

APPEAL NO. 991934

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 August 16, 1999. The issues at the CCH were whether the appellant (claimant) suffered a compensable injury to his right shoulder in the course and scope of employment on _____; whether the respondent (carrier) is relieved of liability pursuant to Section 409.002 due to the claimant's failure to timely notify his employer pursuant to Section 409.001; whether the claimant had disability from December 29, 1998, to the present; and whether the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The hearing officer determined that the claimant did not suffer an injury to his right shoulder in the course and scope of employment on _____; that the claimant did not suffer disability as a result of the alleged injury; that the carrier is relieved of liability for this claim due to the claimant's failure to report the injury within 30 days as required by Section 409.001; and that the carrier is relieved of liability because the claimant made an election of remedies. The claimant appeals, urging that the hearing officer's decision is contrary to the evidence. The carrier replies that the evidence is sufficient to support the hearing officer's decision and it should be affirmed.

DECISION

Affirmed, as reformed, in part and reversed and rendered in part.

The claimant worked in the tire and lube department of employer's store and had transferred from a (State) store in August 1998. The claimant testified that he sustained an injury to his right shoulder on _____, when lifting a tire off of a car. The injury was witnessed by Mr. S. According to the claimant, he finished the job and then reported the injury to his supervisor, Mr. M. The claimant went to the emergency room (ER) for treatment on _____; was diagnosed with a right shoulder sprain; and was released to return to work with restrictions. The claimant said that the employer did not accommodate his restrictions and he continued to work changing tires. On December 22, 1998, the claimant sought medical treatment with Dr. J, who performed x-rays, an MRI, and diagnosed the claimant with rotator cuff disorder. The claimant said that he told both the doctor at the ER and Dr. J that he injured himself lifting a tire at work. Dr. J took the claimant off work on December 29, 1998, and the claimant had a right shoulder acromioplasty on January 21, 1999. The claimant testified that he has not been released to return to work and has been unable to work since December 29, 1998.

The claimant testified that he completed a leave-of-absence form with the employer in January 1999, after discussing the form with the personnel manager. The form states "Explain Short-term disability. If the illness or injury is expected to exceed 14 days, is not work related, and he/she has short-term disability, the associate must contact . . . to file a disability claim." The claimant said that he called the telephone number, filed for, and received short term disability benefits, and has currently applied for long-term disability benefits. The claimant testified that he was not familiar with Texas workers' compensation

law and he filed his shoulder surgery under his group health insurance because he had no other way of paying for it. The claimant said that he had a previous workers' compensation injury in _____ while working for the employer in State, which caused him to lose a couple of days work and required medical treatment, but he did not file a claim. According to the claimant, he learned that workers' compensation was for work-related injuries after he spoke with a person who works at a chiropractor's office and they helped him complete an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on April 7, 1999. The TWCC-41 indicates that the date of injury is _____, and in response to the question "how did the injury/occupational disease occur," it states "don't know." The claimant testified that he pointed out this mistake to the person assisting him complete the form, but apparently no change was made.

On cross-examination, the claimant admitted that while released to light duty from September through December 29, 1998, the employer assigned him to work as a greeter, but testified that he still changed tires and oil. Mr. M, the service manager, testified that the claimant complained that his shoulder was bothering him in September 1998 and the claimant denied it was work related. Mr. M testified that the claimant brought in work restrictions from a doctor indicating no heavy lifting, he was assigned to be a greeter, and did not do tire or oil changes. According to Mr. M, he first learned that the claimant was alleging a work-related injury in _____. Mr. W, the tire/lube manager, testified that both Mr. M and the claimant brought the claimant's light-duty restrictions to him in September 1998, that he asked the claimant if it was work related, and that the claimant said "no." Mr. W testified that the claimant did not perform tire or oil changes while on light duty and that he first learned that the claimant was alleging a work-related injury in _____.

The ER record of _____, reflects that the claimant reported a history of shoulder pain with onset two weeks ago and "denies any injury." On December 22, 1998, Dr. J's history states "this patient has had a several month history of pain in his right shoulder. He does not seem to have any history for an injury and it is just becoming worse and worse." The first medical report which indicates the claimant sustained a work-related injury is Dr. J's report of April 6, 1999, which states:

[The claimant] has been under my treatment for the last several months. He had an injury to his shoulder, which he claimed under his private insurance, however the injury was related to constant repetitive lifting work where he works. The injury was aggravated by this and has since made him unable to work. He is currently under my treatment which consists of therapy and anti-inflammatory medications. It is my opinion that this injury is directly related to work and therefore should be covered under Workers' Compensation.

The claimant had the burden to prove that he injured himself as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an

issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). The claimant testified that the mechanism of injury was a specific lifting incident which occurred on _____; however, his appeal states that the injury was a result of lifting overhead repeatedly. No assertion of an occupational disease was made at the CCH and the hearing officer correctly did not consider such an issue. The hearing officer resolved contradictions in the evidence against the claimant and concluded that claimant did not meet his burden of proving he sustained an injury in the course and scope of employment on _____. 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 determination of the hearing officer that the claimant did not sustain an injury to his right shoulder in the course and scope of his employment on _____.

The claimant asserts that the hearing officer's finding that he had shoulder problems prior to _____, is contrary to the evidence. We note that the record does not reflect any evidence of shoulder problems prior to _____, and such a finding is not necessary to the decision in this case. For these reasons, we strike Finding of Fact No. 5.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The testimony of the claimant that he reported the injury to the employer on _____, is in direct conflict with the carrier's assertion that the employer did not get notice until _____. The hearing officer, after considering all of the evidence, found that the claimant did not report the alleged injury until after April 7, 1998, more than 30 days after _____. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not timely report the injury or establish good cause for failure to give timely notice.

"Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain an injury in the course and scope of his employment (no compensable injury), the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The claimant appeals the hearing officer's finding that he was informed of his rights and made an informed election to use medical benefits and short- and long-term disability 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. 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 nonworkers' 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. 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 it has paid out.

In this case, the hearing officer determined that the injury was not sustained in the course and scope of employment. The evidence in this case does not meet the standards set forth in Bocanegra for imposing a binding election in that there is insufficient evidence to support the finding of fact that the claimant made an informed choice. Although it does not effect the outcome of this case, we reverse the hearing officer's decision that the carrier is relieved of liability for this claim due to an election of remedies, and we render a decision that the claimant is not barred from pursuing workers' compensation benefits based on an election of remedies.

We note that the CCH was held in (City 1), Texas, and the parties stipulated that the claimant resided within 75 miles of the City 1 field office of the Texas Workers' Compensation Commission. The hearing officer's Conclusion of Law No. 2 states that "Venue was proper in the (City 3) Field Office of the Texas Worker's Compensation Commission." This is obviously a typographical error and we reform the hearing officer's decision by substituting "City 1" for "City 2" in Conclusion of Law No. 2.

We affirm that part of the hearing officer's decision and order that concludes that claimant did not suffer an injury to his right shoulder in the course and scope of

employment on _____, that he did not suffer disability as a result of the alleged injury, and that the carrier is relieved of liability for this claim due to the claimant's failure to report the injury within 30 days as required by Section 409.001. 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 the claimant is not barred from pursuing workers' compensation benefits based on an election of remedies. The order that the claimant is not entitled to benefits on this claim remains unchanged.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge