APPEAL NO. 000631

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 March 2, 2000. The hearing officer resolved the disputed issues by concluding that the date of injury is _____; that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that the respondent (carrier) is relieved of liability under Section 409.002 because of claimant=s failure to timely notify his employer under Section 409.001; that claimant did not have disability since there was no compensable injury; and that claimant is barred from pursuing workers= compensation benefits because of an election of remedies. Claimant appeals, requesting that we reverse the hearing officer=s decision and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

The hearing officer=s Decision and Order contains a detailed recitation of the evidence and in his request for review claimant states that he agrees with the hearing officer=s summary of the evidence. Accordingly, only so much of the evidence will be set forth below as is necessary for our decision.

The parties stipulated that on _____ and _____, claimant was the employee of (employer). Claimant testified that in early January 1999 (all dates are in 1999 unless otherwise stated), he commenced employment with the employer as a cement truck driver; that three to four days before _____ he began having pain in his left neck and shoulder area and going down his side; that the pain became so severe that he could no longer do his job after _____, his last day at work; that he told his supervisor, Mr. F, that he "was hurting" and was going to his doctor, Dr. ES, to "see what was going on"; that he saw Dr. ES on April 29th; that he later went to a hospital emergency room (ER) for a pain shot; and that still later he was admitted to the hospital where he was evaluated by Dr. HS, who performed cervical spine surgery. Dr. HS=s records reflect that the surgery was performed on May 14th for a herniated disc at the C6-7 level which was compressing the spinal cord. The Initial Patient History sheet reflects the answer "No" to the question whether this is a work-related injury. Claimant indicated that most of the information provided to Dr. HS at the hospital upon his admission came from his wife and that he was "numb" from the injury and the medication.

Claimant, who said he had a prior workers= compensation claim for an ankle injury, apparently in 1996, further testified that from the time he saw Dr. HS he knew the injury should be filed under workers= compensation and that he did not tell Mr. F the injury was work related during the several calls Mr. F made to him inquiring about his status. He attributed this lapse to his being affected by medication. He further stated that he later changed treating doctors to

Dr. L, a chiropractor. Claimant indicated that after _____ the employer placed him in an unpaid leave of absence status for 89 days, after which his employment was terminated by Mr. F because he ran out of unpaid leave and had not obtained a release to return to full duty with the employer.

Claimant, who several times stated that he was "not good at dates," testified that there was not one specific incident at work on a specific day which caused his neck injury but rather that it occurred over the three- or four-day period before _____. He did not, however, testify to the types, frequency, and duration of whatever repetitive motions he made in performing his job. As previously mentioned, claimant said he first saw Dr. ES for his injury on April 29th. However, Dr. ES=s records reflect that he saw claimant for this complaint on April 19th and obtained x-rays of claimant=s neck and left shoulder on April 22nd. With regard to the April 19th date recorded by Dr. ES for that visit, claimant indicated that Dr. ES erred and attributed it to Dr. ES=s being 90 years of age. A May 5th record of Dr. K states that claimant=s cervical and left upper extremity pain began about two and one-half weeks ago and that he was given a pain shot at the ER on _____ and released. The signed but undated Employee=s Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) introduced by the carrier does not state a date of injury but does state the date of the first day of work missed as _____. The Employee=s Request to Change Treating Doctors (TWCC-53), signed by claimant on July 29th, which requested the change from Dr. HS to Dr. L, states the date of injury as _____. Claimant indicated that he and his attorney were still unsure of dates at the time those forms were completed. On an amended TWCC-41 dated November 29th, the date of injury is stated as _____ and the occurrence of the injury as "repetitive trauma."

The employer=s human resources administrator, Ms. O, testified that her first indication that claimant was alleging that his neck condition was work related came when a pharmacy called seeking verification for workers= compensation coverage. Mr. F testified that he first learned that claimant was alleging a work-related injury when Ms. O told him about the call from the pharmacy about one and one-half weeks after he terminated claimant=s employment. He said he asked claimant the day before claimant stopped work if his problem was work related and that claimant responded, "No, its just something that=s been coming on" and that it was not due to the job.

Concerning the election of remedies issue, claimant acknowledged that he filed his medical bills for Dr. ES, Dr. HS, and the hospital, including the surgery, under the employer=s group health insurance program. Ms. O indicated that the employer=s group health coverage on claimant expired when his employment was terminated but that he had the option to continue coverage under COBRA. Claimant said he filed under the group health insurance at the hospital, apparently including Dr. HS=s services, because "to get in the hospital, you have to do that." He further stated that the hospital did not ask whether his condition was work-related; that he was "not thinking right" in that "the injury [he] sustained had [him] numb" and

because "the medicine was in [him]." As noted, he also said he knew from the time he began seeing Dr. HS that he should file under workers= compensation.

Claimant had the burden to prove that he sustained the claimed occupational disease injury (defined in Sections 401.011(34) and (36)), the date of the claimed injury (defined in Section 408.007), that he provided the employer with timely notice (Section 409.001(2)), and that he had disability (defined in Section 401.011(16)).

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. We are satisfied that the disputed findings of fact on the date of injury, occupational disease injury, timely notice, and disability issues are sufficiently supported by the evidence and the inferences the hearing officer could reasonably draw from the evidence. 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).

Concerning the election of remedies issue, the hearing officer found in Finding of Fact No. 8 that "[a]s of April 29, 1999 the Claimant made a knowing choice to use his group health benefits rather than pursue his available workers= compensation remedies" and concluded in Conclusion of Law No. 4 that claimant "is barred from pursuing Texas Workers= Compensation benefits because of an election to received [sic] benefits under a group health policy." We do not view this finding as being against the great weight of the evidence nor the conclusion as legally incorrect. *See* Smith v. Home Indemnity Company, 683 S. W. 2d 559 (Tex. App. Fort Worth 1985, no writ) which, on similar facts and applying the four criteria in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), determined that the employee made an election to pursue the employer=s group health insurance benefits.

The decision and order of the hearing officer are affirmed.

Philip F. O=Neill
Appeals Judge

CONCUR IN RESULT:

Thomas A. Knapp
Appeals Judge

CONCUR IN RESULT:

Dorian E. Ramirez
Appeals Judge