

APPEAL NO. 012457
FILED NOVEMBER 28, 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 September 18, 2001. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) did not sustain a compensable injury on _____; (2) the claimant has not had disability; (3) the claimant timely notified her employer of her claimed injury; (4) the claimant timely filed a claim for compensation; and (5) the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under her group insurance policy. The claimant appealed the determinations on the issues of compensable injury, disability, and election of remedies. The respondent (carrier) responded, requesting affirmance. There is no appeal of the hearing officer's determinations that the claimant timely notified her employer of her injury and that the claimant timely filed a claim for compensation.

DECISION

The hearing officer's decision is affirmed in part and is reversed and rendered in part.

COMPENSABLE INJURY ISSUE

The hearing officer did not err in determining that the claimant did not sustain a compensable injury. The claimant had the burden to prove that she was injured in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Conflicting evidence was presented at the CCH on this issue. The hearing officer apparently gave greater weight to the initial medical reports that made no mention of a work-related injury than to the later medical reports that indicated that the claimant sustained a work-related injury. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence. The hearing officer found that the claimant was not injured in the course and scope of her employment and concluded that the claimant did not sustain a compensable injury. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

DISABILITY ISSUE

The hearing officer did not err in determining that the claimant has not had disability because, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

ELECTION-OF-REMEDIES ISSUE

The hearing officer erred in determining that the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under her group insurance policy. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court held that the election doctrine may constitute a bar to relief when one successfully exercises an informed choice between two or more remedies, rights, or states of fact which are so inconsistent as to constitute manifest injustice. The Appeals Panel has held that the carrier has the burden of proving an effective election of remedies, and that critical to a finding of an election of remedies is a determination that the election of nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000.

In the instant case, the only finding made by the hearing officer on the election issue was that the claimant reported a work-related injury to her employer before going to the hospital, but that when she got to the hospital she elected to use her husband's medical insurance instead of workers' compensation benefits. Based on that finding, the hearing officer determined that the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under her group insurance policy. The hearing officer made no finding as to whether the claimant made an "informed choice" between workers' compensation benefits and her husband's insurance, nor did he make a finding as to whether any "manifest injustice" resulted from an election of remedies. Under the circumstances presented in this case, we decline to imply such findings. The claimant testified that she was unaware that the employer had workers' compensation coverage and that is why she used her husband's health insurance. The carrier presented no evidence to the contrary. In Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993, the Appeals Panel noted that it had not found inconsistency amounting to manifest injustice to the carrier arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered.

We conclude that not all of the requirements for an election of remedies to constitute a bar to relief have been shown. Thus, we reverse the hearing officer's decision that the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under her group insurance policy, and we render a decision that the claimant is not barred from pursuing workers' compensation benefits under the doctrine of election of remedies. However, because we are affirming the hearing officer's decision that the claimant did not sustain a compensable injury, the claimant is not entitled to workers' compensation benefits.

We affirm the hearing officer's determinations that the claimant did not sustain a compensable injury and that the claimant has not had disability. We reverse the hearing officer's decision on the issue of election of remedies and render a decision that the claimant is not barred from pursuing workers' compensation benefits under the doctrine of election of remedies.

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

**MARCUS MERRITT
6600 CAMPUS CIRCLE DRIVE EAST #200
IRVING, TEXAS 75063.**

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge