

APPEAL NO. 011717
FILED SEPTEMBER 4, 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 July 3, 2001. The hearing officer resolved the disputed issues by determining that the respondent (claimant) sustained a compensable injury on _____; that the claimant does not have disability as a result of the compensable injury; that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to pursue remedies for her injury in district court rather than filing a claim for compensation with the Texas Workers' Compensation Commission (Commission); and that the appellant (carrier) is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Commission within one year of the injury as required by Section 409.003. The carrier appealed and the claimant responded, urging affirmance. The determination of no disability as a result of the compensable injury was not appealed and has become final. Section 410.169.

DECISION

Affirmed in part; reversed and remanded in part.

The hearing officer did not err in determining that the claimant sustained a compensable injury on _____. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). There was conflicting evidence presented on the injury issue. The hearing officer resolved the conflicts and inconsistencies in the evidence in favor of the claimant and she was acting within her role as fact finder in determining that the claimant sustained her burden of proof on the issue. Nothing in our review of the record indicates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. 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 claimant is not barred from pursuing Texas workers' compensation benefits because of an election to pursue remedies for her injury in district court rather than filing a claim for compensation with the Commission. 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 an alternative relief must be made as a result of (1) an 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 Commission Appeal No. 990022, decided February 19, 1999. The hearing officer reviewed the evidence presented to her at the CCH and determined that the claimant hired legal counsel, who filed her injury as

a common-law action of slip and fall in district court. The claimant testified that she retained counsel to assist her in receiving workers' compensation benefits, and was unaware that they had filed her claim in district court. The hearing officer further determined that the claimant filed her claim with the Commission as soon as she found out she should. Finally, the hearing officer determined that the claimant's exclusive remedy for her injuries is exhaustion of her administrative remedies under Texas workers' compensation benefits. We find that the hearing officer correctly determined that the claimant's actions in this case do not meet the four-prong test set forth in Bocanegra, *supra*; thus, the hearing officer's determination on this issue is affirmed.

The hearing officer's determination that the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Commission within one year of the injury as required by Section 409.003 is reversed and remanded back to the hearing officer for additional findings of fact. Section 409.003 provides, in pertinent part, that an injured employee shall file a claim for compensation with the Commission not later than one year after the date the injury occurred. Section 409.004 provides that the claimant's failure to comply with Section 409.003 relieves the carrier of liability unless good cause exists for the claimant's failure to file a claim in a timely manner. Section 409.008 provides that the period for the claimant to file a claim under Section 409.003 is tolled if the employer or the employer's carrier has been given notice or has knowledge of the injury and the employer or carrier fails, neglects, or refuses to file the report under Section 409.005. Section 409.005(a)(1) provides that an employer shall report to the employer's carrier if an injury results in the absence of an employee of that employer from work for more than one day.

The hearing officer determined that the claimant reported her injury to her employer on the same day which it occurred. However, the record does not indicate that the claimant missed at least one day of work as a result of her injuries. Therefore, the employer was not obligated to file a report with its carrier under Section 409.005, and the tolling provision of Section 409.008 does not apply. It is clear from the record that the claimant did not file a claim with the Commission within one year of the date of injury as required by Section 409.003.

As the hearing officer did not articulate her reasoning for her determination that the carrier is not relieved from liability under Section 409.004 due to the claimant's failure to comply with Section 409.003, we reverse her determination and remand the case back to the hearing officer for additional findings of fact on this sole issue. The hearing officer needs to specifically state what good cause, if any, she finds to exist for the claimant's failure to file a claim in a timely manner. A rehearing on remand is not necessary, provided the hearing officer believes she has enough evidence to make the ordered findings of fact.

The hearing officer's determinations that the claimant sustained a compensable injury on _____; that the claimant does not have disability as a result of the compensable injury; and that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election of remedies are affirmed. The hearing

officer's determination that the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Commission within one year of the injury as required by Section 409.003 is reversed and remanded for further proceedings in accordance with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge