APPEAL NO. 012669
FILED NOVEMBER 29, 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 was held on October 24, 2001. She determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; that the respondent/cross-appellant (carrier) is not relieved from liability because of the claimant's failure to timely notify his employer of the claimed injury; and that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The claimant appeals the compensability determination. The carrier appeals the determinations relating to timely notice and election of remedies. The carrier also urges on appeal that the hearing officer erred in determining that the claimant sustained disability. However, as the issue of disability was not presented to the hearing officer and she did not make findings relating to disability, we will not address this argument. Both the claimant and the carrier filed responses to the opposing party's appeal.

DECISION

Affirmed.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). The claimant had the burden to prove that he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In the present case, the hearing officer determined that the claimant did not sustain a compensable injury. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. The Appeals Panel will not disturb the challenged factual 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 to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

Section 409.001 requires that an employee, or a person acting on the employee's behalf, shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The carrier contends that because the hearing officer determined that the claimant did not sustain a compensable injury, she erred in finding that the claimant gave timely notice of a work-related injury to his employer. We disagree. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93761,

decided October 4, 1993. We find sufficient evidence in the record to support the hearing officer's determination that the claimant timely reported an injury to his employer and do not agree that a claimed injury, which ultimately is found not to be compensable, cannot nevertheless be timely reported.

The hearing officer determined from the evidence presented that the claimant did not make an election of remedies and, therefore, did not foreclose entitlement to workers' compensation benefits. 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. The Appeals Panel has frequently cited the case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) in support of the proposition that any election of remedies, which is held to bar a claimant from seeking an alternative relief, must be made as a result of an (1) informed choice (2) between two rights, remedies, or states of fact that (3) are so inconsistent (4) *as to constitute manifest injustice*. (Emphasis added). However, the Bocanegra case makes clear that election be imposed sparingly, reserved for instances where 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 carrier is **ASSOCIATION CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

HAROLD FISHER, PRESIDENT
3420 EXECUTIVE CENTER DRIVE
AUSTIN, TEXAS 78731.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge