APPEAL NO. 970361

Following a contested case hearing held in (city), Texas, on January 27, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, (hearing officer), resolved the disputed issues by concluding that the appellant (claimant) did not have significant contacts with Texas to bring his injury, which occurred in (State 1), within the purview of Section 406.071; that claimant elected to pursue his remedy under the workers' compensation laws of (State 1), thus precluding his recovery under the 1989 Act; that based on the foregoing conclusions, claimant's injuries are not compensable; and that because claimant's injuries are not compensable, he did not have disability. Claimant's request for review appears to dispute the hearing officer's having added the election of remedies issue to the statement of disputed issues at the hearing and to challenge the sufficiency of the evidence to support the dispositive conclusions. In his appeal, claimant essentially urges what he believes his exhibits and testimony established and reargues the evidence. In its response, the respondent (carrier) first objects to claimant's presenting new evidence, for the first time on appeal, referring to statements of fact asserted by claimant in his appeal which were not testified to at the hearing, and asks the Appeals Panel to disregard such statements. The carrier further contends that good cause existed to add the election of remedies issue and that the evidence is sufficient to support the challenged determinations of the hearing officer.

DECISION

Affirmed.

The carrier introduced into evidence its response to the benefit review conference (BRC) report, dated December 23, 1996, which, among other things, requested the addition of the election of remedies issue asserting that the matter had been discussed at the BRC. The BRC report reflected that the BRC was held on December 2, 1996, and that the report was signed on December 3, 1996. Texas Workers' Compensation Commission (Commission) records reflect that the BRC report was sent to the parties on December 12, 1996. The carrier introduced a PS Form 3811 ("green card") which reflected that it was addressed to "(claimant's name)" but which stated no address beneath the name. The "green card" also bore the signature of "(claimant's name)" and reflected the delivery date of "12/26/96." Claimant, who did not deny that his signature was on the "green card," acknowledged that his address had not changed in five years and said he could not recall whether he received the carrier's response. Claimant objected to the addition of the election of remedies issue on the grounds that his address was not on the "green card" and that he was not prepared to meet the issue, but he did not request a continuance. The hearing officer found that the carrier timely requested and had good cause for the addition of the issue. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 142.7(c)(3) and 142.7(e) (Rules 142.7(c)(3) and 142.7(e)). Given the representation of the carrier that the matter of election of remedies was discussed at the BRC and that it was not stated as an issue in the BRC report, we find no abuse of discretion in the hearing officer's ruling on the carrier's request.

We also find no abuse of discretion in the hearing officer's excluding persons identified as witnesses from the hearing room during the testimony of other witnesses under "the rule" and in discouraging claimant from presenting cumulative evidence. Further, our review is limited to the record developed at the hearing and to the request for review and the response. Section 410.203. To the extent that claimant's request for review presents new evidence for the first time on appeal, it will be disregarded. Texas Workers' Compensation Commission Appeal No. 950331, decided April 18, 1995.

The parties stipulated that on (date of injury), claimant was the employee of (employer) and that he was injured on that date in the course and scope of his employment in (State 1). This case involves the application of the following two provisions of the 1989 Act:

Sec. 406.071 EXTRATERRITORIAL COVERAGE.

(a) An employee who is injured while working in another jurisdiction or the employee's legal beneficiary is entitled to all rights and remedies under this subtitle if:

(1) the injury would be compensable if it had occurred in this state; and

(2) the employee has significant contacts with this state or the employment is principally located in this state.

(b) An employee has significant contacts with this state if the employee was hired or recruited in this state and the employee:

(1) was injured not later than one year after the date of hire; or

(2) has worked in this state for at least 10 working days during the 12 months preceding the date of injury. (V.A.C.S. Arts. 8308-3.14, 8308-3.15.)

Sec. 406.075 EFFECT OF COMPENSATION PAID IN OTHER JURISDICTION.

(a) An injured employee who elects to pursue the employee's remedy under the workers' compensation laws of another jurisdiction and who recovers benefits under those laws may not recover under this subtitle.

(b) The amount of benefits accepted under the laws of the other jurisdiction without an election under Subsection (a) shall be credited against the

benefits that the employee would have received had the claim been made under this subtitle. (V.A.C.S. Art. 8308-3.19.)

The carrier called (Mr. T), the employer's personnel manager for its east coast operations for the past 15 years, who testified that the job site in (State 1) where claimant was injured was a refinery. He indicated that when the employer, under a national maintenance agreement, obtained the job, a refinery shutdown job requiring around-the-clock shifts to complete on time, the employer not only provided certain of its own boilermakers for the job but also had its local foreman contact the (union local in State 1) and request the provision of a number of boilermakers (possibly from 80 to 150) for the job. In evidence was Mr. T's letter of April 26, 1996, to the carrier stating that the employer is a union contractor and as such is required to hire two-thirds of its labor force from (State 1's) union local; that the employer placed an order for boilermakers with (State 1's) union local; and that claimant was subsequently referred to the project by (State 1's) union local. Mr. T further stated that he himself had once worked as a boilermaker hiring out of (State 1's) union local; that the boilermakers provided to the employer by (State 1's) union local, including claimant, were on that union's referral list; and that he had recently verified the latter information with Mr. C, (State 1's) union local's assistant business agent. Mr. T said that according to Mr. C, in order to get on (State 1's) union local's referral list for jobs, boilermakers had to come to the union hall and complete forms, and that once they get on the list, they are referred for jobs, in numerical order, to employers who contact (State 1's) union local for boilermakers. Mr. T further testified that the employer had no contact with claimant in Texas; that the employer had no contact with claimant's union local in Texas; and that the employer did not know claimant's identity before he was referred by (State 1's) union local, came to the job site with the other referrals, and completed an employment application and W-4 form. Mr. T refused on cross-examination to characterize (State 1's) union local as the employer's agent. According to Mr. T, the only employees requested by name by the employer from union locals were general foremen. Mr. T also stated that claimant was hired about seven days before his injury and that he later filed a workers' compensation claim in (State 1).

Claimant testified that he had resided in Texas for all of his 35 years although since 1988 he has frequently worked in other states. He indicated that he had sustained a job-related broken cheek bone injury in (State 1) in 1991 and a job-related crushed finger injury in (State 2) in 1992; that he subsequently received lump-sum payments under the workers' compensation laws of those states; that he did not understand how his claims were handled; and that he had a law firm in (State 1) involved in the injury in that state.

Claimant further testified that in early October 1994, (Mr. K), the business manager for the Texas union local of which claimant was a member, called him or his father to advise about job openings in (State 1) which were to soon be filled. Claimant surmised that Mr. K called him or his father because claimant, his father, and his brother, had previously worked

in (State 1) through (State 1's) union local. Claimant also stated that Mr. K said they would "likely" be working for the employer. He also stated that on other occasions there were multiple union contractors in touch with the Texas union local and he would not know the identity of the employer before leaving Texas for a job. Claimant did state that he would not leave for work in another state without knowing he would have a job when he arrived. He said that in addition to himself, his father, his brother and two other boilermakers responded to Mr. K's call and that they made the trip to (State 1) at their own expense. Mr. K's letter of October 7, 1996, stated that "on or about August 1994," he was contacted by (State 1's) union local for boilermakers for a job there; that he then contacted claimant, claimant's father and brother and several other union local members and told them about the job; and that they knew they had jobs waiting for them upon arrival in (State 1). Claimant acknowledged not having spoken with any representative of the employer before appearing at the job site after referral by (State 1's) union local. In his January 27, 1997, letter, (Mr. D), the business agent for (State 1's) union local, stated that claimant had worked from that union local at various jobs in (State 1) from March 1990 through November 1994 and that he would sometimes be dispatched by telephone or in person if he came into the union hall. Mr. D attached a list showing 10 job sites in (State 1) where claimant had worked for various employers at various time in the 1990 - 1994 period.

Claimant further stated that on the day after his injury, he received medical treatment at an emergency room in (State 1), apparently paid for by the carrier; that when he returned to Texas after being laid off on November 11, 1994, he was treated by several doctors who were arranged for by the carrier; that the carrier would not authorize certain proposed treatment; and that in October 1995, the carrier arranged for him to fly to (State 1) to be examined by a doctor. Claimant did not testify to the nature of his (date of injury) injury. However, the employer's injury report of (the day after the date of injury), stated that claimant fell five or six feet onto a lower deck, that he injured his left forearm, elbow and shoulder, and that he was placed on light duty for one week. A carrier claim summary reflected "fall/slip from different level" and the injury as "bruise/contusion/ abrasion" to the left arm. The January 25, 1995, report of a left shoulder arthrogram stated that the findings were compatible with a complete left rotator cuff tear. Other medical records indicate that claimant was later seen for neck and back complaints. Claimant testified after his injury, that he was placed on light duty; that he was laid off by the employer on November 11, 1994; that he then returned to Texas; and that he has not since been able to work as a boilermaker and has not worked at all. There was some indication that he underwent surgery on his shoulder and that the carrier resisted a second shoulder operation as well as treatment for his back and neck.

Claimant also stated that he contacted an attorney in (State 1), (Mr. P), to look into a third-party claim and that he did not know what either Mr. P, or another (law firm in State 1) that had represented him in his prior job-related injury in that state, had done about his most recent claim. In his appeal, claimant intimates that Mr. P exceeded his authority in filing the

workers' compensation claim in (State 1). Claimant further testified that in April 1995, he contacted the Commission and filed a claim but never heard anything about its disposition. In evidence was claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated April 5, 1995, and bearing two later date stamps of April 1995 dates. Claimant also said that in May 1995, he began receiving income benefits from the carrier's adjusting company's (office in State 1); that those benefits continued to be paid through August 1995; and that he was never advised, though he inquired, why they were discontinued. Claimant further stated that an adjuster told him that a check for $13,000.00, apparently representing a lump-sum payment of past due income benefits, had been mailed to him. He said he never received the check, that he discussed its whereabouts with the adjuster several times but has not discussed it with any of his attorneys, and that he assumes it was lost in the mail.

In evidence was claimant's (State 1) workers' compensation "Employee's Claim Petition" reflecting claimant's Texas address and the signatures of claimant and of Mr. P on June 12, 1995. This petition stated that the carrier had not been helpful in claimant's requests for continued medical care and for income benefits; that the carrier did not let claimant see a doctor for his back and neck injuries until mid-February 1995; that claimant did not begin to receive compensation until mid-May 1995; and that the carrier had not paid claimant "in full for all of my back weeks of compensation, dating back to my last day of work in 1995." Also in evidence was another version of claimant's petition reflecting a (State 1) address. Also in evidence was the "Respondent's Answer to Claim Petition," dated August 21, 1995, reflecting that the nature of claimant's injuries remained to be determined and that temporary disability was being paid at the rate of $460.00. Also in evidence was a (State 1) Notice of Motion for Temporary and Medical Benefits, signed by Mr. P on July 31, 1995, requesting medical treatment for claimant, the payment of certain doctors' bills in both Texas and (State 1), and payment of temporary disability benefits from December 10, 1995, to February 15, 1996, at the rate of $464.00 per week. The carrier's claim summary reflected that as of September 21, 1996, the carrier had paid $12,157.14 in indemnity payments, $29,477.54 in medical costs, and $10,142.63 in expenses.

Insofar as the extraterritorial coverage statute is concerned, claimant's apparent position was that because he was a Texas resident, and because he was advised of an employment opportunity in (State 1) by his Texas union local which, in turn, had been similarly advised by the (State 1) union local, and because he knew where he would be sent to work by the (State 1) union local, he was recruited in Texas by the two union locals acting as the agents of the employer and thus had significant contacts with Texas pursuant to Section 406.071(a)(2) and Section 406.071(b). Claimant has cited no authority for the agency proposition. Claimant's position concerning the election of remedies (Section 406.075) issue appeared to be that he first filed a workers' compensation claim in Texas and nothing came of it and that he did not understand how the (State 1) claim came to be filed and had not authorized Mr. P to file it.

The hearing officer found that claimant was not hired or recruited in Texas to work for the employer in (State 1); that after filing a claim with the Commission, claimant filed a workers' compensation claim in (State 1); that claimant retained an attorney to assist him with his claim in (State 1); that claimant received (State 1) workers' compensation benefits and has diligently sought to have those benefits reinstated after they were stopped in August 1995; and that he was unable to obtain and retain employment at wages equivalent to his preinjury wages from December 10, 1995, through the date of the hearing. As stated above, the hearing officer concluded that claimant did not have significant contacts with Texas so as to bring his injury, which occurred in (State 1), within the purview of Section 406.071; that claimant elected to pursue his remedy under the workers' compensation laws of (State 1), thus precluding recovery under the 1989 Act; that based on the foregoing conclusions, claimant's injuries are not compensable; and that because his injuries are not compensable, he did not have disability. Concerning the latter conclusion, Section 401.011(16) defines disability as the inability "because of a compensable injury" to obtain and retain employment at the preinjury wage equivalent. If claimant does not have a compensable injury under the 1989 Act, he cannot have disability.

In Texas Workers' Compensation Commission Appeal No. 92634, decided January 14, 1993, the Appeals Panel affirmed the decision of the hearing officer who determined that pursuant to the extraterritorial coverage statute (then Articles 8308-3.14 and 8308-3.15), the employee was not entitled to benefits under the 1989 Act because there was no evidence the (State 3) employer hired or recruited the employee in Texas or that the Texas employer hired or recruited claimant to work in (State 3). That decision noted that there were no court decisions, Commission rules or Appeals Panel decisions interpreting Articles 8308-3.14 and 8308-3.15 and discussed the predecessor statute and its interpretation. *And see* Texas Workers' Compensation Commission Appeal No. 92724, decided February 16, 1993.

Claimant cited Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993, Texas Workers' Compensation Commission Appeal No. 951817, decided December 15, 1995, and Texas Workers' Compensation Commission Appeal No. 960572, decided May 3, 1996, in support of his position that he was recruited in Texas. However, in those cases the Appeals Panel affirmed the decisions of hearing officers which found the injured employees entitled to benefits under the 1989 Act because they had been recruited in Texas by their respective employers and the facts in those cases distinguish themselves from the facts in claimant's case. In Appeal No. 93819, *supra*, it was undisputed that the injured employee was actually hired in (State 4). However, the employer had previously sent a representative to the truck driver school in Texas where the employee was in attendance; the representative made a presentation and left job application forms and a toll-free telephone number; and claimant completed an application and was sent an airline ticket by the employer to come to (State 4) for testing and a physical examination. The Appeals Panel was unwilling to hold as a matter of law that such conduct

did not constitute recruitment by the employer. In Appeal No. 951817, *supra*, the injured employee, who was injured at a job site in (State 5), was commonly called at his home in Texas by the employer and given information about jobs and he would then travel to the work sites, complete a job application and perform the work. The carrier maintained that a simple telephone call from the employer could not constitute a recruitment. However, the Appeals Panel affirmed the finding that the employee was recruited in Texas, given the unrefuted evidence that the employee had been contacted by the employer in this manner some 25 times and had never failed to be hired upon arrival at the work site. The obvious distinction in claimant's case is that he learned of out-of-state job openings through his union and the employer had no contact with claimant in Texas and before claimant arrived at the job site in (State 1).

In Appeal No. 960572, *supra*, the Appeals Panel again affirmed the hearing officer's determination that the employee was recruited in Texas. In that case, the evidence showed that a friend of the injured employee called the employer's pipe superintendent in (State 6), whose responsibilities included locating qualified employees, and inquired about a job for himself. He then asked if other "hands" were needed and, upon being advised that he could bring someone with him, contacted the injured employee who indicated he wanted the employment. The friend then called the superintendent and provided information about the injured employee, including his social security number. The employer paid for their travel and lodging expenses en route to the job site where they completed job applications. Under these facts, the Appeals Panel was unwilling to find error in the hearing officer's determination that the injured employee was recruited in Texas.

Concerning the election of remedies issue, claimant cited Texas Workers' Compensation Commission Appeal No. 960395, decided April 8, 1996. In that case, the Appeals Panel affirmed the hearing officer's determination that claimant made a knowing election to pursue benefits in (State 7) and was thus precluded from seeking benefits in Texas. Our decision noted that claimant, who was not represented at the time, had signed and returned a petition and other settlement documents to (State 7) and that (a State 7) judge had signed an order approving the settlement. Our decision cited and distinguished Texas Employers' Insurance Association v. Miller, 370 S.W.2d 12 (Tex. Civ. App.-Texarkana 1963, writ ref'd n.r.e.), where the court upheld the trial court's refusal to enforce an election because of the employee's acceptance of benefits voluntarily paid in (State 8) and held there was no election by the employee because there was no evidence there had been a final adjudication of the employee's claim under (State 8) law or a final settlement with the carrier.

In Appeal No. 92634, *supra*, the Appeals Panel addressed the election of remedies issue after stating that the hearing officer's failure to make findings on the issue was not reversible error since the issue was moot after the hearing officer determined that the injured employee was not entitled to benefits under the 1989 Act based on the extraterritorial coverage statute. In this decision, the Appeals Panel stated that the appropriate test for

the election of remedies was that stated in Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, 851 (Tex. 1980), to wit:

> The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice.

Our decision noted that the election of remedies doctrine has not been favored by some courts and that the court in Miller, *supra*, and another court "apparently place great reliance on filing a claim in the foreign jurisdiction and settling that claim." Citing Wasson v, Stracener, 786 S.W.2d 414 (Tex. App.-Texarkana, 1990, writ denied), which viewed the doctrine as conditioned on the existence of two inconsistent remedies and a mistaken belief that a party has a particular remedy, our decision opined that the injured employee's having accepted medical benefits in (State 9) was not inconsistent with the acceptance of medical benefits in Texas, particularly given the credit provisions in Article 8308-3.19(b). In conclusion, our decision in Appeal No. 92634, *supra*, stated that "[t]he purpose of the doctrine is to prevent a party who has obtained a specific form of remedy from obtaining a different and inconsistent remedy for the same wrong. Using this test, it would appear that there was no election of remedies in the instant case."

We are satisfied the evidence in this case is sufficient to support the hearing officer's determination of the election of remedies issue. The hearing officer could consider that claimant, a lifelong resident of Texas, had previously settled workers' compensation claims in (State 1) and in (State 2); that after he began to have difficulty with the carrier's medical authorizations in February 1995, he filed a TWCC-41 in April 1995; that he began receiving and accepted income benefits from the carrier in May 1995; that he obtained the services of an attorney who, in June 1995, filed a formal workers' compensation petition in (State 1) and in July 1995 filed motions for income and medical benefits; and that he received substantial medical and income benefits from the carrier.

The disputed issues presented the hearing officer with questions of fact to resolve. 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, is to resolve such conflicts and inconsistencies in the evidence as were present in this case. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As an appellate reviewing body, we will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge