APPEAL NO. 94052

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on July 27, 1993, with the record closing on September 10, 1993, in (city), Texas, (hearing officer)., presiding as hearing officer. He determined that the respondent (claimant) did not make an election of remedies and had disability from July 7, 1992, through the date of the hearing. Appellant (employer/carrier), a self-insured governmental entity, appeals urging that the evidence does not support the determinations of the hearing officer and asks that we determine "that there was a valid election of remedies; that there existed no injury, or in the alternative, if injury is found, that there existed no disability; that this claim was timely controverted with regard to compensability and course and scope; and that the actions of the ombudsman in this be examined" since the ombudsman "was involved in the hearing to an extent far overreaching the bounds of the ombudsman." Claimant responds urging that the decision be affirmed.

DECISION

Determining that there is sufficient evidence in the record to support the findings and conclusions of the hearing officer regarding the election of remedies issue, that part of the decision is affirmed. Finding error, we reverse and remand on the issue of disability.

Initially we note there was no objection whatsoever expressed at the hearing level as to any improper action on the part of the ombudsman. As a matter first raised on appeal, we are not inclined to address it, particularly where there are no specifics provided and no indication that something transpired after the hearing closed. In any event, we have, in our review of the record, looked for indications of improper conduct on the part of the ombudsman and find none. The ombudsman did assist the pro se claimant and asked questions, both on direct and cross-examination, on behalf of and in assisting the claimant. Such activity is not improper or precluded under the 1989 Act. Section 409.041.

There were two issues presented and agreed upon at the inception of this contested case hearing: (1) did claimant make an election of remedies which precludes benefits under the Act; (2) has the claimant had disability due to a work-related injury of (date of injury). These are the only substantive issues we address on appeal. Nothing in the record indicates that an issue involving an injury in the course and scope of employment was previously litigated or otherwise disposed of, or that such issue was an issue before the hearing officer in this case. We have previously held that the Appeals Panel does not determine issues first raised on appeal which were not raised or considered earlier in the dispute resolution process. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 93514, decided August 5, 1993, where we recognized that a sub-issue or matter can, in some situations, be subsumed in a substantive issue under consideration.

Briefly, with regard to the election of remedies issue, the claimant testified that she was a toll booth attendant for the employer/carrier having returned to this job in early 1992, that she occasionally bumped her left knee on a "blue box" and cashier drawer in the booth in which she was working, and that she intermittently experienced pain in her left knee. There was evidence that she has had two prior surgeries on that knee, one in 1985 and a second one after she was thrown from a horse in July of 1991. She did not report any injury to her supervisor but had complained about bumping her knee to a coworker and to a nurse at the employer/carrier's group health provider in late June when she sought a leave of absence which was not approved. She testified that because of the pain in her knee and the fact that her husband was going to have surgery, she decided to resign in early July 1992. She filled out the paperwork on July 5th but did not give a definite date for her last day of work. The last day she worked was (date of injury).

On July 7th, the claimant made an appointment with a (Dr. W) who had previously treated her, and his July 9th report noted complaints of left knee pain by the claimant but does not mention cause. On July 9th or 10th, the claimant called employer/carrier to see about withdrawing her resignation and going on short term disability (STD) citing her sore knee and followed up with an STD request. She was informed that the employer/carrier rules did not permit her to rescind her resignation. On July 16th, the claimant went to the employer/carrier and talked with the STD coordinator. When the claimant stated that she had hurt her knee by bumping it on a box in the toll booth, the STD coordinator discussed the matter with the former STD coordinator and told the claimant it sounded like an on-the-job injury and sent her to the official who coordinates workers' compensation. She was advised that a claim could not be processed until her supervisor completed an accident form which was completed later that day stating claimant ". . . alleged she bumped and hurt her knee on equipment box. . . ." The employer/carrier hired a consultant to investigate the matter and her workers' compensation claim was subsequently denied although she was advised that she was eligible for limited STD. According to the claimant, the employer/carrier initially authorized an MRI and for her to see a specialist, (Dr. N), but declined to pay workers' compensation after that.

The employer/carrier brought out that the claimant had a prior worker's compensation claim for a minor eye injury and that she had previously had a period of STD. It was also stressed that the claimant resigned because of her husband's upcoming surgery and, according to the claimant, because she was having problems with her knee. She also stated that at the time she applied for STD, although she had mentioned to Dr. W that she bumped her knee at work, she was not "aware of even claiming workmen's comp. There was nothing ever said about workmen's comp." She also stated that it was someone at the Texas Workers' Compensation Commission (Commission) that told her to use (date of injury) as her date of injury.

As set forth above, the hearing officer determined on the basis of this evidence that the claimant had not made an election of remedies and noted in his discussion that it was

the employer/carrier who determined the benefit route claimant pursued. We find there was sufficient evidence before him to sustain his finding that the claimant had not made an election of remedies. We have addressed the matter of election of remedies on a number of occasions. In Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993, we observed that it has been stated in case law that the doctrine of election of remedies is not a favorite of equity and that its scope should not be extended. In Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992, we set forth the test stated in Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980):

> 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.

We observed that the Texas Supreme Court further stated 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." In Appeal No. 92273, *supra*, the claimant was not barred from a compensation claim although the claimant filed for group health and disability benefits. *See also* Texas Workers' Compensation Commission Appeal No. 92678, decided January 29, 1993, where claimant accepted medical/disability from another plan prior to workers' compensation. An election of remedies was held not to occur where the claimant filed under the spouse's group health care plan. Texas Workers' Compensation Commission Appeal No. 931005, decided December 8, 1993. *See* Texas Workers' Compensation Commission Appeal No. 93618, decided September 7, 1993. While it is apparent that the employer/carrier was convinced that the claimant was familiar with STD and workers' compensation because of her previous claim and application for STD and knowingly made an election to file for benefits other than workers' compensation initially, the claimant testified that she was ignorant of the options available, under the present circumstances, and there was evidence that when she attempted to talk to the STD coordinator she was directed toward workers' compensation procedures. Under these conditions and recognizing that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)), we cannot say that the hearing officer's findings on this issue were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

Regarding disability, the claimant testified that she was not able to work up to the time of the hearing because of her knee injury (aggravation by repeated bumping of her previously injured knee), and that the knee "doesn't want to move" when she sits and gets up, that it is stiff, and that "sometimes I will be walking and it will give way" and she will almost fall. Also in evidence was correspondence from Dr. N dated May 18, 1993, stating

that the claimant was not able to work at that time because of knee pain. The testimony of a claimant alone can be sufficient to establish disability. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Texas Workers Compensation Commission Appeal No. 931117, decided January 21, 1994. And, although mere pain alone (absent some significant debilitating condition) is normally not compensable, pain nonetheless can be a rather convincing circumstance of a potential underlying injury and where there is evidence, as there is here of injury to the knee, to support an injury, disability can result. Texas Workers' Compensation Commission Appeal No. 93812, decided October 22, 1993. The hearing officer determined that the claimant had disability. However, for there to be disability as defined in Section 401.011(16), there must be a compensable injury. Texas Workers' Compensation Commission Appeal No. 94047, decided February 16, 1994; Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. The hearing officer predicated his determination that the claimant had disability on an unsupportable inference and waiver. In his discussion section, the hearing officer stated "[c]arrier would not stipulate compensability, so it is inferred that issue has been previously decided or that the Airport did not timely contest it." He also stated that since the employer/carrier's primary argument regarding disability was that the claimant's complaints are not work related and since an "issue regarding course and scope" was not urged by either party, the carrier/employer was foreclosed, as a matter of law, from contesting disability on that basis. We can only assume that the hearing officer is applying a "waiver" theory to preclude the employer/carrier from disputing "course and scope" under the circumstances. This action by the hearing officer is, in our opinion, misplaced and attempts to resolve an issue not before him. *Compare* Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. *See* Texas Workers' Compensation Commission Appeal No. 93593, decided August 31, 1993, where we held the hearing officer reached findings and conclusions well beyond the framed issue. *See* Section 410.151(b) and Texas Workers' Compensation Commission Rule 142.7 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7) which limits disputed issues that can be considered by the hearing officer and provides procedures to add or include issues. Our review of the record also does not disclose any evidence to support the above stated inference. To the contrary, it is clear from the evidence that the employer/carrier disputed at the outset of the filing of the claim that this was a compensable claim. Carrier Exhibit No. 10 contains a Notice of Medical Payment Dispute stating that the employer/carrier disputed that claimant was injured in the course and scope of employment and Carrier Exhibit No. 7, a letter dated August 20, 1992, from the employer/carrier to the claimant, advises her that the on-the-job-injury claim has been denied. The hearing officer nonetheless apparently determined that there was a compensable injury. Without a disputed issue properly before the hearing officer, i.e., whether the claimant sustained an injury in the course and scope of employment (a compensable injury), a necessary predicate for a determination of disability, and with no evidence to establish that such issue had been previously decided or otherwise resolved, we necessarily reverse and remand on this issue. In Texas Workers' Compensation Commission Appeal No. 93547, decided August 2, 1993, we held that where there was no issue before the hearing officer as to injury in course and scope, the hearing officer's finding

that there was no injury was error and that since there was no issue as to a compensable injury, the basis for a finding on disability was not clear, therefore remand was required. In Texas Workers' Compensation Commission Appeal No. 92330, decided August 31, 1993, we remanded where "the issue upon which the hearing officer's decision appears to be principally predicated was not an issue properly before her." *See also* Texas Workers' Compensation Commission Appeal No. 92608, decided December 30, 1992. Where there is a predicate issue necessary to the disposition of a disputed issue before the hearing officer, it should be resolved prior to the hearing (either by agreement, stipulation, or dispute resolution) or made an issue at the hearing.

The decision on the issue of disability is reversed and the case remanded for further consideration and appropriate development of evidence by the hearing officer on the threshold matter of whether the issue of compensable injury has in fact been resolved or whether a compensable injury was sustained. If this issue has been previously resolved or has otherwise been properly disposed of, evidence should be included in the record to show this fact. If it has not been resolved, then the parties, with appropriate notice, should be given the opportunity to present evidence on the compensability of the claimed injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge