APPEAL NO. 032585
FILED NOVEMBER 6, 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 held on August 25, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable injury; that the date of injury was _____; that the appellant (carrier) is not relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; 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 carrier appeals the injury, timely notice, and election-of-remedies determinations on legal and evidentiary sufficiency grounds. The claimant responded, urging affirmance. The date-of-injury determination was not appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant had the burden to prove that she sustained a compensable injury and that she gave timely notice of injury to her employer. The claimant claimed that she sustained a repetitive trauma injury as a result of performing her work activities for the employer. Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, which is defined in Section 401.011(36). Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment.

The claimant testified that beginning in _____ she had fatigue in her arms after performing her job. She described the mechanics of performing her job, the frequency with which she used her arms and hands, and how this caused fatigue in her arms and hands. She testified that she would recover after a period of rest or overnight, but that as time went by, the fatigue became pain, and the recovery periods became longer. She had a week-long vacation scheduled for the last week of June 2002, and when the condition did not improve while she was off work, she bought braces for herself which provided some relief, told her supervisor about her problems, and scheduled a doctor's appointment. The claimant testified that the supervisor told her to let the doctor decide whether her condition was caused by her work activities. The first doctor she saw did not provide an opinion concerning whether her condition was work-related, but a required medical examination doctor, Dr. E, diagnosed bilateral tendonitis, and attributed it directly to her job. The hearing officer noted that the medical records and the claimant's testimony were sufficient to establish that the claimant sustained an occupational disease injury.

The hearing officer determined that the date that the claimant knew or should have known that her injury might be work-related was _____, and that she reported her injury to her supervisor on July 15, 2002. The hearing officer went on to find that the claimant trivialized her injury and continued to work in the hopes that it would improve with rest, and this trivialization was good cause for the claimant's failure to report her injury until July 15, 2002.

Conflicting evidence was presented on the disputed issues of whether the claimant sustained a compensable injury in the form of an occupational disease and whether she had good cause for not timely notifying her employer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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). Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations on the disputed issues are supported by sufficient evidence and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Thus, no sound basis exists for us to disturb those determinations on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Although another fact finder may have drawn different inferences from the evidence, which would have supported a different result, that fact does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer did not err in determining that the claimant is not barred from pursuing workers' compensation benefits because of the election of remedies doctrine. 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. The court also stated: "One's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice." *Id*. at 852. Election of remedies is an affirmative defense. Allstate Insurance Co. v. Perez, 783 S.W.2d 779 (Tex. App.-Corpus Christi 1990, no writ). The carrier had the burden to prove an effective election of remedies. Texas Workers' Compensation Commission Appeal No. 002682, decided December 22, 2000. There is conflicting evidence in this

case regarding the disputed issue. The hearing officer found that the claimant did not make an informed election between two inconsistent remedies, such as to constitute a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **MARYLAND CASUALTY COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251-2237.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Edward Vilano
Appeals Judge