

APPEAL NO. 001283

On April 21, 2000, 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.* With regard to the disputed issues on appeal, the hearing officer decided that the respondent (carrier) is relieved of liability under Section 409.002 because the appellant (claimant) failed, without good cause, to timely notify her employer of her injury and that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under her personal insurance policy. The claimant requests that the hearing officer's decision on the issues of timely notice and election of remedies be reversed and that a decision on those issues be rendered in her favor. The carrier requests that the hearing officer's decision be affirmed.

DECISION

Affirmed on the issue of no timely notice to the employer, reversed and rendered on the issue of election of remedies.

It is undisputed on appeal that the claimant sustained an occupational disease in the form of a repetitive trauma injury to her right knee while working for (employer); that the date of injury under Section 408.007, that is, the date the claimant knew or should have known that the disease may be related to the employment, was _____, which was the date Dr. B told her that her right knee condition was work related; and that the claimant was unable to obtain and retain employment at her preinjury wages for the periods of time found by the hearing officer.

With regard to the notice issue, Section 409.001(a) provides that if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. To fulfill the purpose of the notice statute, that is, to allow the carrier an opportunity to investigate the facts, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The claimant had the burden to prove that she gave timely notice of injury to her employer or that she had good cause for failing to give timely notice.

The claimant testified that a week or so after Dr. B told her that her right knee injury was work related, she reported to her supervisor, EP, and to the employer's benefits clerk, YH, that Dr. B had told her that her right knee injury was work related. EP testified that the claimant told him that her right knee was hurting but that she did not inform him that her right knee injury was work related until shortly before her second knee surgery in November 1999 (the claimant had an arthroscopic procedure done on her right knee in January 1999 for a torn medial meniscus and had a total right knee replacement done in November 1999). YH testified that the claimant told her in January 1999 that her right knee was hurting and that the claimant said at that time that she did not know if her right knee

injury was work related. YH said that the claimant did not report to her that her right knee injury was work related until September 1999.

The hearing officer found that the claimant reported her injury to her employer on September 1, 1999, and that the claimant failed to show good cause for her failure to report the injury within 30 days. The hearing officer concluded that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer of her injury. Whether the claimant timely notified her employer of her injury and whether she had good cause for failing to timely notify her employer of her injury were fact questions for the hearing officer to determine from the evidence presented. There is conflicting evidence on the notice issue. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision on the issue of notice of injury is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

With regard to the issue of election of remedies, in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court held that the election doctrine may constitute a bar to relief when one successfully exercises an informed choice between two or more remedies, rights, or states of fact which are so inconsistent as to constitute manifest injustice. In the instant case, the claimant has received medical benefits for her knee injury under her group health insurance policy and has also received short-term disability benefits.

The hearing officer found that the claimant made an informed choice between two inconsistent remedies and chose to receive benefits under a health insurance policy rather than workers' compensation insurance. However, the hearing officer made no finding that any manifest injustice resulted from the receipt of group health benefits and short-term disability benefits and we decline to imply such a finding.

The carrier states in its response that manifest injustice results because the claimant "should not be allowed to pick one insurance policy, bleed it dry, and then pick another." The carrier fails to mention that it denied the claimant's claim for workers' compensation benefits in September 1999, which was before the claimant had her total knee replacement done and, thus, at least for that major operation, the claimant had no choice to use workers' compensation insurance.

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 the carrier arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered. See also Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999, and Texas Workers' Compensation

Commission Appeal No. 990525, decided April 16, 1999. We conclude that all the requirements for an election of remedies to constitute a bar to relief have not been shown and, thus, we reverse the hearing officer's decision that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under her personal insurance policy and we render a decision that the claimant is not barred from pursuing workers' compensation benefits under the doctrine of election of remedies. However, because we are affirming the hearing officer's decision that the claimant failed, without good cause, to give timely notice of injury to her employer, the carrier is relieved of liability under Section 409.002.

We reverse the hearing officer's decision that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under her personal insurance policy and we render a decision that the claimant is not barred from pursuing workers' compensation benefits under the doctrine of election of remedies. We affirm the hearing officer's decision that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer of her injury.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge