

APPEAL NO. 030636
FILED APRIL 30, 2003

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 convened on November 21, 2002, with the record closing on February 10, 2003. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained a low back injury on _____, but determined that the injury is not compensable because the claimant failed to timely report it to his employer without good cause for failing to do so; that since the claimant's injury is not compensable, no period of disability could be established; and that the claimant is not barred from receiving benefits under the 1989 Act pursuant to the election-of-remedies doctrine. In his appeal, the claimant argues that the hearing officer's notice determination is against the great weight of the evidence. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. The carrier filed a cross-appeal, contending that the hearing officer erred in determining that the claimant did not make an election of remedies and that he sustained a low back injury on _____, while in the course and scope of employment. The carrier additionally challenged the finding that the claimant has been unable to obtain and retain employment at wages equivalent to his wage before _____, for specified periods. The claimant responded, urging affirmance of the challenged findings.

DECISION

We affirm.

The claimant had the burden to prove that he timely reported his injury to his employer. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). Conflicting evidence was presented at the hearing on the notice issue. The hearing officer weighed the conflicting evidence and determined that the claimant did not report the injury to his employer before May 3, 2001, and that the claimant's failure to timely report the injury was without good cause. The challenged notice findings are supported by sufficient evidence and are 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). Consequently, the hearing officer did not err in determining that the carrier is relieved of liability under Section 409.002. The hearing officer also did not err in determining that the claimant has not had disability because without a compensable injury as defined by Section 401.011(10), the claimant would not have disability as defined by Section 401.011(16).

Although the hearing officer found that the carrier is not liable for compensation, the carrier appealed the findings that the claimant sustained a low back injury on _____, while in the course and scope of his employment. Carrier also appealed the finding that the claimant had, for specified time periods, been unable to obtain and retain employment at wages equivalent to his preinjury wage. Conflicting

evidence was presented on the challenged findings and the hearing officer was acting within her province as a fact finder in resolving the evidence in favor of the claimant. Nothing in our review of the record demonstrates that the hearing officer's challenged findings are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier additionally appealed the election-of-remedies determination. The applicable law regarding election of remedies is set forth in Texas Workers' Compensation Commission Appeal No. 030473, decided April 15, 2003. 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. Critical to a finding of an election of remedies is the determination that the election of nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998; Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000. In this case, the hearing officer found that the claimant had not made an informed choice between his group health insurance and workers' compensation benefits. We find no error by the hearing officer in determining that the claimant was not barred from pursuing workers' compensation benefits because he elected to receive benefits under a group health plan. We conclude that the hearing officer's determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We affirm the hearing officer's decision and order.

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

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

Judy L. S. Barnes
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Roy L. Warren
Appeals Judge