APPEAL NO. 012218
FILED OCTOBER 29, 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 May 29 and August 1, 2001. The hearing officer resolved the disputed issues by determining that the appellant (claimant) suffered from fibromyalgia, which was not a compensable repetitive trauma injury, that the date she knew or should have known that her injury may be related to her employment was _____, that she failed to timely report her injury to her employer and did not have good cause for this, that she had no disability, and that she did not make an election of remedies by receiving private insurance benefits. The employer was (employer), who was insured at different times pertinent to the claim by respondent (carrier 2) and respondent/cross-respondent (carrier 1). For the date of injury found by the hearing officer, the carrier was carrier 2.

The claimant has asked for a full review of the evidence and all findings against her. Carrier 1 responds by setting out the facts that support the hearing officer's determination that the claimant did not have a compensable injury or give timely notice. Carrier 1 also asserts that the date of injury found was correct. Carrier 1 has filed its own appeal, contingent on the claimant appealing, that seeks a review of a record as to whether the date of injury was even earlier than that found by the hearing officer. Carrier 1 also disputes the admission into evidence of medical records that do not meet the requirements of expert medical evidence as set out in various Texas Supreme Court cases. Finally, Carrier 1 asserts that an election of remedies should have been found and the contrary finding is against the great weight and preponderance of the evidence. Carrier 2 has not filed an appeal or response.

DECISION

Affirmed.

The hearing officer's thorough recitation of the facts is incorporated here by reference. We will only note that the claimant contended that she woke up the morning of _____, with a "crick" in her neck. Her claim was that various regions of her body, including her low back (for which there was no objective evidence of injury produced), had been injured through repetitive trauma, specifically doing key entry of several hundred checks for her employer for five to six hours a day. This rate of activity was sharply disputed by witnesses for the employer. In addition, medical evidence showed that the nature of the diagnosis was somewhat elusive, with a doctor for the carrier concluding that the complex of symptoms resulted from nonwork-related fibromyalgia. This condition had also been diagnosed by her treating physician back in March 1997.

The claimant contended that she first realized her problems were work-related after a March 1998 conference with a counselor for Texas Rehabilitation Commission. However, she testified, and evidence was offered, that she discussed with her doctor and

sent him questions, which he answered affirmatively on _____, as to whether her problems were related to her work. The claimant had initially filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) contending that her date of injury was _____, but said that she thought she had to use the date she last worked.

The only basis which the hearing officer credited for excluding medical reports was failure of the claimant to timely exchange them. Those medical reports that were timely exchanged were admitted over the objection to their qualification as "expert" medical evidence.

INJURY, DATE OF INJURY, NOTICE, AND DISABILITY

We have reviewed the record and find that the inferences drawn by the hearing officer from the conflicting evidence are supported by the record; consequently, he did not err in finding that the date of injury for the alleged repetitive trauma injury was _____; that the claimant in fact did not prove that she had an occupational repetitive trauma injury; and that she did not have disability due to the lack of a compensable injury. Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza, *supra.* This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). Without a finding of an injury, a threshold requirement of disability as defined in Section 401.011(16) is not met.

Regarding date of injury and notice, the record supports some confusion over the nature and cause of the claimant's maladies. However, she also testified as to discussing the possible work-relatedness of her condition with her doctor, gong so far as to send him written questions. We cannot agree that the hearing officer's findings on date of injury and notice to the employer are so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

ADMISSION OF EVIDENCE

We cannot agree that the hearing officer erred by accepting medical reports over the assertion that they did not meet the requirements of expert evidence in that they were not shown to be based upon a reasonable degree of medical probability or certainty and which are not shown to be scientifically reliable pursuant to the standards in Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456 (Tex. 1992), and EI. DuPont De Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995). We note, however, that as carrier 1 won on the issue of compensability, admission of such evidence is moot.

ELECTION OF REMEDIES

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 decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

That is not the case here, and the hearing officer's decision and order on all appealed points is affirmed.

The true corporate name of Carrier 1 is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

C. T. CORPORATION SYSTEM
350 N. ST. PAUL
DALLAS, TEXAS 75201.

The true corporate name of Carrier 2 is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701

Susan M. Kelley
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge