

APPEAL NO. 011637  
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 (CCH) was held on June 14, 2001. The hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_, and therefore did not have disability; the respondent (carrier) is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer pursuant to Section 409.001 and there was no good cause for late reporting; and, the claimant is barred from pursuing Texas Workers' Compensation benefits because of his election to receive benefits under a group health insurance policy.

DECISION

Affirmed in part, reversed and rendered in part.

The hearing officer did not err in determining that the claimant did not sustain a compensable injury and that he did not have disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). There was conflicting evidence on the issues of injury and disability. The hearing officer resolved the conflicts and inconsistencies in the evidence against the claimant and he was acting within his role as the fact finder in determining that the claimant did not sustain his burden of proof on either issue. Nothing in our review of the record indicates that the challenged determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb those determinations on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer did not err in determining that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify the employer pursuant to Section 409.001 and there was no good cause for late reporting. There was conflicting evidence presented on the issue of notice. Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. The hearing officer weighed the evidence presented, and determined that the claimant did not give sufficient notice to the employer to comply with Section 409.001. We will not substitute our opinion of the weight and credibility to be given to the evidence for that of the hearing officer. Accordingly, we will not disturb the hearing officer's determination on appeal.

Finally, the hearing officer's determination that the claimant is barred from pursuing

benefits because of an election to receive benefits under a group health insurance policy is reversed, and a new decision is rendered that the claimant is not barred from pursuing benefits because he did not make an election to receive benefits under a group health insurance policy. Under Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) any election of remedies which is held to bar a claimant from seeking alternative relief must be made as a result of an (1) informed choice, (2) between two rights, remedies, or states of fact that (3) are so inconsistent (4) as to constitute manifest injustice. **An election should be imposed sparingly, reserved for instances where the “assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust.”** *Id.* at 851. See Texas Workers’ Compensation Appeal No. 990022, decided February 19, 1999; Texas Workers’ Compensation Commission Appeal No. 010226, decided March 20, 2001. We find that the hearing officer’s determination on the issue of election of remedies is in conflict with the test set out in Bocanegra, *supra*; thus, the hearing officer erred in determining that the claimant made an election of remedies, and a new decision is rendered that the claimant did not make an election of remedies.

The hearing officer’s decision and order is affirmed, except as modified herein.

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Michael B. McShane  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge