APPEAL NO. 991309

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 February 11, 1999, and April 19, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on _____, whether the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy, and whether the claimant had disability resulting from the injury sustained on _____. The hearing officer determined that the claimant did sustain a compensable injury on _____, that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy, and that the claimant had disability resulting from the injury sustained on _____, from July 3, 1998, continuing to the date of the CCH. The appellant (carrier) appeals, urging the findings of fact are supported by insufficient evidence, or contrary to the great weight and preponderance of the evidence, and the conclusions of law constitute legal error and should be reversed. The claimant replies that he agrees with the hearing officer's decision.

DECISION

Affirmed.

The claimant testified that he sustained a heat stroke on _____, while working as a plumber. The claimant testified that at 3:20 p.m. on _____, he was down in a nine-foot ditch laying pipe in approximately 125 degrees and he started feeling dizzy. The claimant testified that as he left the ditch to cool off he hit his head on a beam. He drove to the office to pick up his paycheck, and shortly thereafter had a reoccurrence of dizziness. The claimant testified that he had taken his blood pressure medication that day. On the evening of _____, the claimant sought treatment at the emergency room (ER) for headaches and dizziness. The ER records indicate that the claimant complained of being faint and dizzy; that the symptoms started at 5:00 p.m.; that he has a history of high blood pressure and diabetes; that the claimant worked outside in heat; and that the claimant admitted running out of his medication. The claimant was diagnosed as having heat exhaustion and an elevated glucose level, medication was prescribed, and the claimant was instructed to seek follow-up care.

The claimant testified that he worked on July 3, 1998, got overheated again, and began suffering from dizziness and nausea on July 4, 1998. On July 4, 1998, the claimant went to the hospital for treatment. The history taken from the claimant indicates that he had continued nausea and vomiting which followed an episode of dizziness on July 4, 1998. The claimant was diagnosed with incapacitating vertigo, high blood pressure, and bradycardia. The claimant was admitted to the hospital and released on July 8, 1998. On the way home from the hospital the claimant had increasing difficulty with weakness on his right side and he went to another hospital on July 9, 1998, where he was diagnosed as having a cerebrovascular accident (CVA) or a stroke. The claimant was transferred to the

rehabilitation unit where he received treatment until he was discharged on July 21, 1998, with a diagnosis of CVA with right hemiplegia, dysarthria, and urinary and fecal incontinence.

The carrier presented the testimony of Ms. BG, Ms. JG, Mr. S, and Mr. L. Ms. BG, a dispatcher for the employer, testified that she saw the claimant on _____, at approximately 3:30 p.m., that he looked fine, and that he did not mention being overheated or not feeling well. Ms. JG, the bookkeeper/secretary for the employer, testified that the claimant's wife told her on July 6, 1998, that the claimant had suffered a stroke. Ms. JG testified that her first knowledge that the claimant was filing a workers' compensation claim was at the end of July 1998. Mr. S, claimant's coworker, testified that he was working with the claimant on _____, which was a very hot day. Mr. S testified that one or two days before _____, the claimant told him that he had been off of his blood pressure medication for about five days. Mr. S testified that on _____, the claimant told him that he had a dizzy spell and Mr. S saw the claimant grab a pole. Mr. L, the president of the company, testified that he did not see the claimant on _____, but did see the claimant when he was in the hospital and the claimant said that he was picking up mufflers after work and he got hot.

The claimant presented the medical opinion of Dr. S to support his position. Dr. S, after examining the claimant and reviewing the medical records, opines that the claimant's strokes and resulting paralysis and paresis were initiated by the heat exhaustion which the claimant suffered while performing his job duties on _____. The carrier presented the medical opinion of Dr. W, a peer review doctor, to support its position. Dr. W reviewed the claimant's medical records and opined that the claimant's work environment did not cause his hospitalization on July 4, 1998, and that there was no evidence to suggest that heat exhaustion, or heat stroke, had occurred pertaining to the work environment.

The carrier asserts that the hearing officer erred in determining that the claimant sustained a compensable injury on _____, because it was an act of God. Pursuant to Section 406.032(E), a carrier is not liable for compensation if the injury arose out of an act of God, unless the employment exposes the employee to a greater risk of injury from an act of God than ordinarily applies to the general public. We do not find merit to the carrier's assertion that the claimant presented no evidence that his employment exposed him to greater heat than the heat to which all workers were exposed to on _____. The claimant's testimony indicated that he was working in a nine-foot ditch laying pipe in an area which was 125 degrees. Although Mr. L testified that the ditch was only three or four feet deep, there was no evidence contrary to that of the claimant concerning the temperature in the ditch. The claimant's testimony sufficiently indicates that he was exposed to a greater risk of injury than that of the general public.

The carrier asserts that the hearing officer erred in determining that the claimant sustained a compensable injury on _____, because no scientific evidence established that his stroke was caused by the work. The carrier contends that causation in this case must be proved by expert medical evidence that meets the standards enunciated by the

Texas Supreme Court in Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997). First, we observe that Havner concerned the exclusion of evidence after a proper objection that the offered expert testimony lacks reliability. In the case before us, the carrier stated that it had no objection to claimant's exhibits. Further, Havner is not a workers' compensation case, but is a civil tort case tried in conformity with the Texas Rules of Civil Evidence. In several Appeals Panel decisions, we have noted that Havner and E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995) were cited as authority for the proposition that a doctor was not qualified to give an opinion on medical causation. Havner and Robinson were cases based upon the requirements of Rule 702 of the Texas Rules of Evidence. Section 410.165(b) specifically states that "conformity to legal rules of evidence is not necessary." Further, rather than providing for the exclusion of evidence, Section 410.165(a) provides that a hearing officer "shall accept all written reports signed by a health care provider." *See also* Texas Workers' Compensation Commission Appeal No. 972493, decided January 16, 1998 (Unpublished). We do not conclude that Dr. S's opinion is "merely conclusory" and unsubstantiated. The opinion of Dr. S is based upon the history as given by the claimant and review of the medical records, and while he does not use the words "reasonable medical probability," Dr. S's statement makes it clear that he considered the claimant's strokes to be caused by the heat exhaustion suffered on _____. *See* Texas Workers' Compensation Commission Appeal No. 951417, decided October 9, 1995, which said that the words, "reasonable medical probability" do not have to be used to convey that meaning.

It was the province of the hearing officer to resolve the conflicting evidence concerning the causal relationship of the heat exhaustion and the strokes. While the claimant argued that he sustained a "heat stroke" on _____, the medical evidence indicates that the claimant suffered heat exhaustion on _____, and two strokes on or about July 8, 1998. Given the specific facts of this case, we do not find that the overwhelming evidence was contrary to her resolution of this issue. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

With regard to the issue of whether claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance plan, in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court stated that the election of remedies 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 fact (3) which are so inconsistent as to (4) constitute manifest injustice. The carrier has the burden of proving an effective election of remedies and whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Critical to a finding of an election of remedies is the determination that the election of non-workers' compensation remedies was an informed choice. Texas Workers'

Compensation Commission Appeal No. 981226, decided July 20, 1998. Although the claimant testified that he did not think he had any prior workers' compensation injuries, the carrier's evidence indicates that the claimant has had several claims prior to 1991. On cross-examination, the carrier asked the claimant why he did not initially have his medical bills filed under workers' compensation and the claimant responded "I was old enough for them to handle it." The claimant testified that the quickest way he could get medical treatment was through his Medicare card. This testimony does not indicate that the claimant made an informed choice of using his group health insurance as opposed to workers' compensation benefits. We find the evidence sufficient to support the hearing officer's determination that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy.

The carrier appeals the hearing officer's determination that the claimant had disability, asserting that the claimant did not sustain a compensable injury and therefore did not have disability. Given our affirmance of the hearing officer's determination that the claimant sustained a compensable injury on _____, the claimant could establish disability. The claimant testified that he was unable to work beginning July 3, 1998, as a result of his heat stroke. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

We find sufficient evidence to support the determination of the hearing officer that the claimant had disability from July 3, 1998, through the date of the CCH.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge