

## APPEAL NO. 001471

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 May 25, 2000. With regard to the three issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_ (all dates are 2000 unless otherwise stated); that the claimant did not have 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 appeals, repeating testimony from the CCH (and adding information not presented at the CCH), alleging bias by the hearing officer and contending she had not made an election of remedies. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responds to the matters raised and urges affirmance.

### DECISION

Affirmed in part and reversed and rendered in part.

The claimant was employed by (employer) in a clerical capacity, making computer entries using either a keyboard or a scanner gun. The claimant testified, and it is undisputed, that on \_\_\_\_\_, she worked 5.84 hours of overtime (almost 14 hours) and she used the scanner gun between 1,800 to 2,100 times, pulling the trigger to complete the data entry. The claimant's testimony and the evidence are inconsistent whether the claimant used her right hand (she said she was right hand dominant) or her left hand to operate the scanner gun. The claimant also testified that she received or made a number of telephone calls that day and that she cradled the telephone handset between her neck and shoulder. The claimant contends that the activity on that day caused an injury to her left shoulder, left arm, neck, upper back (thoracic area), and the no. 5 rib on her left side. The claimant testified that \_\_\_\_\_ was a Saturday, that she was off on Sunday and Monday, and that she returned to work and worked in pain on Tuesday, Wednesday, and Thursday. The claimant said on Friday, \_\_\_\_\_, she took a sick day and sought treatment with Dr. E.

Dr. E had been treating the claimant for a \_\_\_\_\_ back injury and apparently kept different charts for different injuries. In evidence is an off-work slip dated \_\_\_\_\_ taking the claimant off work until January 25. Another report indicates that the claimant's "original visit of 1-21-00 . . . was originally filed under [the \_\_\_\_\_ injury]." On a Specific and Subsequent Medical Report (TWCC-64) of a January 31 visit, Dr. E diagnosed shoulder tendinitis, cervical radiculitis, and upper arm pain. A chart note indicates visits by the claimant on January 21, 25, 27, 28, and 31 and February 1, 4, 7, and 8. Dr. E referred the claimant to Dr. H, "an orthopedic surgeon" in the same office. The claimant completed a "confidential case history" for Dr. E on February 8 and reported the injury to the employer on that date. In a report dated April 3, Dr. E diagnosed "an overuse

injury involving the neck and left shoulder.” In a report dated April 17, Dr. E explained the mechanism of the injury as:

The muscle fibers that were repeatedly strained on that long day of work slowly glued themselves together with adhesion type of tissue as some poor healing took place over the next several days. This is very common if the patient does not get proper care during the immediate days of injury. The brachial nerve is now being irritated in two places which is sometimes referred to as a double crush syndrome. It is being irritated as it exits the cervical spine and then as it transverses through the shoulder musculature it has the spasm and adhesive tissues compressing and pulling at the nerve.

Dr. E testified at the CCH and there was obviously some confusion whether the claimant’s complaints dealt with her \_\_\_\_\_ injury or a new injury. The claimant also testified that she thought her pain would go away. Dr. E testified that on February 8, he (or his office) “contacted the carrier and asked them what they wanted us to do and they were somewhat evasive, and then finally we got a written information that said that they were contesting that alleged date of injury.” Although not entirely clear Dr. E’s office may have initially tried to bill this case under the \_\_\_\_\_ injury and was denied, then Dr. E decided it was a new injury and contacted the carrier who denied liability on a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 14. Apparently, at some time, the medical care has been billed under the claimant’s group health policy, raising the question of election of remedies.

The hearing officer, in her Statement of the Evidence, noting inconsistencies in the claimant’s testimony, comments that the claimant’s testimony “was not credible.” Similarly, the hearing officer commented that:

[Dr. E] testified for Claimant stating that he tried to get her shoulder injury accepted as an extension of her \_\_\_\_\_ injury; that he kept separate records for the injuries and forgot to bring records for the injury he was testifying about. None of [Dr. E’s] testimony or his records were credible as they were contrived to support an injury that did not occur on \_\_\_\_\_.

The claimant, in her appeal, reiterated her testimony of what she was doing on \_\_\_\_\_ (in some ways expanding on her testimony), what happened on the succeeding days, and the events in Dr. E’s office in trying to get approval for care.

Regarding the issues of injury and disability, the claimant in a workers’ compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant’s testimony alone may be sufficient to prove an injury, the testimony of a claimant is not

conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994. In this case, there was conflicting evidence and the hearing officer chose not to believe the claimant or Dr. E. That was a prerogative of the fact finder and we affirm the hearing officer's decision on those issues as being supported by the evidence.

On the election of remedies issue, the standard is set out in the Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), where 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, \_\_\_\_\_. 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.

In this case, Dr. E said that he asked the carrier what to do; the carrier was evasive and six days later denied liability. It appears disingenuous to us for the carrier to then say the claimant has made an election of remedies. At that point, the claimant had a choice of filing under group health, or doing without health care, hoping that the dispute resolution process would find in her favor, which it eventually did not. The claimant here had no choice between remedies and further the testimony and evidence made clear that there was confusion as to which injury medical care should be billed. In this case, we hold that the hearing officer's finding that the claimant's decision (if it even was the claimant's, as opposed to Dr. E's decision) "in using her group health insurance benefits was made with the full understanding of the problems, rights and remedies between workers' compensation benefits and group health insurance benefits and was therefore an informed decision" is against the great weight and preponderance of the evidence. The evidence in this case does not meet the standards set forth in Bocanegra, *supra*, for imposing a binding election in that there is insufficient evidence to support the finding of fact that the claimant made an informed choice. Although it does not affect the outcome 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 workers' compensation benefits based on an election of remedies.

Last we address the claimant's contention that the hearing officer "was very biased, opinionated and hostile toward both my doctor and my representative [the ombudsman]." Our review of the record does not reveal that to be the case.

Accordingly, we affirm the hearing officer's decision on the injury and disability issues and reverse and render a new decision on the election of remedies issue.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Robert W. Potts  
Appeals Judge