APPEAL NO. 000115

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 1, 1999, a contested case hearing was held. Initially, the case had five issues: (1) whether there was a compensable injury in the form of an occupational disease; (2) the date of injury; (3) timely notice to the employer; (4) election of remedies; and (5) disability. By stipulation, the parties resolved three of the issues; namely, that appellant (claimant) had sustained a compensable injury (in the form of an occupational disease), that the date of injury was _____, and that claimant had disability from April 28, 1999, through September 12, 1999. On the other two issues, the hearing officer determined that claimant had not reported an injury to the employer on or before the 30th day of the injury and did not have good cause for failing to do so, and that claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health plan.

Claimant appeals the decision on the two disputed issues, contending that she had timely reported the injury on _____; that she had trivialized the injury until she received the results of an MRI performed on April 19, 1999; and that she again reported the injury and claim on April 21, 1999. On the election of remedies issue, claimant asserts that although she was aware of the difference between workers' compensation benefits and group health insurance, she used her group health benefits only after being informed by the respondent (self-insured) that it was denying her claim. Claimant requests that we reverse the hearing officer's decision on these two issues and render a decision in her favor. The self-insured responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

Claimant was employed as a certified nurse's aide in the self-insured's schools. The hearing officer recites that the "parties agreed that the Claimant sustained a repetitive trauma injury to her lumbar spine on _____. . . ." Claimant's appeal recites this was caused by "repetitively lifting a large handicapped child from her wheelchair." (Claimant's testimony could have established a specific injury on September 1; however, that is not an issue before us.) It appears relatively undisputed that claimant told a coworker, Ms. Z, at the time that she had hurt her back lifting the child. It is also undisputed that Ms. Z was a student aide and was not in a supervisory or management position. Claimant also testified that 30 to 45 minutes later she called the school nurse, Ms. G, and informed her of the injury and that Ms. G was her immediate supervisor. Ms. G, in a written statement dated August 23, 1999, stated:

> In the fall of '98 [claimant], in a casual conversation mentioned to me she thought she had a pulled muscle. My understanding was that she was not

> sure exactly when the pain started. We had a special need student that required transferring from a wheelchair to a bed twice a day. I questioned and advised her if she had hurt herself during that procedure that she should fill out an accident report.

Claimant testified that she did not fill out an accident report because she did not think her injury was serious. Also in evidence is a letter prepared by claimant and apparently attached to her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) where claimant said that she told Ms. Z about her injury, that the pain "continued into November," and that as she continued to work she "mentioned this to [Ms. G]." In a transcribed statement taken by Mr. L on behalf of the self-insured, claimant said that she told Ms. Z about her injury but that she did not tell anyone else "at that time." The hearing officer, in the Statement of the Evidence, summarizes the evidence in some detail, including the contentions of who told whom what and when. In any event, the evidence regarding reporting is conflicting, contradictory and subject to varying interpretation. Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The testimony of the claimant that she reported the injury to Ms. G on _____, or at other times within 30 days of that date, is in conflict with the self-insured's contention that it did not receive notice of a work-related injury until April 21, 1999. The hearing officer, after considering all the evidence, reciting and summarizing much of that evidence, found that claimant did not report her injury until April 21, 1999, which is more than 30 days after _____. Whether, and if so when, notice is given is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 991934, decided October 11, 1999. Regarding claimant's contention that good cause existed for failing to timely report the injury, claimant saw her family doctor on January 7, 1999, complaining of low back pain and leg pain due to lifting a 150-pound child twice a day, which caused a back strain, and claimant had safety belts requisitioned in that time frame. The hearing officer, without citing any specific incident or example, made a finding that a reasonably prudent person in the same or similar circumstances would have reported the injury before April 21, 1999. Although we have held that trivialization of an injury can constitute good cause for delay in giving notice of the injury (Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991), we review the hearing officer's good cause (or failure thereof) determination on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 970195, decided March 10, 1997. Our review of the record does not demonstrate that the hearing officer abused his discretion in determining that the claimant did not have good cause for failing to report the injury timely. We find there was sufficient evidence to support the determination of the hearing officer that claimant did not timely report the injury or establish good cause for the failure to give timely notice. The hearing officer obviously believed that a reasonably prudent person who continued to have intermittent back pain throughout September, October, November and December 1998, sought medical treatment for a back strain in January 1999 and asked for a safety belt

should have reported the injury before April 21, 1999. We affirm the hearing officer's decision on this issue as being supported by sufficient evidence and not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

After seeing her family doctor, Dr. L, in January 1999, she returned on March 1, 1999, with continued complaints of low back pain " x 1½ - 2 wks - denied trauma," and again on March 15, 1999. Claimant was eventually referred for a lumbar MRI which was performed on April 19, 1999. The MRI showed a protrusion with "(probable herniation)." Claimant then notified the self-insured of a work-related injury on April 21, 1999. Claimant was subsequently referred to Dr. P, who diagnosed a moderate to large central disc herniation and who discussed various treatment options with claimant, including referral for a series of epidural injections. Claimant saw Dr. M for the steroid injections on May 4, 1999. At that time, the issue came up whether the injury was work related and claimant was told that Dr. M would not provide treatment for workers' compensation cases. Claimant testified that someone from Dr. M's office called Mr. L (the self-insured's representative) who conducted a telephone interview with claimant. Claimant said that at the conclusion of the interview Mr. L told her that the self-insured would deny the claim. (The self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) denying the claim on May 5, 1999.) Claimant said that she was aware of the difference between work-related injuries under workers' compensation and health insurance for non work-related injuries. Claimant said that she did not receive treatment by Dr. M on May 4th, that she continued to be in severe pain and that she returned to Dr. M for treatment and eventually had spinal surgery on June 18, 1999. The medical treatment and surgery by Dr. M (and perhaps other treatment) were billed to claimant's group health coverage. The hearing officer, in the Statement of the Evidence, commented:

> Certainly, on May 4, 1999, the Claimant was aware of the difference between workers' compensation benefits and what was covered by her group health insurance plan. At that time she made a choice as to what path she wished to pursue. Under the circumstances presented in this case the Claimant made an informed choice between two inconsistent remedies.

Claimant appealed the hearing officer's determination on the election-of-remedies issue, asserting that although she was aware of the difference between workers' compensation benefits and her group health benefits there was no election of remedies in that the self-insured had denied benefits under the workers' compensation claim. The Appeals Panel has addressed the issue of election of remedies numerous times, including in Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995, cited by the self-insured as being authoritative. Generally, we have cited the Texas Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), as establishing the standard. In Bocanegra 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 nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. In Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999, the Appeals Panel stated:

> 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.

We are hard-pressed to see how a carrier, in this case the self-insured, can assert a defense of election of remedies when it has denied the claim which removes workers' compensation benefits as a remedy. We cannot expect an injured worker to forego medical care while the denial of his or her claim is being litigated under penalty of having been held to have made a choice of remedies. When a claim is denied, the injured worker has no real choice; it is either use group health benefits or do without, which is no choice at all.

We do not believe that the evidence in this case meets the standards set forth in Bocanegra for imposing a binding election in that there is insufficient evidence to support the finding of fact that the claimant made an informed choice between inconsistent remedies. We distinguish Appeal No. 950636, *supra*, on the basis that in that case the carrier had not denied liability. In Appeal No. 950636, the injured employee (the executive director of a retirement and nursing care center) had the choice of completing "paperwork" and getting preauthorization for surgery under workers' compensation or having "immediate" surgery under his private group insurance. The employee in that case said that he was being transferred to New Jersey and had to be there by a certain date and that he chose "group health because that's the only way I could get treated right then." The Appeals Panel pointed out that that case was decided strictly on its facts, commenting:

> Claimant knew from the outset that his injury was work related, that his employer's workers' compensation insurance only covered work-related injuries, and that his group health insurance did not cover work-related injuries. He acknowledged that he made no effort to contact the employer to ascertain whether the New Jersey trip could be delayed and at that point, of course, claimant had not yet even filed a workers' compensation claim.

Claimant, in the instant case, had no such choice. The self-insured had made it clear that it was denying claimant's claim, thereby removing claimant's choice of proceeding under workers' compensation. Although it does not affect the end result of this case, we reverse the hearing officer's decision that the carrier is relieved of liability for this claim due to an election of remedies, and we render a decision that the claimant is not barred from pursuing compensation benefits based on an election of remedies.

We affirm the hearing officer's decision and order, relieving carrier of liability, on the notice-of-injury issue.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge