

APPEAL NO. 002172

Following a contested case hearing held on August 17, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant) sustained a compensable injury on _____; that he did not make an election of remedies by receiving benefits payable under a group health insurance policy; and that he has had disability since February 27, 2000. The appellant (carrier) has appealed, asserting that the claimant did elect group health insurance as his remedy and that the hearing officer's determination of the injury issue is against the great weight of the evidence. The claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The claimant, who according to his medical records is a pipe fitter, testified that on _____ (all dates are in 2000 unless otherwise stated), he experienced back pain after having taken down a heavy chainsaw from a pipe rack; that a coworker knew he was in pain when he descended from the scaffolding; that he continued to work for about five days, thinking he had "just pulled a muscle"; and that his pain became so acute he went to an emergency room (ER) on February 21. He said he used his group health insurance card at the ER because he was asked for an insurance card and needed treatment. The claimant further stated that he reported his injury to Mr. S on the day it happened; that a week later he talked to Mr. C; and that his last day of work was on February 26. He testified that he was treated by Dr. P and that after diagnostic testing revealed a ruptured lumbar disc, Dr. K performed surgery. He acknowledged having had low back pain for several years for which he took Vicodin and that he had a prior workers' compensation claim. Dr. P's appointment verification form states that the claimant has a work excuse from February 26 to March 6 or until determined by Dr. P at the next visit.

Dr. K wrote on June 22 that the claimant has been disabled from working since the first time he saw him on March 17 and remains so at this time. Dr. K's operative report reflects that on May 4 he performed a lumbar discectomy at the L5-S1 level and diagnosed an extruded herniated nucleus pulposus with a huge, free fragment under the S1 nerve root. Dr. K's records also reveal that the claimant sustained three gunshot wounds on March 17, 1978, one of which went into his left lumbar area and entered the right vertebral soft tissue and that he thereafter had numbness and weakness of his left lower extremity for which he was seen by Dr. K.

The hearing officer found that on _____ the claimant sustained an injury while engaged in the exercise of his duties with the employer; that since February 27, his _____ injury has prevented him from obtaining and retaining employment at wages equivalent to the wage he earned prior to _____; and that although he accepted

benefits payable under a group health insurance policy, his action in so doing did not constitute the successful exercise of an informed choice between two or more remedies which are so inconsistent as to constitute manifest injustice.

The 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 carrier had the heavy burden to prove that the claimant elected the remedy of group health insurance over workers' compensation benefits. 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 hearing officer explains in her discussion of the evidence how she reached the determination that the claimant sustained a new injury at work on _____ as distinguished from a mere flare-up of symptoms from his prior low back injury. As for the election of remedies determination, the hearing officer could conclude that the carrier's evidence failed to establish the elements set forth in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) in the claimant's initial use of his group health insurance benefits. See, *generally*, Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997, and Texas Workers' Compensation Commission Appeal No. 980024, decided February 13, 1998.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Tommy W. Lueders
Appeals Judge