

APPEAL NO. 012590
FILED DECEMBER 11, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on September 27, 2001, the hearing officer determined that the respondent (claimant) sustained a compensable right shoulder injury on _____; that her notice of injury to the employer was timely; that she is not barred from pursuing workers' compensation benefits because of an election to receive group health insurance benefits; that she had disability from March 8, 2001, through the date of the hearing; and that the appellant (self-insured) is liable for payment of accrued benefits under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3)) for the period ending on August 17, 2001, due to its failure to dispute or initiate the payment of benefits within seven days of April 20, 2001, the date it received written notice of the injury. The self-insured has appealed, asserting evidentiary sufficiency grounds. The self-insured, relying on a Texas appellate court decision, also asserts that the determination of the Rule 124.3 issue is erroneous as a matter of law. The claimant has responded urging, in effect, the sufficiency of the evidence and the absence of legal error.

DECISION

Affirmed in part; reversed in part.

The claimant testified that on or about _____, she experienced right arm pain after moving some boxes at one of the many stores she serviced as a cosmetics account representative of the self-insured and that she did not file a workers' compensation claim but did receive medical treatment from Dr. S. She stated that on _____, while lifting her heavy bag of manuals, forms, and tools over the front seat and into the back seat of her car after servicing a customer's store, she had severe pain in her right shoulder; that she saw Dr. S and was diagnosed with a torn rotator cuff; that she continued to work up to March 8, 2001, the date she underwent right shoulder surgery; and that she has not since been able to work. The claimant further testified that after being advised of the results of an MRI on February 22, 2001, she called her supervisor, Ms. K, who was not in, so she left a voice mail message reporting her shoulder injury and need for surgery and also forwarded that message to the manager, Ms. P. The claimant acknowledged not being certain that she reported in that message that the injury date for her shoulder injury was _____. She said that when Ms. P returned her call, she was told that because this was an on-the-job injury, she should report the injury to the self-insured's third party administrator (TPA), and so she called the TPA on February 26, 2001, and reported the injury, including the injury date. She also said that Ms. P sent her some forms relative to her planned shoulder surgery which she completed on February 28, 2001. Much of this testimony was essentially corroborated by the testimony of Ms. P, who also testified that the claim was disputed

because the injury date was understood by the self-insured to be _____, and timely notice of such claim had not been provided.

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 (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The claimant's testimony concerning injury, notice, and disability is partially corroborated by Dr. S's records and Ms. P's testimony. We are satisfied that the challenged findings relating to the injury, timely notice, and disability issues are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The self-insured notes that in the hearing officer's discussion of the evidence he states that based on the claimant's testimony, as supported by that of Ms. P, and a February 26, 2001, letter from the TPA, the hearing officer finds that the claimant reported a _____, injury to the self insured "by reporting it to the TPA." The self-insured notes the requirement of Section 409.001 that a report must be made to an employer's supervisory or managerial personnel and asserts that reporting the injury to some employee of a TPA does not meet that requirement. We find this argument disingenuous because the claimant testified to the content of her telephone message to Ms. K and Ms. P and to being instructed shortly thereafter by Ms. P to further report the injury to the TPA.

Section 409.021(a) provides, in part, that not later than the seventh day after the date on which an insurance carrier receives written notice of an injury the carrier shall begin payment of benefits or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay. Rule 124.3(a) provides in part that upon receipt of written notice of injury as provided for in Rule 124.1, the carrier shall conduct an investigation and, if it believes it is not liable, shall file a notice of denial of a claim in the form and manner required by Rule 124.2. Rule 124.3(a) states that if the carrier does not file a notice of denial by the seventh day after receipt of the written notice of injury, the carrier is liable for any benefits that accrue and shall initiate the benefits. As for the written notice requirement, Rule 124.1(a) provides that written notice of injury consists of the carrier's earliest receipt of the Employers First Report of Injury (see Rule 120.2), notification provided to the Commission per Rule 123.1(c), or "any other communication regardless of source which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which asserts the injury is work related."

As for the written notice of injury in this case, the self-insured challenges Findings of Fact Nos. 10 and 11 stating, respectively, that "[o]n April 20, 2001, [Ms. S], an employee with the self-insured's human resources department, made a written notation that the claimant was alleging that she had sustained a work-related right shoulder injury in _____," and that "[t]he self-insured had written notice that the

claimant was alleging that she had sustained a work related right shoulder injury in _____, while employed with the self-insured, when [Ms. S] made the written notation in her file.” The self-insured asserts that it was the claimant’s burden to prove when the self-insured received written notice of the injury compliant with Rule 123.1 and that the hearing officer’s finding that Ms. S made a written notation sufficient to satisfy the written notice requirement of Rule 123.1(c) is based on speculation and conjecture and is not supported by evidence. In his discussion of the evidence, the hearing officer references the testimony of Ms. P to the effect that when the claimant’s claim was denied in April 2001 for untimely reporting based on a _____, date of injury, Ms. P called Ms. S and advised that the claimant was asserting a _____, date of injury. The hearing officer then states that Ms. S wrote a letter on August 13, 2001, to “A,” whom the hearing officer surmises to be the attorney for the self-insured, referencing the telephone call on April 20, 2001, with Ms. P; that Ms. S’s files are not in evidence; and that he “infers” from Ms. P’s testimony and the letter to “A” that “Ms. S made a written notation in her file that the claimant was alleging that she had sustained a right shoulder injury in the course and scope of her employment in _____.” Not appealed are findings that the self-insured did not file a dispute of the compensability of the _____, injury until August 17, 2001, and that although the self-insured did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until August 17, 2001, it was clearly disputing liability on or before July 13, 2001, the date of the first benefit review conference.

The writing relied on by the hearing officer as satisfying the requirements of Rule 124.3(c), if it actually does exist, is not in evidence nor was there evidence adduced from Ms. S. Because not only the existence of the written notice but its content is found by inference based on Ms. P’s April 20, 2001, telephone conversation with Ms. S and Ms. S’s August 13, 2001, letter to “A,” such inference is not, in our view, reasonably drawn and Findings of Fact Nos. 10 and 11 are, accordingly, against the great weight of the evidence. We reverse those findings as well as Conclusion of Law No. 7, which states that “[t]he self-insured is liable for the payment of accrued benefits under Rule 124.3 for the period ending on August 17, 2001, as a result of its failure to dispute or initiate the payment of benefits within seven days of April 20, 2001, the date it received written notice of the injury.” The self-insured also complains of the hearing officer’s failure to address the self-insured’s alternative contention on the Rule 124.3 issue, namely, that because the 1989 Act does not expressly provide for a carrier to dispute the claim or pay within seven days, the rule provision is invalid as a matter of law. The self-insured supports its contention with a citation to Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin, April 12, 2001). It may be that the hearing officer declined to comment on the self-insured’s contention because the Fulton case addresses Rule 130.5(e). Further, the Commission is not presently following the decision in Fulton. See, e.g., Texas Workers’ Compensation Commission Appeal No. 012067, decided October 24, 2001.

As for the election-of-remedies determination, the self-insured introduced a

hospital form dated March 8, 2001, the date of the claimant's rotator cuff repair surgery, reflecting that the primary insurance carrier is (group health carrier). The hearing officer found that the claimant was unaware that use of her group health insurance to receive medical care for the work-related injury could jeopardize her ability to receive workers' compensation benefits for the injury. We read this finding to be saying that she did not appreciate the differences between the two coverages, not that she was ignorant of the law on the subject which would, of course, not provide her with a basis for relief from an election of another remedy. The so-called "test" for the defense of election of remedies is stated in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). The hearing officer states that the self-insured, who we note had the burden of proof, "failed to adduce any evidence that would tend to show that the claimant was aware that the utilization of her group health insurance could interfere with the receipt of workers' compensation benefits." We are satisfied that the hearing officer's determination of the election of remedies issue is not against the great weight of the evidence.

Excepting Findings of Fact Nos. 9 and 10 and Conclusion of Law No. 7 which are reversed, we affirm the hearing officer's Decision and Order.

The true corporate name of the insurance carrier is **(self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 N. ST. PAUL STREET
DALLAS, TEXAS 75201.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge