

APPEAL NO. 990351

On January 20, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the appellant/cross-respondent (claimant) sustained a compensable injury on _____; (2) whether the respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely notify the employer under Section 409.001; (3) whether the claimant has had disability, and if so, for what period; and (4) whether claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The claimant requests reversal of the hearing officer's decision that she is barred from pursuing Texas workers' compensation benefits because of her election to receive benefits under her group health insurance policy. The carrier requests reversal of the hearing officer's decision that claimant sustained a compensable injury on _____; that claimant timely notified her employer of the work-related injury; and that claimant had disability on August 31, 1998; on September 1, 1998; from September 3, 1998, through September 5, 1998; on September 16, 1998; and from September 24, 1998, and continuing through the date of the CCH. Each party filed a response.

DECISION

We affirm the hearing officer's decision that the claimant sustained a compensable injury on _____; that claimant timely notified her employer of the work-related injury; and that claimant had disability on the dates and for the time periods found by the hearing officer. We reverse the hearing officer's decision that claimant is barred from pursuing Texas workers' compensation benefits and we render a decision that claimant is not barred from pursuing Texas workers' compensation benefits.

Claimant worked in the housekeeping department of the employer's hospital. According to her testimony and recorded statement, on _____, she was taking soiled mops in a large trash can on wheels down a ramp at the hospital to the stockroom to wash the mops when she twisted her left knee and her knee popped just before getting to the end of the ramp. There is no question that taking the soiled mops to the stockroom for washing was part of claimant's job duties. A nurse at the hospital gave a written statement that on _____, she saw claimant pushing a trash can down the ramp and claimant stopped almost at the bottom of the ramp and complained that she twisted her left knee. Claimant said that on (a day after date of injury), she told her supervisor, SS, who is the manager of the housekeeping department, that she twisted her knee going down the ramp the day before; that she again reported the injury to SS on August 30, 1998, and told her that her knee was swollen and hurt and that she was going to the emergency room (ER); and that she again reported the injury to SS on September 2, 1998. Claimant's husband testified that on September 2, 1998, he was with claimant when claimant reported to SS

that she had twisted her knee on _____ going down the ramp. It is undisputed that claimant was at work performing her job duties for the employer on _____.

On August 30, 1998, claimant went to the ER at the employer's hospital and the ER report states that on (day of the week after date of injury), which would have been (a day after date of injury), a day the claimant was working for the employer, she twisted her left knee while walking and was referred to Dr. P with a diagnosis of a left knee sprain. Claimant went to Dr. P on September 2, 1995, and Dr. P wrote in a December addendum to the September 2nd office visit that claimant reported that while working on _____ she was taking soiled mops in a large trash can on wheels down a ramp to the stockroom to wash the mops when her left foot turned inward and her knee popped. Claimant went to physical therapy for her left knee and the physical therapist reported on September 14th that claimant told her that on either _____ or (a day after date of injury) she was at work taking mops in a large rolling trash can down a ramp when she twisted her left knee and noticed a pop in her knee. On September 24, 1998, Dr. P performed left knee surgery on claimant for a tear of the medial meniscus. Claimant testified as to the days she has been off work due to her left knee injury and presented off-work slips from Dr. P. After the surgery, Dr. P wrote that claimant might be able to return to light duty in eight weeks time, but claimant said the employer has not offered her light duty.

SS testified that on August 29, 1998, claimant called her and told her that she hurt her knee walking down the hospital ramp on August 27, 1998, a day when claimant was off work, but was at the hospital because her husband was undergoing back surgery on that day. SS said that she does not know when she received a report that claimant was claiming a work-related injury.

Claimant had the burden to prove that she was injured in the course and scope of her employment, that she gave notice of injury to the employer within 30 days of the injury, and that she had disability. The hearing officer found that claimant sustained an injury to her left knee while in the course and scope of her employment on _____; that claimant informed her supervisor of the work-related injury on multiple occasions during the 30-day period following _____; and that due to her left knee injury, claimant was unable to obtain and retain employment at wages equivalent to her preinjury wage on August 31, 1998; on September 1, 1998; from September 3 through September 5, 1998; on September 16, 1998; and from September 24, 1998, and continuing through the date of the CCH. The hearing officer concluded that claimant sustained a compensable injury on _____; that claimant timely notified her employer of the work-related injury; and that claimant had disability on the dates and for the time periods found in his finding on disability. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the testimony.

Carrier contends that claimant did not prove a causal connection between her work activities and the injury because she was "merely walking at work." The evidence reflects that claimant was not merely walking at work but was walking down a ramp pushing a large trash can with soiled mops in it to go to the stockroom to wash the mops when her knee twisted. There is sufficient evidence that claimant was injured in the course and scope of her employment as that term is defined in Section 401.001(12). See Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999. Compare Texas Workers' Compensation Commission Appeal No. 980631, decided May 14, 1998 (Judge Kilgore dissenting). Carrier contends that claimant did not timely report her injury to her employer. Claimant's testimony and the testimony of her husband provided sufficient evidence to support the finding of a timely report of injury to the employer. Carrier contends that claimant did not have disability because there was not a timely report of a compensable injury. We are affirming the hearing officer's decision that claimant sustained a compensable injury and that claimant timely reported the injury to the employer and thus we find no merit in carrier's contention regarding the decision on disability, which is supported by claimant's testimony and medical reports. We conclude that the hearing officer's decision that claimant sustained a compensable injury on _____; that she timely notified her employer of the work-related injury; and that she had disability on the dates and for the time periods found by the hearing officer 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 v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the election of remedies issue, the claimant testified that she had previously sustained a back injury while working for the employer, that she did not miss time from work due to that injury, that she did not use her group health insurance to pay medical expenses for that injury, that she does not know if workers' compensation insurance paid the medical expenses for that injury, but that her medical expenses for that injury were paid by the hospital. She testified that while she did not want her _____ knee injury to be on her "permanent record" because she thought that might be "derogatory," she nonetheless reported the knee injury to SS as a work-related injury on (a day after date of injury) and on several occasions thereafter within 30 days of that injury. She testified that that is all that she knew to do, that she thought SS would take care of the rest of it, that on September 2nd SS told her that her knee injury would go on her permanent record as a work-related injury, that she did not tell SS not to put the injury on her permanent record when SS told her that she was going to do that, and that she used her group health insurance to pay for her ER visit, her physical therapy, her September 24th knee surgery, and her treatment by Dr. P because SS did not fill out an incident report after she reported the injury to SS. Claimant said that when she reported her knee injury to SS, they did not discuss workers' compensation insurance and that she was not aware that use of her group health insurance could bar her from claiming workers' compensation benefits. SS testified that claimant did not ask her to fill out an incident report and that when she asked claimant to fill out an injury report on some unspecified date, someone stated that claimant had already filed it on her insurance. She said she did not tell claimant the injury would go on her permanent record.

In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court stated that 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. The court further stated that 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.

The hearing officer found that claimant exercised an informed choice between pursuing workers' compensation benefits and benefits provided by her group health insurance policy in an effort to avoid her work-related injury from being reported and placed in her permanent record, and he concluded that claimant is barred from pursuing Texas worker's compensation benefits because of her election to receive benefits under her group health insurance policy. The claimant requests reversal of the hearing officer's finding and conclusion on the election of remedies issue.

There are several reasons for our reversal of the hearing officer's decision on the election of remedies issue. First, the hearing officer's finding that claimant exercised an informed choice between workers' compensation benefits and group health benefits in an effort to avoid her work-related injury from being reported and placed in her permanent record is in direct conflict with his finding, which we have affirmed, that claimant informed her supervisor of the work-related injury on multiple occasions during the 30-day period following _____. If claimant did not want the work-related injury to be reported, then she would not have reported it on multiple occasions to her supervisor within the 30-day reporting period.

Second, carrier's claims representative took claimant's recorded statement on October 16, 1998, regarding her claim (an insurance claim number is given) of a work-related injury of _____, which was just seven weeks after her injury, which demonstrates that claimant was at that time pursuing her rights under the workers' compensation law or otherwise carrier would not have taken her statement, and, in addition, a benefit review conference (BRC) was held on December 11, 1998, which was about three and one-half months after the injury, and the BRC report reflects that carrier was contesting the claim based on, among other things, that fact that claimant did not sustain an injury in the course and scope of her employment. Thus, the hearing officer's finding, which suggests that claimant was not pursuing workers' compensation benefits, ignores the evidence that she was pursuing workers' compensation benefits and that carrier's denial of benefits resulted in a BRC in December. In Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993, the Appeals Panel noted that it had not found inconsistency amounting to manifest injustice to carriers arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered. The

claimant's pursuit of workers' compensation benefits shortly after her injury, as evidenced by the fact that carrier's representative took her recorded statement on October 16, 1998, is one thing that distinguishes this case from Texas Workers' Compensation Commission Appeal No. 970314, decided April 4, 1994, where the injured employee used his group health insurance to pay for medical expenses for his work-related injury and did not pursue workers' compensation benefits until a year after his date of injury and after his health insurance was canceled.

Third, there is insufficient evidence that claimant's use of her group health insurance to pay for her medical treatment was made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice, and thus does not amount to an election which will bar her from continuing to pursue workers' compensation benefits. Bocanegra, *supra*. See Texas Workers' Compensation Commission Appeal No. 952063, decided January 18, 1996. Compare Texas Workers' Compensation Commission Appeal No. 980898, decided June 17, 1998. In Appeal No. 93662, *supra*, the Appeals Panel stated that, because election of remedies is a disfavored doctrine, it will not be assumed or inferred in the absence of direct evidence showing the choice of exclusive remedies is fully and clearly understood. In the instant case, the hearing officer wrote that claimant may not have been fully aware of the legal consequences of utilizing her health insurance.

The hearing officer's decision that claimant sustained a compensable injury on _____; that claimant timely notified her employer of the work-related injury; and that claimant had disability on the dates and for the time periods found by the hearing officer is affirmed. The hearing officer's decision that claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under her group health insurance policy is reversed and a decision is rendered that claimant is not barred from pursuing Texas workers' compensation benefits. We reverse the hearing officer's order that carrier is not liable for benefits and we order that carrier is liable for workers' compensation benefits for claimant's compensable injury of _____.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge