

APPEAL NO. 040871
FILED JUNE 8, 2004

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 March 24, 2004. The hearing officer determined that: (1) the date of injury (DOI) is _____; (2) the appellant/cross-respondent (carrier) is relieved from liability under Section 409.002 because of the respondent/cross-appellant's (claimant) failure to timely notify his employer pursuant to Section 409.001; (3) if the claimant had timely notified his employer of the claimed injury, the bilateral shoulder condition would be a compensable injury; (4) if the claimant had timely notified his employer of the claimed injury, he would have had disability; and (5) the claimant is not barred from pursuing workers' compensation benefits because of the election of remedies doctrine. The carrier appealed the hearing officer's DOI, injury, disability, and election-of-remedies determinations. The claimant cross-appealed the hearing officer's timely notice determination. The carrier responded, urging affirmance of the timely notice determination.

DECISION

Affirmed.

The issues of DOI, injury, timely notice, and disability presented questions of fact for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no basis to reverse the hearing officer's resolution of the DOI, injury, timely notice, and disability issues.

The hearing officer determined from the evidence presented that the claimant did not make an election of remedies and, therefore, he was not barred from pursuing a workers' compensation claim. Whether a claimant has made an election of remedies in a given scenario is essentially a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court held that the election of remedies 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 court stated that "an election will bar recovery when the inconsistency in 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. From our review of the evidence, we cannot conclude that the determination of the hearing officer on this issue was erroneous.

The decision and order of the hearing officer are affirmed.

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

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge