

APPEAL NO. 012184
FILED OCTOBER 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 August 20, 2001. The hearing officer resolved the disputed issues by determining that the respondent (claimant) suffered a compensable injury to his right elbow on _____; that the claimant had disability as a result of the compensable injury from January 15, 2001, through January 22, 2001, and from February 8, 2001, through the date of the hearing; and that the claimant is not barred from receiving workers' compensation benefits due to making a knowing election of remedies. The appellant (carrier) appealed on sufficiency grounds and the claimant responded, urging affirmance. The employer has filed a statement but because the carrier is disputing the claim, the employer is not a party to the case and cannot therefore file a separate appeal.

DECISION

Affirmed.

The claimant worked as a machinist for the employer. The claimant testified that on _____, he experienced a burning sensation from his right wrist up to his elbow while screwing a gauge into a connection. The claimant reported the injury to his employer and went to the doctor on April 24, 2000. The claimant was diagnosed with tendinitis. The claimant testified that he did not have personal health insurance so his employer paid for the initial visit directly. The claimant was able to continue to work with the assistance of medication until he was taken off work. The claimant admitted that except for his initial doctor's visit, he paid for two doctor's visits out of his own pocket.

We would first note that the decision and order makes several typographical errors with regard to the date of injury; all references to an _____, date of injury are hereby corrected to _____. At the hearing and on appeal, the carrier attempted to call into question the credibility of the claimant. 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 issues of injury and disability. The hearing officer resolved the conflicts and inconsistencies in the evidence in favor of the claimant, and he was acting within his role as the fact finder in determining that the claimant met his burden of proof on both issues. 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).

Finally, the carrier asserts that the claimant made an election of remedies by paying for most of his medical treatment out of his own pocket. We find that the hearing officer did not err in determining that the claimant is not barred from receiving workers'

compensation benefits because of an election to pay his medical costs out of his own pocket. Even if personal payment for one's medical expenses could be construed as a "remedy" for purposes of this doctrine, 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 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 Commission Appeal No. 990022, decided February 19, 1999. The evidence presented in this case does not meet the standards set forth in Bocanegra, *supra*; thus, the hearing officer did not err in determining that no election of remedies was made by the claimant.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **COLONIAL CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**WILLIAM HAGAN
12850 SPURLING DRIVE, SUITE 250
DALLAS, TEXAS 75203.**

Susan M. Kelley
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge