and to avoid involvement in the employer's incident review process. He testified that he reported his injury as work related on March 29th because he realized his injury was more significant than he had first thought in that one of his doctors began discussing the possibility of surgery.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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 manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The self-insured contends that the hearing officer's injury determination is against the great weight of the evidence. In so arguing, the self-insured argues the claimant's testimony was not credible. It emphasizes the delay in the claimant's reporting that his injury was work related to his employer and the failure of the early medical records to include a history of an on-the-job injury. The self-insured emphasized the same factors it emphasizes on appeal to the hearing officer at the hearing. As the fact finder, it was solely the hearing officer’s responsibility to assess the significance of those factors in determining whether the claimant had satisfied his burden of proving injury. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence tending to demonstrate that the claimant sustained a compensable injury and to reject the contrary evidence. The hearing officer's injury determination is sufficiently supported by the claimant's testimony. Our review of the record does not demonstrate that that determination is so contrary to the great weight of the evidence as to be clearly wrong or

manifestly unjust. Therefore, no sound basis exists for us to reverse the hearing officer's decision on appeal. Cain; Pool.

The self-insured's challenge to the disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the injury determination, we likewise affirm the determination that the claimant had disability from April 6, 1999, through the date of the hearing, July 14, 1999.

With regard to the issue of whether claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance plan, 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. 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 claimant testified that he did not know that his receipt of benefits under his group health insurance could jeopardize his receipt of workers' compensation benefits. The hearing officer was acting within his province as the fact finder in crediting that testimony and in determining that as a result, the claimant did not make an informed choice to seek group health benefits to the exclusion of workers' compensation benefits in that he did not understand the consequences of his decision to initially pursue group health benefits. Our review of the hearing officer's determination that the claimant did not elect to forego workers' compensation benefits demonstrates that the election-of-remedies determination is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. As such, we will not disturb it on appeal. Cain, *supra*; Pool, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

I concur, although I do not agree with language indicating that election of remedies is simply a factual determination to be upheld unless the great weight of evidence is to the contrary. This is a legal equitable doctrine, and as pointed out in my majority opinion in Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998, the circumstances that will merit a finding of a Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) election are few and far between. Whether a choice is "informed" is only part of the Bocanegra analysis. That case also emphasizes that there must be "harm" to an innocent party, and that the result of pursuing inconsistent remedies actually rises to an unconscionable level. This is never the case, in my mind, where regular health insurance is first tapped as a source of payment for what is ultimately found to be a compensable injury. There will be no double recovery, because the health care provider or the workers' compensation carrier will need to reimburse the regular health insurance carrier. Where the impact on a carrier is to require it to pay the statutory workers' compensation benefits for which it collects premiums, the end result is "conscionable," not unconscionable and inequitable. Furthermore, I believe Section 406.035 precludes waiver through an election.

_____

Susan M. Kelley

Appeals Judge