APPEAL NO. 92273

On March 31, 1992, a contested case hearing was convened. The hearing was continued on April 17, 1992. Three issues were before the hearing officer: (1) whether the claimant (respondent herein) sustained a compensable injury on_____; (2) whether the claimant gave timely notice of his injury; and (3) whether the claimant made an election of remedies which would preclude his recovery of benefits. The hearing officer held that respondent sustained a compensable injury in the course and scope of his employment on_____, that respondent provided timely notice to his employer, and that he did not make an election of benefits which would otherwise have precluded his recovery under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant (carrier below) contests the findings of fact and conclusions of law relevant to timely notice of injury, compensable injury, and election of benefits. Respondent cites the evidence and legal authority supportive of the decision.

DECISION

We affirm the decision and order of the hearing officer.

Respondent was employed by for (employer), working on the fuel cell of the _____ (a fuel cell holds the gasoline that flies the plane). On _____ while crawling inside the fuel cell, he hit his head when he raised himself up. He said he told his foreman, (Mr. Du) that day, but he did not go home, nor did he go to the company clinic, which was required by employer's procedures in the case of an on-the-job injury. Two coworkers who were present, gave written statements that he hit his head with sufficient impact to knock him to the floor.

In 1957 respondent suffered an injury to his head as the result of a gunshot wound. He had had surgery to replace part of his skull with a metal plate. He said the same plate was in his head until the incident which is the subject of this appeal. Respondent saw his primary care insurance physician, Dr. P, on July 19th. Dr. P examined him and that day referred him to Dr. A. Medical records admitted into evidence show that Dr. A admitted him to the emergency room of Hospital on July 19th because the plate was extruding through the skin on the area above the right frontal sinus. Because the craniotomy site was found to be infected, Dr. A operated and removed the metal plate on July 22nd. A surgical pathology report stated in part that the metal plate contained multiple small holes. A catheter was also placed in respondent's head and he was given antibiotics. On October 30th Dr. A performed cranioplasty and inserted a new plate made of titanium mesh. A November 9th letter from Dr. A said when he removed the old plate, "there was definitely an indentation in the middle where the plate had bent down at the center and forward at the edges which was definitely due to a traumatic event."

Respondent testified that he informed both Dr. P and Dr. A on the first visit to each of them that he had hit his head on the job. However, on August 7th respondent submitted to employer a disability income claim form, which checked "no" in response to a question as to whether the accident or sickness was caused by his occupation. The form was filled out by respondent's wife and signed by respondent. On September 12th, he received a letter from employer's claims administrator enclosing a supplemental claim form for respondent's doctor to complete. A supplemental group claim form signed by Dr. A on September 16th also indicated that the sickness or injury did not arise out of the patient's employment. An August 5, 1991 physician's statement signed by Dr. P checked "no" to the question whether respondent's condition was due to injury or sickness arising out of his employment. Respondent said he thought he had filed a claim for workers' compensation two or three weeks after the accident, but that he wasn't sure. An October 31st letter from employer to respondent requested repayment of disability benefits from July 23rd through October 6th because of his filing a workers' compensation claim.

Respondent's wife, (Mrs. D), said respondent told her on _____he had hit his head at work; she told him he needed to get it checked out when she saw a black spot on his forehead. She said he went back to work the next day, even though he had a bad headache, and she made an appointment for him July 19th with Dr. P, who saw respondent and referred him to Dr. A.

Mrs. D said that while her husband was in the hospital she spoke on the telephone with an employee benefits person at employer, (Ms. P). She said she told Ms. P that respondent had hit his head. Ms. P told her there would be a delay since Mrs. D had already filed for health benefits. She said she could not afford any delay, and that she told Ms. P she would "just leave it like this." She said she spoke to Mr. Du, the foreman, on July 23rd and told him what had happened to respondent. She could not remember when respondent filed his workers' compensation claim, but she said that it was prior to their hiring an attorney in December 1991. When the claim was filed, she said, her husband ceased receiving disability benefits. She said his health care and health-related treatment has been paid for by employer's group insurance.

Respondent went back to work and worked for about two weeks after his first surgery. Dr. A released him to work only if he wore a hard hat, but without the metal plate he couldn't stand the pressure the hard hat put on his head. At that time, Dr. A told him to stop working.

A clinic record from employer's medical clinic noted that on September 30, 1991, respondent called to report "bumping head many times at work. Developed osteo of frontal bone. Surgical drainage on 7/22/91. Will have plate inserted in about a month. Wants to RTW." (Mr. A), employer's workers' compensation administrator, characterized this entry as "a nonindustrial call to report bumping heads many times at work," and said

this information precipitated the filing of the Employer's First Report of Injury (TWCC-1) on October 7th. He was not aware of any reporting of respondent's injury to a supervisor prior to September 30th. However, a recorded statement of Mr. Du contained the latter's recollection that respondent came to him "at least a month after the incident" saying he had hit his head and that it continued to hurt. Mr. Du's statement also said respondent requested to go to employer's medical clinic, that Mr. Du let him go there, and that respondent went out on occupational (work-related) leave thereafter.

An Employer's Contest of Compensability form (TWCC-4) was filed November 29, 1991, based on the certification by respondent, Dr. A and Dr. P, that respondent's condition was not job related, and because respondent did not report his injury timely. Mr. A said that an employee attendance record admitted into evidence showed respondent was on personal leave from work for five days starting with July 21st, and that starting July 29th he was on nonoccupational leave (he defined nonoccupational leave as sickness and accident, as opposed to occupational leave which he defined as work related disability.) He said respondent was placed on occupational leave on October 28th.

At the outset, we will address respondent's contention in its reply that the appeal in this case was not timely filed (while respondent's pleading says that "The claimant's request for review is barred . . ." [emphasis added] we assume this is a misstatement). The letter from the Texas Workers' Compensation Commission's Division of Hearings & Review transmitting the hearing officer's decision to the parties is dated June 4, 1992. Article 8308-6.41(a) provides that a party that desires to appeal the decision of the hearing officer must file a written appeal with the appeals panel not later than the 15th day on which the decision is received. Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE §143.3(c) provides for a presumption of timely filing if the request for review is mailed on or before the 15th day after the date of receipt, and the request is received by the Commission not later than the 20th day after the date of receipt of the decision. Appellant's pleading recites that the decision and order was received June 8, 1992; the appeal was filed and received by the Commission on June 23rd. Therefore, the appeal is timely.

The Findings of Fact contested by the appellant are as follows:

FINDINGS OF FACT

4. On_____, [respondent] sustained damage to a metal plate in his skull when he struck his head against the top of a fuel cell located in the aircraft on which he was working.

6. As a result of the _____ injury, the metal plate was bent outward on at least one of its edges, resulting in an inflammation with resultant severe infection.

7. As a result of the severe infection caused by the bent plate, it was necessary for [respondent] to have surgery for the plate's removal on July 22, 1991; [respondent] has been unable to work since that time.

8. During the period _____ through July 19, 1991, [respondent] informed his immediate supervisor, [Mr. Du], that he had been injured on the job.

9. On July 22, 1991, [respondent's] wife informed [Ms. P], a clerk assigned the responsibility of processing employee benefit claims, that [respondent] had sustained a work-related injury on_____.

10. On July 22, 1991, [respondent's] wife telephoned supervisor Mr. Du and informed him [respondent] had been injured on the job during the preceding week.

11. At the time they filed the initial claim with [employer] neither [respondent] nor his wife had reason to be aware of the mutually exclusive nature of the respective benefits involved [temporary disability/medical benefits vs. workers' compensation benefits].

12. [Respondent] was not aware of the correlation between striking his head on_____, and the subsequent suppurating wound until the relationship between the bent plate in his head and the infection was explained to him by [Dr. A] at some time between July 19 and July 22, 1991.

13. Although [respondent's] wife had a conversation with [employer's] employee benefit clerk, [Ms. P], on July 22, 1991, she decided to continue with the temporary disability/medical benefit plan due to the delay which would be caused by changing the paperwork (on [Ms. P's] suggestion).

Appellant contests the following conclusions of law:

CONCLUSIONS OF LAW

3. On_____, [respondent] sustained a compensable injury in the course

and scope of his employment.

4. [Respondent] is entitled to benefits related to the repair or replacement of the metal plate in his head and for treatment of the injury to his head.

5. On or before the 30th day following his injury, [respondent] notified [employer] of its occurrence.

6. In the event it is determined [respondent] failed to give [employer] notice within 30 days, a person eligible to receive notice for [employer] had actual knowledge of the injury within that 30 day period.

7. During the period in question, [respondent] did not successfully exercise an informed choice between the available benefit plans which was so inconsistent as to constitute manifest injustice.

The 1989 Act 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. Article 8308-5.01(a). Such notice may be given to the employer or any employee of employer who holds a supervisory or management position. Article 8308-5.01(c). An employee's failure to timely notify the employer relieves the employer and the employer's insurance carrier of liability under the act unless (1) the employer or person eligible to receive notification or the insurance carrier has actual knowledge of the injury; (2) the Commission determines that good cause exists for failure to give notice in a timely manner; or (3) the employer or insurance carrier does not contest the claim. Article 8308-5.02.

Appellant contends that the overwhelming weight of the evidence is against the findings of fact leading to the conclusion that the notification was timely. A review of all the evidence in the record on this issue shows the following: respondent testified that he gave notice to his foreman within 30 days of his injury, although he could not remember the date. Mrs. D testified that she notified her husband's foreman on July 23rd. Mr. A testified that the clinic report entry of September 30th was the first indication that respondent reported a job related incident to the clinic, and that it was that entry which triggered the employer's first report of injury. Mr. A said he was aware of no report made prior to that time. The employee attendance form for respondent shows occupational leave beginning around the end of October. The recorded telephone interview with Mr. Du indicates he knew of the blow to the head, although he speculated respondent informed him "at least a month after the incident."

The hearing officer's decision makes it clear that he chose to believe the testimony of respondent's wife, who testified she notified Mr. Du. Respondent testified that Mr. Du, who was identified as a foreman, was his supervisor. The hearing officer also buttressed his decision by reference to Mr. Du's statement (which said, in part, that respondent "came to me...and said his head had been hurting") and the fact that the evidence indicated he could have spoken in person to respondent only between _____ and 19th since the evidence does not show that respondent returned to work any earlier than October 8th. We are also not persuaded by appellant's argument that the first notice was to employer's clinic on September 30th. While respondent may not have complied with company policy by going directly to the clinic on the day of injury, that is immaterial under the notice standards set out in the Act. Given the foregoing, we cannot say the hearing officer's findings of fact on notice were so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Appellant argues that the damage to respondent's metal plate is not compensable, because injury to the plate is not an injury under the law. Appellant also argues that medical records in evidence indicate some prior erosion of the plate. The 1989 Act defines "injury" in pertinent part as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). While there was some evidence that the plate had eroded in the 34 years it had been in respondent's head, there was also medical evidence that it was bent outward, that it was protruding from respondent's forehead, and that the exposure had resulted in infection. This situation is different from that in National Union Fire Insurance Co. of Pittsburgh v. Janes, 687 S.W.2d 822 (Tex. App.-El Paso 1985, writ ref'd n.r.e.), where the injury was only to a temporary metal plate and not to the body. *See also* Texas Workers' Compensation Appeals Panel Decision No. 91001 (Docket No. redacted), decided July 31, 1991.

Finally, appellant alleges that by filing for group health and disability benefits, the respondent has made an election of remedies and is precluded from now claiming that he is entitled to workers' compensation benefits.

The Texas Supreme Court in Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), a workers' compensation case, articulated the following test for election of remedies:

> 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. *Id*. at 851.

The court further said that a person's choice between inconsistent remedies or rights 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." It stated an exception to that rule where the choice of a course of action, though made in ignorance of the facts, will cause harm to an innocent party. *Id*. at 852.

Appellant cites the case of Smith v. Home Indemnity Co., 683 S.W.2d 559 (Tex. App.-Fort Worth 1985, no writ) as controlling. In that case the claimant was denied workers' compensation benefits where he applied for and received medical and disability benefits and only filed for workers' compensation when his group disability benefits were about to expire. The claimant in Smith was also bound by his failure to answer requests for admission, which the court said satisfied the requirements of election of inconsistent remedies set out in Bocanegra.

In the instant case, respondent filed a request for and received disability insurance and health insurance benefits, remedies which are inconsistent with a workers' compensation claim. The question thus arises whether this action was taken with such a full and fair understanding of the problem, facts, and remedies essential to the exercise of an informed choice. *See* Bocanegra, *supra*.

Respondent testified that at the time of his injury he needed immediate medical attention and was ignorant as to which avenue to take; that because he did not know the cause of the ensuing problems with his head, he sought whatever coverage he could get at that time. He also stated that "[b]enefits said it was workmen's (sic) comp case. Workmen's (sic) comp says it was benefits, so I was just hanging in the middle and wasn't getting anything."

Mrs. D testified that she spoke to Ms. P, employer's benefits person, while her husband was in the hospital. She said, "I told her that he had hit his head, but since I had already filed it on the [health] insurance, she told me there would be a delay. And at that time, financially, I couldn't afford another delay. So I said, “Okay. I guess we'll just leave it like this." Afterwards, she said, "I did all the paperwork and when [respondent's] signature was needed, I slapped the paper to him and said, “Sign here."

Mrs. D also said there had been a problem with Ms. P and her supervisor: "[t]o get ahold of [Ms. P], you have to call and leave a message, and they're supposed to contact you back. I placed several calls and did not get [Ms. P] on the phone. We went out to [employer] to get the information in November or December, neither one of them could help me. [Mr. A] couldn't help me, and I don't--Mr. L [the director of the stealth project] could not help, also."

It was not entirely clear from the evidence whether it was the filing of respondent's workers' compensation claim that stopped the disability benefits, or whether the claim was filed after the benefits stopped. Both respondent and his wife testified that they were agreeable to paying back the disability benefits.

We believe the hearing officer applied the correct test with regard to election of benefits. The evidence shows confusion on the part of respondent and his wife with regard to benefits, a situation which apparently was not cleared up with the assistance of employer. In addition, the evidence shows there was a period of time in which it was not even clear to respondent as to what caused his condition. Based on all the foregoing, we believe there is also sufficient evidence to support the hearing officer's conclusion that respondent did not successfully exercise and informed choice between the available benefit plans. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e).

The decision and order of the hearing officer is thus affirmed.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge