

APPEAL NO. 991962

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 August 12, 1999, the hearing officer to consider two claims filed by the respondent (claimant) for two different alleged injuries. With respect to the issues before him in the claimant's first claim, the hearing officer found that the claimant sustained a compensable injury on _____; that he timely reported that injury to his employer; and that he is not barred from receiving workers' compensation benefits because of an election to receive benefits under a group health insurance policy. With respect to the claimant's second claim, the hearing officer determined that the claimant did not sustain a compensable injury on _____; that he did not have disability; and that he is not barred from receiving workers' compensation benefits because of an election to receive group health benefits. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant sustained a compensable injury on _____; that he timely reported his injury; and that he did not make an election of remedies are against the great weight of the evidence. In his response to the carrier's appeal, the claimant urges affirmance. The claimant also filed a document that is in the nature of a contingent appeal of the hearing officer's injury and disability determinations relating to the alleged _____, injury. The hearing officer's decision and order were distributed on August 18, 1999. The claimant is deemed to have received the hearing officer's decision on Monday, August 23, 1999. The 15th day after the deemed date of receipt was September 7, 1999. The claimant's purported appeal was received by the Texas Workers' Compensation Commission on October 4, 1999, well beyond the deadline for filing a timely appeal. Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3). Thus, it is not properly before us and will not be considered.

DECISION

Affirmed.

The claimant testified that on _____, he was working at a landfill site and that his duties required him to drive an all-terrain vehicle to document placement and elevation requirements. He stated that the ride is very rough and jarring and that when he stopped the vehicle to get out at about 10:00 a.m. on _____, he was struck with severe pain in his neck, left shoulder and left arm. The claimant testified that the pain did not subside and at about 2:00 p.m., he told Mr. F, the site manager, that he needed medical attention. He stated that Mr. F drove him to the emergency room; that he told Mr. F that he had been injured at work; that Mr. F told him that he had not been injured on the job; that when he gave his history at the emergency room, he did not mention that his injury was work related because he was intimidated by Mr. F; and that as a result of that intimidation, he did not pursue workers' compensation benefits for an extended period.

In a report of June 24, 1998, Dr. A, the claimant's treating doctor, noted that the claimant's "electrodiagnostic findings are consistent with a left C7 radiculopathy." A June

25, 1998, cervical MRI revealed a small herniation at C6-7. On December 18, 1998, the claimant underwent cervical surgery that was performed by Dr. R.

The carrier introduced medical records from the claimant's emergency room visits of _____, and January 30, 1998, in which the claimant reported pain in his neck, left shoulder and left arm, denying trauma or injury to those areas. The claimant also reported that his neck "felt like he had slept wrong" and that he had started working out in a gym about two weeks earlier. In addition, the carrier introduced a written statement from Mr. F in which he states that the claimant responded with a "firm no" to the question of whether his neck and shoulder pain was work related. Mr. F opined that the claimant had been hurt off the job, noting that the claimant had boasted about starting a weight-lifting program. Finally, the carrier introduced written statements from three coworkers of the claimant which stated that the claimant had never attributed his neck and shoulder injury to work activities but to weight lifting.

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 carrier asserts error in the hearing officer's injury and notice determinations. Those issues presented questions of fact for the hearing officer to resolve. In his discussion the hearing officer specifically noted that the "resolution of this case depends almost entirely on the Claimant's credibility" and that the claimant was a "credible witness." Thus, it is apparent that the hearing officer resolved the conflicts and inconsistencies in the testimony and evidence in favor of the claimant and he was acting within his province as the fact finder in so doing. The factors emphasized in the carrier's appeal as the basis for a reversal were also emphasized at the hearing. It was a matter left to the discretion of the hearing officer to decide the significance, or lack thereof, of those factors. The hearing officer's determinations that the claimant sustained a cervical injury performing his job duties on _____, and that he reported his injury to Mr. F that day are supported by the claimant's testimony, which the hearing officer was privileged to credit. Our review of the record does not reveal that the hearing officer's injury and notice determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust;

therefore, no sound basis exists for us to reverse those determinations on appeal. Pool; Cain.

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 what workers' compensation insurance was for in January 1998 and that he did not understand the difference between workers' compensation insurance and group health insurance. 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge