

APPEAL NO. 010916
FILED JUNE 20, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on April 10, 2001, the hearing officer resolved the disputed issues by determining that the respondent/cross-appellant (claimant) did not sustain a low back injury in the course and scope of employment on _____; that the appellant/cross-respondent (carrier) is not relieved from liability pursuant to Section 409.002 because the claimant did timely notify the employer pursuant to Section 409.001; that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; that the claimant did not have disability; and that the Texas Workers' Compensation Commission abused its discretion in approving Dr. W as an alternate treating doctor. The carrier has appealed the notice and election of remedies determinations on evidentiary sufficiency grounds. The claimant has not responded to the carrier's appeal but has appealed the injury, disability, and change of treating doctor determinations. The carrier's response asserts that the claimant's appeal is untimely and that the evidence sufficiently supports the determinations he challenges.

DECISION

A timely appeal not having been filed by the claimant, the hearing officer's determinations of the injury, disability, and change of treating doctor issues have become final. The hearing officer's determinations of the notice and election issues are also affirmed.

The hearing officer did not err in determining that the claimant provided the employer with timely notice of his claimed injury (Section 409.001) and that the claimant is not barred from pursuing benefits under the 1989 Act because of an election to receive group health insurance benefits. The claimant testified to having immediately reported the injury to Ms. E, who was in charge on the date of the injury. The carrier acknowledged at the hearing that the challenge to the timeliness of the claimant's notice was premised on the carrier's being able to establish a date of injury earlier than the _____, date claimed by the claimant. The hearing officer did not err in determining that the claimant's initial resort to his health insurance did not bar him from pursuing workers' compensation benefits. The evidence on this issue was in conflict. The claimant's initial treating doctor wrote that the claimant indicated he was trying to protect a work bonus. However, the claimant testified that he used his group health insurance with that doctor, whom he saw twice, because the employer would not file a report of injury; and that once an accident report was completed by the employer, he sought benefits under the 1989 Act. See Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) for the elements of the election of remedies defense. *And see* Texas Workers' Compensation Commission Appeal No. 001321, decided July 26, 2000.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, 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)). While another fact finder may well have drawn different inferences from the evidence on the election of remedies issue, we cannot find that the challenged determinations 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge