APPEAL NO. 001321

On May 15, 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* (1989 Act). The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease, that the respondent (self-insured) is relieved of liability under Section 409.002 because the claimant failed to timely notify the self-insured of her claimed injury under Section 409.001, that the claimant has not had disability, and that the 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 that the hearing officer's decision be reversed and that a decision be rendered in her favor. The self-insured requests that the hearing officer's decision be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant began working for the self-insured in 1985. She was diagnosed with carpal tunnel syndrome (CTS) in 1994, received workers' compensation benefits for that injury, and was placed on light duty. The claimant transferred to the self-insured's (A Division) in 1995 where she did clerical work. The claimant was diagnosed with lumbar nerve root compression in June 1995. The claimant said that the evening of March 30, 1999, while at home, she felt numbness or tingling in her right foot and that the next morning she had numbness in her hips and legs. The claimant was seen by Dr. EL at a hospital on March 31, 1999, and Dr. EL gave an assessment of "[p]araesthesia of the lower extremities. Etiology unknown at this time. Differential diagnosis would be transverse myelitis, tumors, or vascular insufficiency." Dr. EL recommended MRIs. Dr. H reported that the claimant's lumbar MRI done on March 31, 1999, showed a small disc bulge at L5-S1 without evidence of central canal or neural foraminal compromise, bilateral mild facet osteoarthritis at L4-5 and L5-S1, and intervertebral disc desiccation throughout the entire lumbar region. Dr. H reported that the claimant's thoracic MRI done on March 31, 1999, showed an apparent osteophyte at T9-10 indenting the thecal sac without evidence of cord compression.

The claimant was examined by Dr. C, a neurologist, on April 15, 1999, and Dr. C reported to Dr. E, who apparently is the claimant's family doctor, that he wondered whether the claimant may have multiple sclerosis (MS) and recommended a myelography and spinal fluid studies for an MS profile. The claimant said that she did not have the studies recommended by Dr. C done because Dr. E told her that she did not have Dr. G reported on April 16, 1999, that an electroencephalogram was consistent with "a mixed bag of, probably, bilateral sensory cord track involvement. . . [n]o particular etiology, of course, is suggested."

The claimant said that she has not worked since March 31, 1999. The claimant said that when she saw Dr. E on April 30, 1999, Dr. E asked her to describe her workstation and she told Dr. E that her chair was not adjustable, that she had to sit on the edge of her chair to reach her keyboard, that she had to stretch to reach her keyboard, and that she had to reach to the left to answer the telephone. The claimant said that Dr. E told her on April 30, 1999, that her injury was caused by her job because her stretching and reaching in an abnormal way caused a pinched nerve in her back. The claimant said that it was not until April 30 that she knew that her injury was work related. The claimant said that Dr. E told her that the lumbar nerve root compression that had been diagnosed in 1995 was something different than her current injury. Dr. E referred the claimant for physical therapy, which the claimant undertook.

The claimant said that she reported to her supervisor, BA, the first week of May 1999 that she had a back injury because of stretching and reaching at work and that she again reported to BA the second week of May 1999 and in July 1999 that she had a work-related back injury. She said that BA told her in July 1999 that he had been told not to report her injury as being work related.

On May 25, 1999, Dr. E wrote that the claimant is under his care for lumbar nerve root compression and back pain, and that due to that condition, the claimant requires a chair that has height adjustment and that has lumbar support and arms. The claimant said that she gave a copy of that letter to BA and that she gave the self-insured another copy of it in June.

On August 3, 1999, the claimant completed a workers' compensation information form that, she said, Dr. E gave her and on that form she noted that her accident happened from having to stretch to reach her computer keyboard, having no adjustments on her chair, and having misaligned equipment, and that she had advised BA of a work-related injury.

In a letter dated August 9, 1999, BA wrote that on March 30, 1999, the claimant turned in a duty-status form placing her off work because of numbness and pain in her legs; that on June 1, 1999, he received a letter from the claimant's doctor stating that the claimant's condition would require a special chair for her to return to work; that on June 9, 1999, the paperwork was started to purchase the prescribed chair; that the claimant told him that she would return to work when she completed therapy and her doctor released her; that on July 26, 1999, he called the claimant and told her that a hearing with human resources might be scheduled to determine her status; that on August 3, 1999, the claimant called him and requested that an injury report be completed; and that that was the first time the claimant had said that her injury was duty related.

Dr. E wrote in January 2000 that the claimant is under his care for lumbar nerve root compression and that the back pain that the claimant is experiencing is directly related to the misalignment of the claimant's work area and chair.

JD testified that his last assignment for the self-insured was working in a supervisory capacity for employer in the A Division until April 1999 and that in 1996 he requested the self-insured's risk management division to survey A Division's facilities because he was concerned about reports of CTS. JD said that DC of the self-insured's risk management division surveyed A Division and recommended that A Division purchase adjustable chairs with armrests, a different type of workstation, and wrist supports. JD said that the self-insured purchased only the wrist supports. DC testified that he had recommended that A Division purchase adjustable chairs and adjustable workstations because the workstations were not set up correctly and employees were not using proper chairs, and that he had made the same recommendations to the division the claimant had worked in before she was assigned to A Division.

The claimant essentially claims an occupational disease in the form of a repetitive trauma injury, which is defined in Section 401.011(36) as damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. The claimant had the burden to prove that she was injured in the course and scope of her employment and that she had disability.

The hearing officer found that the claimant's paresthesia and pain in her legs was not sustained as a result of physically traumatic activities over a course of time in the course and scope of her employment and she concluded that the claimant did not sustain a compensable injury in the form of an occupational disease. The hearing officer also determined that the claimant has not had disability. The claimant contends that the hearing officer erred in failing to find that she had an occupational disease, noting Dr. E's opinion and the testimony of JD and DC. The claimant also contends that the hearing officer erred in not finding that she has disability. The hearing officer noted in her decision that although Dr. E had related the claimant's nerve root compression and pain to a misalignment of her work area and chair, Dr. G had reported that no particular etiology was suggested for the claimant's bilateral sensory cord track involvement and that Dr. C had suggested testing for MS. The hearing officer stated in her decision that the claimant's evidence was insufficient to prove by a preponderance of the credible evidence that the claimant's pain and paresthesia in her lower extremities were within reasonable medical probability caused by repetitive traumatic activity over a long period of time.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence. We conclude that the hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease 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. Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

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. The hearing officer found that the claimant asserted that she knew her symptoms were work related on April 30, 1999. The hearing officer further found that the claimant did not report an injury to the self-insured as work related until August 3, 1999. The hearing officer concluded that the self-insured is relieved of liability under Section 409.002 because the claimant failed to timely notify the self-insured of her injury under Section 409.001. The claimant contends that the hearing officer erred in finding that she did not timely notify the self-insured of her injury.

In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the court stated that to fulfill the purpose of the notice provision, that is, to allow the insurer 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.

In the instant case, it is apparent that the claimant's supervisor, BA, was aware that the claimant had leg pain at the end of March 1999. However, there was conflicting evidence as to when the claimant told BA that she had an injury that was caused by her work. The hearing officer resolved the conflict in the evidence and determined that the claimant did not report that she had a work-related injury until August 3, 1999. We conclude that the hearing officer's findings and conclusion with regard to the notice issue are supported by sufficient evidence and that they are 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 injury under her group health insurance policy. It appears that she used sick leave, compensatory time, and personal leave while off work.

The claimant testified that she knew about workers' compensation from her previous CTS injury; that when she went to the hospital on March 31, 1999, she did not know what was wrong with her so she used her group health insurance; that when she went to physical therapy prescribed by Dr. E she told the therapist that her injury was under workers' compensation but the therapist said that they needed to have her group health insurance to guarantee payment; that when she continued to treat with Dr. E, Dr. E kept telling her that she had an injury on workers' compensation and that he would take care of the paperwork; and that she did not realize that when she continued to use her group health insurance after April 30, 1999, that she might be "waiving" her rights to workers' compensation benefits. The self-insured completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on August 16, 1999, disputing the claimant's claim.

The hearing officer found that the claimant voluntarily and with knowledge of her rights and remedies under both her group health insurance plan and workers' compensation elected to use her group health insurance benefits in lieu of workers' compensation benefits. The hearing officer concluded that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The claimant contends that the hearing officer erred in determining that she is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy.

The hearing officer made no finding that any manifest injustice resulted from the receipt of group health insurance benefits and we decline to imply such a finding. Texas Workers' Compensation Commission Appeal No. 001283, decided July 14, 2000. 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 a group health 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 did not sustain a compensable injury and did not give timely notice of injury to the self-insured, the self-insured is not liable for workers' compensation benefits.

We affirm the hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease, that the claimant has not had disability, and that the self-insured is relieved of liability under Section 409.002 because the claimant failed to timely notify the self-insured of her injury under Section 409.001. 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 a group health insurance policy and we render a decision that the claimant is not barred from pursuing Texas workers' compensation benefits under the doctrine of election of remedies.

The self-insured is not liable for workers' compensation benefits.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

Given the lack of evidence going towards all of the criteria in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), I concur in the result. However, I write separately to state that I do not regard it to be settled as a matter of law (recent decisions by the majority and several other of my colleagues could give rise to that impression) that the defense of election of remedies can never be made out in the situation where a claimant has first pursued health insurance benefits and later pursued workers' compensation benefits because there can never be a "manifest injustice." My colleagues' decisions seem to assume that there can be no "manifest injustice" to a health insurance carrier who has paid medical benefits for a compensable injury because such carrier has received premiums and will inevitably be able to successfully pursue a subrogation claim against the workers' compensation carrier for medical benefits paid. My colleagues, in this and other recent decisions, seem to focus exclusively on the "manifest injustice" criterion in Bocanegra to the virtual exclusion of the other criteria.

As the court stated in Texas General Indemnity Company v. Hearn, 830 S.W.2d 257 (Tex. App.-Beaumont 1992, no writ), a case involving workers' compensation insurance and health insurance, "[e]ven though the election of remedies doctrine is not viewed with judicial favor [citations omitted], it is nevertheless a viable defense when properly pleaded and affirmatively proved. [Citations omitted.]" I observe that this is a post-1989 Act decision. The post-Bocanegra decisions in Overstreet v. Home Indemnity Company, 669 S. W. 2d 825 (Tex. App.-Dallas 1984), rev'd, 678 S.W.2d 916 (Tex. 1984), and Smith v. Home Indemnity Company, 683 S.W. 2d 559 (Tex. App.-Fort Worth [2nd Dist.] 1985, no writ), also involve workers' compensation insurance and health insurance and, like Hearn, *supra*, recognize the viability of the election of remedies defense and do not focus on "manifest injustice" to the exclusion of the other criteria.

I have authored a decision reversing and rendering a new decision that there had not been an election of remedies (Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998) where health insurance benefits had been pursued and I have authored a decision reversing and rendering a new decision that there had been an election of remedies (Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995). *See also* Texas Workers' Compensation Commission Appeal No. 991403, decided August 16, 1999 (Unpublished). The outcome of raising the defense of election of remedies, as with all disputed issues, will depend on the quality of the evidence.

Philip F. O'Neill
Appeals Judge