APPEAL NO. 000559

Following a contested case hearing held on February 28, 2000, pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the respondent (claimant) sustained a compensable injury on _____; that as a result of the claimed injury, claimant had disability beginning on October 22, 1999, and continuing through the date of the hearing; and that claimant is not barred from pursuing Texas workers= compensation benefits because of an election to receive benefits under a group health insurance policy. The appellant (carrier) requests our review of these determinations for sufficiency of the evidence. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant, who was employed by the employer as a supervisory boilermaker, testified that on _____, while working on watercoolers at a chemical plant in Arkansas, he was squatted down on top of a cooler working between his legs; that when he stood up, his head, covered with a hard hat, struck a piece of angle iron, jamming his neck; and that he fell, landing on his feet. He further stated that he shrugged off the accident and finished his shift; that when he awoke the next day he felt a burning sensation and numbness from above his right elbow down into his fingers; that he continued to work in pain for the next four days; and that he then returned to Texas where he obtained medical care for his injury and was taken off work. Claimant also stated that, while he had not had any prior neck condition, he did have tendinitis in his right elbow which was painful when pitching a baseball, a pasttime he had enjoyed since the age of six. However, claimant indicated that the pain from this condition was very much different from the symptoms he had following the injury at work.

As for the election of remedies issue, claimant testified that when he reported the injury to Mr. T, the employer=s safety manager, Mr. T suggested that claimant not treat his injury as a workers= compensation injury since the employer=s safety ratings affect getting jobs in other plants and indicated that the employer would continue to pay claimant for 40 hours per week and would take care of his out-of-pocket expenses. Claimant stated that he knew the difference between workers= compensation insurance and group health insurance and that being a four-year employee and "on the rise" with the employer, he shared Mr. T=s interest in keeping the employer=s reportable workers= compensation injuries down. However, he further testified that while Mr. T=s suggestion was initially acceptable to him, after learning that something was wrong with his neck, he talked it over with his wife; realized he would have to lie on medical claim forms; and went in the next day and told Mr. T he wanted the injury treated under workers= compensation. The record is not clear as to when these discussions with Mr. T occurred.

The October 28, 1999, record of Dr. B states the accident history as testified to by claimant and Dr. B=s impression as cervical radiculopathy.

Dr. C, a chiropractor, testified that his "working diagnosis" included a C5-6 disc injury with possible tearing, cervical radiculitis, and a possible subdural hematoma, and that further testing was required to refine the diagnosis. He stated that the mechanism of injury described by claimant was consistent with his symptoms.

Mr. T testified that he and claimant discussed the matter of covering claimant=s injury with workers= compensation or group health insurance; that claimant was aware of the difference between the two types of coverage; and that claimant "elected to continue using his company group benefits." He indicated that claimant brought an off-work slip with him to work on October 29, 1999; Mr. T further testified that claimant returned to the office on November 23, 1999, stating that short-term disability would not pay enough to live on and that he wanted to file a claim under workers= compensation.

In evidence is the record of Dr. M dated October 27, 1999, taking claimant off work until further notice. Also in evidence is a November 23, 1999, record of Dr. JM reflecting that claimant may not return to work.

In addition to the dispositive legal conclusions, the carrier challenges factual findings that during the course and scope of his employment on _____, claimant rammed his head against an angle iron, thereby sustaining a compensable injury; that when claimant used his group health insurance policy for treatment of his _____, injury, it was not an informed choice with a full and clear understanding of the facts and remedies available to him; and that due to the claimed injury, claimant was unable to obtain or retain employment at wages equivalent to his preinjury wage beginning on October 23, 1999, and continuing through the date of the hearing.

Claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers= Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers= compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers= Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref=d n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence (St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref=d n.r.e.)).

As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The carrier had the burden to prove that claimant is barred from pursuing benefits under the 1989 Act because of his election to pursue group health insurance benefits. The court in Texas General Indemnity Company v. Hearn, 830 S. W. 2d 257 (Tex. App. - Beaumont 1992, no writ), citing Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), stated that "in order for the election of remedies doctrine to apply as a bar to the relief sought, it must affirmatively be shown that (1) one has successfully exercised an informed choice (2) between two or more remedies, rights or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice." In Texas Workers= Compensation Commission Appeal No. 980024, decided February 13, 1998, the claimant initially filed for benefits under his wife=s group health insurance policy and later filed for workers= compensation benefits after gaining an appreciation of the serious nature of his injury. The Appeals Panel wrote that it knew of no requirement that a claimant must pursue his or her claim or make an election of remedies within any given time frame after giving timely notice and within one year of the date of the injury. In the case we consider, the hearing officer could infer from the evidence that while claimant was initially amenable to Mr. T=s suggestion that he not pursue a workers= compensation claim in the interest of keeping the employer=s safety rating up, he changed his mind after learning that what he thought was carpal tunnel syndrome was actually diagnosed as a cervical spine injury, and that he did not make an informed choice for group health insurance benefits.

The decision and order of the hearing officer are affirmed.

Philip F. O=Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge