

APPEAL NO. 011990
FILED OCTOBER 3, 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 August 2, 2001. The hearing officer determined that (1) the respondent (claimant) sustained a compensable injury on _____; (2) the claimant had disability from July 25, 2000, through the date of the CCH; (3) the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under her health insurance policy; and (4) the appellant (carrier) is not relieved from liability under Section 409.002, because of the claimant's failure to timely notify the employer of the injury pursuant to Section 409.001, since the claimant had good cause for failing to timely report the injury. 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 injury on _____. The claimant had the burden to prove that she sustained damage or harm to her lumbar spine, 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)). In view of the evidence presented, 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).

DISABILITY

The hearing officer did not err in determining that the claimant had disability from July 25, 2000, through the date of the hearing. Whether disability exists is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 000303, decided March 29, 2000. Upon review of the medical evidence and the claimant's testimony, we cannot conclude that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

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. 980898, decided June 17, 1998. The hearing officer could conclude from the testimony that the claimant did not make an informed decision to utilize her group health insurance and short-term disability instead of workers' compensation benefits. 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.

NOTICE OF INJURY

The hearing officer did not err in determining that the carrier is not relieved from liability for this claim, since the claimant had good cause for failing to timely report the injury. 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.

The claimant testified that she notified her employer of the injury on September 15, 2001, after she realized that her low back pain was related to the work-related incident of _____, and was not caused by kidney stones as had been originally diagnosed. The hearing officer could believe the claimant's testimony and determine, as he did, that the claimant acted reasonably in reporting her injury on September 15, 2000. The hearing officer did not abuse his discretion in determining that the claimant had good cause for failing to timely notify his employer of the compensable injury.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge