APPEAL NO. 012043
FILED SEPTEMBER 25, 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 August 8, 2001. With regard to the issues before her, the hearing officer determined the following:

1. The date of injury is _____;

2. The appellant/cross-respondent (claimant) did not sustain a compensable injury in the form of an occupational disease while working for the employer, because she did not timely report her injury to the employer;

3. No good cause exists under the Texas Workers' Compensation Act for the claimant's failure to timely notify the employer of the occurrence of a work related injury;

4. The claimant did not sustain a compensable injury in the form of an occupational disease while working for the employer, because she did not timely file a claim for compensation within one year of her injury;

5. No good cause exist under the Texas Workers' Compensation Act for the claimant's failure to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission); and

6. The claimant did not make an election of remedies.

The claimant appealed the hearing officer's determinations regarding compensability and the good cause and timeliness issues regarding reporting injury to employer and filing a claim with the Commission. The respondent/cross-appellant (carrier) appealed, arguing that the hearing officer erred in determining that the claimant did not make an election of remedies. In addition, the carrier argues that the hearing officer erred in not making a determination on compensability independent of the timeliness issues regarding reporting an injury to the employer and filing a claim with the Commission. The carrier responded to the claimant's appeal, urging affirmance.

DECISION

Affirmed.

The claimant testified that she was employed for over 19 years for the employer in various positions. The claimant testified that during her last year she worked 10-hour shifts on an assembly line as an "ice packer" in which she repetitively packed, folded and clipped 36 bags of ice per minute and that each bag weighed a few ounces. The claimant testified

that she began to experience pain to her hands in 1999, however the pain would come and go. The medical reports in evidence show that the claimant first sought treatment for her hands and elbows from her family doctor, Dr. H in July 1999. The claimant testified that on February 2, 2000, she realized that the pain to her hands, wrist and elbows was work-related because her hands were swollen and the pain was constant, and she reported her injury to her employer the next day. It was stipulated by the parties that the claimant reported her injury to the employer on February 3, 2000. The claimant stated that she requested treatment from the employer's doctor, however, her request was denied by the employer's nurse, so she began to use her private health insurance to cover medical treatments. The claimant testified that on February 25, 2000, she sought treatment from Dr. H for "hot and cold" symptoms to her hands. The claimant testified that she then sought treatment from Dr. P in April 2000, and that Dr. P referred her to an orthopedic surgeon, Dr. S. The claimant testified that she began seeing Dr. S on October 31, 2000, and that she informed Dr. S that the problems with her hands began at work on December 19, 1999.

The claimant testified that on October 10, 2000, she resigned from her position as an ice packer with the employer. The claimant stated that on October 31, 2000, she was diagnosed with carpal tunnel syndrome to her left side by Dr. P and that her private health insurance expired on the same date. It was stipulated that the claimant filed a notice of injury with the Commission on December 27, 2000. The claimant was taken off work from December 18, 2000, to January 29, 2001, by her treating doctor, Dr. B.

The evidence sufficiently supports the hearing officer's determination that "December 19, 1999, was the first day [the] claimant knew or should have known that the repetitive trauma occupational disease . . . was related to her employment with [the] employer" from Dr. S's medical reports in evidence.

The evidence sufficiently supports the hearing officer's determination that the claimant did not timely report her injury to her employer. Section 409.001 provides that an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs or if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment. It was stipulated that the claimant reported her injury to her employer February 3, 2000. The hearing officer determined that the claimant did not timely report to her employer within 30 days from _____, and that "no good cause exists under the Texas Workers' Compensation Act for [the] claimant's failure to timely notify [the] employer of the occurrence of a work related injury."

The evidence sufficiently supports the hearing officer's determination that the claimant did not timely file a claim with the Commission. Section 409.003 provides that an employee or a person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which the injury occurred or if the injury is an occupational disease, the employee knew or should have known that the disease was related to the employee's employment. It was stipulated

that the claimant filed her claim with the Commission on December 27, 2000. The hearing officer determined that the claimant did not timely file a claim within one year from _____, and that "no good cause exists under the Texas Workers' Compensation Act for [the] claimant's failure to timely file a claim for compensation with the Commission."

The evidence sufficiently supports the hearing officer's determination that the claimant did not make an election of remedies. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court stated that the election of remedies doctrine may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice. The carrier has the burden of proving an effective election of remedies and whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. The hearing officer determined that the "claimant did not knowingly make an informed choice to receive health insurance benefits."

It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The carrier contends on appeal that the hearing officer erred in not making a determination on compensability independent of the timeliness issues regarding reporting an injury to the employer and filing a claim with the Commission. While it would have been preferable for the hearing officer to make findings on compensability separate from the timeliness issues we will infer from the hearing officer's decision that the claimant did not sustain a compensable repetitive trauma injury.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

GAIL L. ESTES
1525 NORTH INTERSTATE 35 E., SUITE 200
CARROLLTON, TEXAS 75006.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge