APPEAL NO. 011600
FILED AUGUST 23, 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 5, 2001. The hearing officer determined that (1) the respondent (claimant) sustained a compensable low back injury on _____; (2) the appellant (carrier) is not relieved from liability under Section 409.002, because of the claimant's failure to timely notify her employer pursuant to Section 409.001; (3) the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation as required by Section 409.003; (4) the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and (5) the claimant had disability from December 23, 1998, through December 28, 1998, and January 31, 2001, through the date of the hearing. The carrier appeals the determinations on sufficiency grounds. No response was filed by the claimant.

DECISION

Affirmed.

Compensable Injury

The hearing officer did not err in determining that the claimant sustained a compensable injury. The claimant had the burden to prove that she sustained damage or harm to her lower back on _____, arising out of and in the course and scope of her 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 trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Upon review of the evidence presented, 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 v. Bain, 709 S.W.2d 175 (Tex. 1986).

Notice of Injury

The hearing officer did not err in determining that the claimant timely notified her employer of a work-related injury, and the carrier is not relieved from liability for this claim. Section 409.001(a) provides, in relevant part, that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurred. Failure to notify an employer as required by Section 409.001(a) relieves the employer and the carrier of liability, unless the employer or carrier has actual knowledge of the injury, good cause exists for the failure to timely notify, or the claim is not contested. Section 409.002. Whether the claimant timely notified her employer of the claimed injury was a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 990301, decided March 31, 1999 (Unpublished). In view of the claimant's testimony and written statements of the claimant's former coworkers, the hearing officer could conclude that the claimant notified her employer of the injury on the date of injury. 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, *supra*.

Claim for Compensation

The hearing officer did not err in determining that the carrier is not relieved from liability for this claim, pursuant to Section 409.004, for a failure to timely file a claim for compensation. The carrier's challenge to the hearing officer's resolution of this issue is premised upon the success of its argument that the claimant did not timely notify the employer of the claimed injury.[1] Given our affirmance of the notice determination, we likewise affirm the hearing officer's determination that the carrier is not relieved from liability for this claim, pursuant to Section 409.004.

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 disjunctive test set out by the Texas Supreme Court in Bocanegra must be met. *See* Texas Workers' Compensation Commission Appeal No.

[1]This is so because once informed of the injury, the employer delayed filing an Employer's First Report of Injury or Illness (TWCC-1), tolling the claimant's time to file a claim pursuant to Section 409.008.

980898, decided June 17, 1998. The hearing officer could believe the claimant's testimony and find that she did not have a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. 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, *supra*.

Disability

The hearing officer did not err in determining that the claimant had disability from December 23, 1998, through December 28, 1998, and January 31, 2001, through the date of the hearing. The claimant had the burden to prove that she was unable to obtain or retain employment, for the stated period, at wages equivalent to the preinjury wage, due to the compensable injury. There was conflicting evidence presented with regard to this issue. The hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge