APPEAL NO. 001142

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 April 12, 2000. The hearing officer determined that the respondent (claimant) was injured in the course and scope of her employment; that the claimant is not barred from pursuing Texas workers' compensation benefits because of having elected another remedy; and that the claimant had disability from March 22 through April 23, 1999; and from July 26 through September 1, 1999. The appellant (self-insured) appeals the injury and election-of-remedy determinations on the grounds that the evidence is insufficient to support them. The self-insured appeals the disability determination on the basis that there is no compensable injury to support it. The file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

The parties stipulated that the claimant timely reported the injury to the employer. The claimant testified that while employed by the employer, a tool manufacturer, she operated a large machine with sand belts which smoothed and polished tools; that the machine threw out "dust and grit all over [her]"; that she has been working with or around grinders for 10 years; that on _____, she called in sick because she was having trouble breathing; and that she was later admitted to a hospital by Dr. S, her primary care doctor. The hospital records reflect that she was admitted on _____, and diagnosed with pneumonia. The claimant stated that she was released from the hospital after four days and that after being off work for about one month, she returned to work. She said she again got sick with breathing problems and was admitted to the hospital on July 26, 1999. Dr. S's impression on that date was stated as "acute bronchitis versus pneumonia." Dr. S's discharge diagnosis on July 30, 1999, included "bronchial asthma with status asthmaticus, superimposed bronchitis." The claimant further testified that Dr. S did not state an opinion one way or the other about whether her pulmonary problems were caused by her work but rather deferred to Dr. H, a pulmonary specialist. The carrier introduced its questions to Dr. S upon written deposition and her responses thereto. To questions concerning her opinion of the cause of the claimant's conditions, Dr. S responded "deferred to pulmonary specialist opinion."

The claimant stated that Dr. S referred her to Dr. H; that after treatment, she recovered and was released by Dr. H to return to work with the restriction to avoid dust; and that the employer provided her with different duties where she was exposed to less dust. Dr. H's certificate to return to work dated "8-26-99" states the nature of the injury as "respiratory illness" and "limited exposure to dust."

Dr. H's July 30, 1999, consultation report states the impression as (1) history consistent with status asthmaticus and subsequent improvement with history suggestive of underlying bronchial asthma; (2) superimposed bronchitis; and (3) occupational

exposure and history of second-hand cigarette smoke. This report also comments that "[r]eduction of exposure at work would certainly be beneficial." Dr. H wrote the following on September 12, 1999: "This lady's recent pulmonary illnesses were significantly worsening [sic] by her work environment and this work related illness." Dr. H wrote on November 8, 1999, as follows: "It is my opinion that the exposure to metal dust at your place of employment and this exposure was the probable cause of your acute asthma and bronchitis." Responding to the carrier's written deposition questions Dr. H stated that by October 12, 1999, with the claimant's exposure to metallic dust at work reduced, she was doing better, and that, with reasonable medical certainty, he felt that the claimant's exposure to metallic dust at work "significantly contributed to her hospitalization." Dr. H further stated that there is "no evidence at present to support that this has led to a chronic disease process." Dr. H went on to respond that he did not conduct any tests of the workplace and that the dust appeared to be a fine black substance but that he had no information as to its composition. He further stated that he did not know the size of the particulate matter, the percent of workplace dust that could be inhaled, the OSHA standards for the metallic dust in claimant's workplace, and the level of such metallic dust to which one must be exposed in order to create the likelihood of injury.

In his recorded statement, Mr. M, claimant's line supervisor, stated that the claimant worked for him in both the machining and finishing processes of wrenches; that the finishing machines have abrasive belts that generate "some grit and some metal dust" and some "smoke"; and that the machines have a central dust collection system to pull the dust away like a vacuum. He also said that the wearing of masks over the nose and mouth is optional with the employees. As far as he knew, the claimant did not have problems with her breathing.

The claimant further testified that when she applied for the employer's group disability benefits from another carrier for the period when she was first hospitalized, she did not recall checking the block for "No" to answer the question on the claim form as to whether she has or would file for workers' compensation benefits. This question was not answered on the group disability claim form she signed on July 26, 1999, and the claimant said she left it blank. She indicated she did not know she would become ineligible for workers' compensation benefits when she applied for the employer's group disability benefits. The claimant indicated that she signed the March 31, 1999, disability claim form prior to reporting her injury as work related and that although she knew the employer had workers' compensation coverage, she "don't know how it works." She said she thought she was supposed to report the injury to the office and that is what she did.

The carrier also introduced the portions of the two disability claim forms signed by Dr. S in which she answered "no" to the question whether the claimant's condition is due to an injury or sickness arising out of her employment. The claimant said that Dr. S did not tell her that her breathing problem was or was not work related and that she thinks Dr. S indicated the problem was not work related on the forms in order to get paid because Dr. S "does not file under workers' comp." The carrier introduced copies of disability benefit checks payable to the claimant in the total amount of $1,567.28.

The carrier objected to the hearing officer's considering Dr. H's opinion concerning the claimant's exposure to metallic dust at work as causative of her condition, expressed both in Dr. H's reports introduced by the claimant and in the carrier's written deposition, which it introduced. The basis of the carrier's objection is the contention, much more fully elucidated on appeal than at the hearing, that Dr. H's opinion is excludable and should not have been considered by the hearing officer because it amounts to "junk science" under the reliability standards set out in Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), cert. den. 118 S. Ct. 1799 (1998). The carrier cites an Appeals Panel decision (Texas Workers' Compensation Commission Appeal No. 000623, decided May 11, 2000) to the effect that the Havner doctrine does not provide a basis to exclude from evidence in a CCH the opinion of an expert because Section 410.165(a) provides that "[c]onformity to the legal rules of evidence is not necessary"; Section 410.165(b) provides that a hearing officer "shall accept all written reports signed by a health care provider"; and Havner "deals primarily with the admissibility of evidence under Texas Rules of evidence 702." The carrier's brief characterizes the Appeals Panel as "quite antagonistic regarding the applicability of Havner to cases decided under the 1989 Act" but fails to persuade us to depart from our prior case law development. We find no abuse of discretion in the hearing officer's rulings admitting the opinions of Dr. H. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

In addition to the dispositive legal conclusions, the carrier challenges factual findings that the claimant worked in an area where she was exposed to dust, grit, metal dust, and smoke; that she developed lung problems and a contributing factor to her lung problems was her exposure to grit, dust, and smoke at work; and that she did not make an informed election of remedies when she filed a group health insurance claim.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the injury issue, the hearing officer could consider not only the claimant's testimony about the particles in the air surrounding the machine she operated but also the corroborating statement of her supervisor and the expert medical opinion of Dr. H to the effect that these particles were a producing cause of the pulmonary condition that twice required that the claimant be hospitalized. As for the election of remedies issue, the hearing officer could consider the four factors set out in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), and determine from the claimant's testimony that she did not exercise an "informed choice" between two or more remedies which are so inconsistent as to constitute manifest injustice. Under the evidence in this

case, the two post-Bocanegra cases cited by the carrier do not mandate reversal of the hearing officer's determination as a matter of law.

Because we affirm the hearing officer's determination of the injury issue, we also affirm the determinations on the claimant's periods of disability. However, so much of Conclusion of Law No. 6 as concludes that the claimant had disability "from July 26, 1999, through July 1, 1999," is reformed to read "from July 26, 1999, through September 1, 1999," consistent with Finding of Fact No. 7.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge