APPEAL NO. 001660

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 June 28, 2000. With respect to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; that the claimant failed to timely report his alleged injury to his employer without good cause for his failure to do so; that the claimant is not barred from receiving workers' compensation benefits by an election to receive benefits under group medical and disability policies; and that the claimant did not have disability. In his appeal, the claimant essentially argues that the hearing officer's injury, notice, and disability determinations are against the great weight of the evidence. In addition, the claimant makes several assertions of procedural error. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. The carrier filed a cross-appeal, contending that the hearing officer erred in determining that the claimant did not make an election of remedies. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

We will only briefly summarize the evidence most germane to the issues before us. The claimant testified that he injured his cervical spine in a motor vehicle accident on _____, in the course and scope of his employment as a route salesman for the employer. He stated that he turned into the parking lot of a restaurant where he was to make a bread delivery, when the truck slid on some water that had collected in the parking lot and struck a concrete barrier and light pole. The claimant stated that he reported the accident to his supervisor shortly after it happened; however, he acknowledged that he did not report an injury at that time. He explained that he did not realize that the pain in his neck that he felt after the accident was the result of the accident because he had numerous other health problems which he thought were the cause of the pain in his neck. The claimant maintained that it was not until February 2000, when the results of his cervical MRI were discussed with him, that he realized that he had sustained a cervical injury in the incident at work. On cross-examination, the claimant admitted that the pain in his neck was different after the motor vehicle accident than it had been before. In addition, as the hearing officer noted, in his responses to the carrier's interrogatories, the claimant stated that he knew he was "hurting" after the incident on _____, but that he did not know the extent of his injury until he obtained the MRI results. The cervical MRI of January 24, 2000, revealed herniation at C5-6 and an "annular fiber prominence" at C3-4. The claimant testified that he underwent a cervical surgery at C5-6 on February 22, 2000.

The claimant 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). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before her. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, the existence of an injury can be established by the claimant's testimony 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 the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain his burden of proving that he sustained a compensable injury. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant injured his cervical spine in the motor vehicle accident at work on _____. The hearing officer was acting within her province as the fact finder in so finding. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The question of whether the claimant had good cause for his failure to timely report his alleged injury to his employer was also a question of fact for the hearing officer. The claimant testified that he did not realize he had sustained an injury to his neck in the accident at work until the results of the cervical MRI were discussed with him. Rather, he maintained that he attributed the pain in his neck after the accident to his other health problems. As noted above there was conflicting evidence on the issue of when the claimant understood that he had injured his cervical spine in the accident at work and the hearing officer was free to resolve those conflicts against the claimant and to determine that he did not establish good cause for his late reporting of his injury. Our review of the hearing officer's notice determination does not demonstrate that it is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, we will not disturb that determination. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to

obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

Next, we consider the claimant's assertions of procedural error. Initially, the claimant contends that the ombudsman who assisted him "knew very little" about his case and "was very unprepared." We do not generally review the adequacy of an ombudsman's assistance; therefore, we dismiss this assertion. The claimant also complains about the employer's failure to comply with a subpoena that was issued for an original copy of the preliminary accident report he completed for the employer. The claimant did not raise this matter at the hearing; thus, he did not preserve error for purposes of appeal. The claimant also contends that he was improperly questioned from Carrier's Exhibits C through I, which were not in evidence because they were withdrawn by the carrier. We find no merit in this assertion. Carrier's Exhibits C, D, E, F, H, and I were all admitted as claimant's exhibits; thus, there was no error in the carrier's having questioned the claimant on exhibits offered and admitted on his behalf. The only withdrawn exhibit that was not a claimant's exhibit was Carrier's Exhibit G, an affidavit, and the record does not reflect that the hearing officer considered that exhibit in making her determination. Accordingly, we perceive no error.

Finally, the carrier appeals the hearing officer's determination that the claimant did not make an election of remedies in this case by seeking and obtaining medical benefits and short-term disability benefits under group policies. 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 and that a manifest injustice would result if the carrier were required to pay workers' compensation benefits. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998. In this instance the hearing officer determined that the evidence did not meet the standards set forth in Bocanegra for imposing a binding election and our review of the record does not reveal that that determination is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Judge/Manager

Robert W. Potts
Appeals Judge