APPEAL NO. 990022

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 1, 1998. The issues at the CCH concerned whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease, and the date of such injury; whether she had disability from her injury; whether the respondent (carrier) was relieved of liability because of the failure of the claimant to timely notify her employer of her injury, in accordance with Section 409.001; and whether the claimant made an election of remedies because she received benefits through her group health insurance that bars her from asserting a claim for worker's compensation benefits.

The hearing officer did not find in favor of the claimant on her contention that she had a repetitive trauma injury to her foot through walking and standing on the job. The hearing officer found that the claimant suffered from an ordinary disease of life. The hearing officer determined that the date of injury was the date that the claimant first knew, or should have known, that her injury may be related to her employment, which was Injury 2, and that she failed to give timely notice to her employer of her injury within 30 days of this date. The hearing officer further found that the claimant did not have good cause for failure to timely notify her employer. The hearing officer determined that the claimant elected a remedy that barred her from pursuing workers' compensation, in that she was familiar with benefits through workers' compensation but "consciously chose" to use her group health insurance.

DECISION

Reversed and rendered as to election of remedies, but otherwise affirmed.

The hearing officer, in her decision, has done a comprehensive job at setting out the record developed in the hearing, which we will briefly summarize here. The claimant was employed as a security guard at a shopping mall through (employer). She agreed that in injury 1 she sustained a back injury while involved in breaking up a gang altercation. She was off work for three to four months. She said she returned to work in October 1994 with restrictions on lifting. About three months later, claimant began having bilateral foot pain, with her left foot worse than her right. She sought treatment from her regular family doctor, Dr. M, during this month, initially in the context of an appointment set for another of several health-related problems for which she was treated. The claimant repeatedly testified that she knew by Injury 2 (and perhaps the month before) that her foot pain was related to being on her feet most of the day at her job.

The Claimant said that her employment required her to walk around the mall or stand at entrances from six to seven hours a day. She had a half-hour lunch. She also said that she might spend one to two hours a day driving around the outside perimeter of the mall. The claimant said she had no problems with foot pain prior to her back injury.

The claimant said Dr. M referred her a foot specialist, Dr. F, whom she first saw in the middle of August 1995. The claimant said that Dr. F told her that her foot problems were probably caused by her back injury and were aggravated by her walking at work. the claimant had surgery on November 3, 1995, was off for about a month, and then returned to work in a very limited duty capacity (working from a wheelchair), but she was unable to continue and left sometime before the holidays. The claimant was terminated effective January 26, 1996. She said that her insurance was canceled sometime prior to this and she began getting medical bills.

The claimant was asked by the hearing officer why she had filed the bills for treatment through regular group health insurance. The claimant pointed out that she did not "file," but that she would pay a copayment when she went for treatment, and the rest was paid directly through group health. The claimant said that she followed this course, rather than filing a workers' compensation claim, because she believed that it would be simpler, and that her foot condition could be promptly resolved so she could return to work. She stated that she did not know that the course of her condition would turn out to be prolonged, as it had developed. Furthermore, the claimant was unaware if the employer offered any income replacement benefits through disability insurance, and consequently made no claim for any such benefits. The claimant contended that she was discussing her foot condition all along with her supervisors at work and that these discussions began around the time she was seeing Dr. F. The claimant had not worked since December 21, 1995.

Dr. F's initial medical report on August 10, 1995, diagnosed plantar faciitis and left heel neuritis. He noted that this affected her left heel primarily. The operative report added that the claimant had a heel spur. Dr. F answered interrogatories (although signed not under oath) on January 7, 1997, in which he stated that the claimant's condition was 100% related to her occupation and was caused by repeated impact on hard surfaces. He stated that her previous rib and back injuries contributed to her nerve pain in her feet.

The claimant filed a claim for compensation on May 30, 1996 (misdated 1995). Dr. X, a doctor for the carrier, without examining the claimant, opined that prolonged standing did not lead to plantar faciitis. The claimant testified that she was injured in a car accident five months prior to the CCH.

Occurrence of a Repetitive Trauma Injury

The hearing officer stated that the claimant failed to present a preponderance of evidence showing that she was exposed to repetitive and traumatic activities resulting in her injury. In this regard, the hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In addition, the Appeals Panel has

held (as has the hearing officer in this case) that walking is generally a hazard to which the public at large is exposed, such that foot problems arising from walking can generally be said to be ordinary diseases of life, which are not included in the definition of occupational disease under Section 401.011(34). Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993; Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993. While we caution that we have not said that walking injuries could never be compensable, the finder of fact would have to be convinced from the preponderance of the evidence that there was a hazard incident to the employment that did not affect the public at large.

Date of Injury and Notice to the Employer

Section 408.007 states that the date of injury for an occupational disease (which includes a repetitive trauma injury) is "the date on which the employee knew or should have known that the disease may be related to the employment." This will not, in every case, mean the date on which a concrete diagnosis is rendered. Likewise, Section 409.001(a)(2) requires the injured worker to give notice to the employer of an occupational disease within 30 days of this same level of knowledge. However, the notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of a work-related injury and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied).

The claimant's repeated testimony at the hearing was that she realized she had foot problems related to her work in Injury 2. No evidence (as opposed to argument) was developed to show the contrary. The hearing officer's determination that the date of injury was Injury 2, is supported by the record. The claimant was required to give notice to her employer within 30 days of this date. As she did not, or the hearing officer did not believe she did, the carrier is discharged from liability. We cannot agree that payment of medical bills through a group health insurance policy (especially with no evidence presented that the employer was aware of these payments), which is designed for non-work-related diseases and ailments, constitutes a constructive notice that would satisfy the requirements of Section 409.001(a)(2). Finally, no evidence was developed on the matter of good cause because the claimant's position was that timely notice was given. We therefore affirm the hearing officer's determination that the carrier is discharged from liability.

Election of Remedies

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 is equally significant for its entire discussion concerning the equitable underpinnings of the election of remedies doctrine, and it makes clear that election should 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. This, in our opinion, calls for a situation in which there is more than the mere filing of health care claims through a regular group insurance policy, even if there is a subjective appreciation that regular health insurance does not usually cover work-related injuries. There is no manifest injustice when a workers' compensation insurer is asked to pay for a work-related injury which it has agreed to cover in return for premiums from the employer, and none to the health insurer who has the subrogation right to the money it has paid out.

As the court in Bocanegra points out (at page 851), mere assertion of inconsistent theories and remedies does not, in and of itself, rise to the level of an "election." The facts in Bocanegra were the converse of the situation here; in that case, the petitioner first achieved a settlement of an occupational disease/workers' compensation claim and the settlement did not include medical treatment. She subsequently sued her regular health insurer for payment of her medical bills, asserting that the injury was nonoccupational. The Supreme Court did not impose an election and noted in its opinion that the workers' compensation settlement actually arose from a dispute over the compensability of the occupational disease. The Court further noted that resolution of whether a disease was occupational could be complex and difficult, commenting that "uncertainty in many complex areas of medicine and law is more the rule than the exception." *Id.* at 853. The Court found that the petitioner did not have the requisite knowledge to bind her to an informed election.

The claimant in this case testified that she felt that claiming the foot injury under her regular health insurance would be simpler. She further emphasized that she did not know or suspect that the course of her injury would turn out to be as prolonged as it had been. She returned to work after the surgical recovery period but was unable to keep working. Although leaving work the second time also coincided with the loss of her regular health insurance, it was at this time also that it became apparent that the course of illness would not be simple and would in fact be more prolonged, facts not known to claimant when she went through medical insurance. We finally observe that workers' compensation coverage is expressly made the "exclusive remedy" against the employer for work-related injuries. Section 408.001(a). The evidence presented in this record does not meet the standards set forth in Bocanegra for imposing a binding election, and we accordingly reverse those findings and render an opinion that the claimant did not, through having her medical treatment paid for initially through her regular health insurance, make a binding election of remedies that would bar her from claiming worker's compensation.

We note that the reversal on election of remedies does not change the decision in other respects and that the order finding against the compensability of the injury and liability of the carrier is hereby affirmed as set forth above.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT

I concur with much of the decision, and concur in the result of rendering a decision that the claimant is not barred from receiving workers' compensation benefits because she did make an election of remedies. On that issue, the hearing officer made the following findings of fact:

FINDINGS OF FACT

14. It is undisputed that claimant used her group health insurance to pay for medical treatment received by (sic) Dr. M, her initial family doctor and Dr. F, her treating doctor, including the November 3, 1995 surgery (sic, and omitted) subsequent physical therapy to her feet and only ceased using her group health for treatment to her feet, because Employer cancelled [sic] her coverage.

15. As a result of Claimant's compensable back injury in Injury 1 claimant was familiar with the type of benefits available through the Texas Workers' Compensation Act as well as with the type of benefits available through use of her group health insurance. Claimant consciously chose to use her group health insurance for medical treatment for her feet.

The hearing officer concluded that the claimant is barred from pursuing workers' compensation benefits because of an election of remedies to receive benefits under a group health insurance policy. In my opinion, Findings of Fact Nos. 14 and 15 are not so against the great weight and preponderance of the evidence as to be clearly wrong and

unjust and I would affirm them. The claimant said that she was unaware whether the employer offered any income replacement benefits through disability insurance. The Appeals Panel has stated that elections concerning medical and income benefits should be considered. There is not a finding of fact concerning disability benefits under another policy and income benefits under workers' compensation law. I do not indorse all of the comments in the majority decision, but I concur with reversing the decision concerning election of remedies and rendering a decision that the claimant is not barred from pursuing workers' compensation benefits because of an election of remedies because the carrier did not meet its heavy burden of proving that the claimant exercised an informed choice between pursuing conflicting remedies. Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998.

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Tommy W. Lueders
Appeals Judge