

APPEAL NO. 011461  
FILED AUGUST 15, 2001

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 6, 2001. The hearing officer determined that (1) the respondent (claimant) sustained a compensable injury on \_\_\_\_\_; (2) the claimant had good cause for failing to timely notify his employer of the claimed injury, and the appellant (carrier) is not relieved from liability under Section 409.002; (3) the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and (4) the claimant had disability from September 30, 2000, to January 22, 2001. The carrier appeals the determinations on sufficiency grounds. The claimant urges affirmance.

DECISION

Affirmed.

**Compensable Injury**

The hearing officer did not err in determining that the claimant sustained a compensable back injury on \_\_\_\_\_. The claimant had the burden to prove that he sustained damage or harm to his lumbar spine, arising out of and in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. There was conflicting evidence presented with regard to this issue. 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, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust (Cain v. Bain, 709 S.W.2d 175 (Tex. 1986)) although different inferences could be drawn from the evidence.

**Notice of Injury**

The hearing officer did not err in determining that the claimant had good cause for failure to timely notify the employer of his work-related injury and that the carrier is not relieved from liability for this claim. We review good cause determinations under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 002251, decided November 8, 2000. The hearing officer's determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, the degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. In

view of the evidence presented, we cannot conclude that the hearing officer abused his discretion in determining that the claimant had good cause for failing to timely notify his employer of the compensable injury. Accordingly, the hearing officer properly concluded that the carrier is not relieved from liability for this claim, pursuant to Section 409.002.

### **Election of Remedies**

The hearing officer did not err in determining that the claimant did not make a binding election of remedies and is not barred from receiving workers' compensation benefits. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the Texas Supreme Court stated that the election of one legal remedy may constitute a bar to relief under another remedy "when (1) one successfully exercises 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." The Court stated that the choice of remedies, rights, or states of facts must be "made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice." We have held that to prove or establish an election of remedies, all four prongs of the test set out by the Texas Supreme Court in Bocanegra must be met. See Texas Workers' Compensation Commission Appeal No. 980898, decided June 17, 1998. In view of the claimant's testimony in this case, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

### **Disability**

The hearing officer did not err in determining that the claimant had disability from September 30, 2000, through January 22, 2001. The carrier's challenge to the hearing officer's disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury and that the carrier is relieved from liability for this claim pursuant to Section 409.002. Given our affirmance of the injury and notice determinations, we likewise affirm the hearing officer's determination with regard to disability.

The decision and order of the hearing officer are affirmed.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Michael B. McShane  
Appeals Judge

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Robert W. Potts  
Appeals Judge