APPEAL NO. 001577

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 June 15, 2000. With regard to the two issues before her, the hearing officer determined that the respondent (claimant) is not barred from pursuing workers' compensation benefits because of an election of remedies and that the claimant's compensable (left leg) injury "extends to a left L4-5 lateral far lateral disc herniation."

The appellant (carrier) appeals the pertinent findings and conclusions, contending that the hearing officer's Statement of the Evidence "is incorrect in numerous facts and details," that the claimant's injury was required to be proved to a reasonable medical probability by expert medical testimony, that certain medical evidence had not been offered, and that the carrier had proven the elements necessary to establish an election of remedies. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds to the carrier's contentions and urges affirmance.

DECISION

Affirmed.

The claimant was employed by a large retailer and on _____ (all dates are 2000 unless otherwise noted), while clearing an area below a cash register, the claimant lost her balance and fell sideways against the leg of a coworker and the floor. The claimant testified that she could not stand or walk after the fall and had pain from the waist down through her left leg and foot. The claimant testified that she was taken to a hospital emergency room (ER 1) where she was told that she needed to have an MRI prescribed by her primary doctor. The carrier has a little different perspective of these events and disputes the hearing officer's recitation of the facts. Our review of the audiotape and records shows the hearing officer's recitation to be supported by the evidence. The hearing officer, as the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility to be given the evidence, resolves any inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The claimant testified that her "primary doctor" was Dr. J and that Dr. J ordered an MRI. No records from ER 1, Dr. J, or the MRI that Dr. J ordered are in evidence. The claimant testified that she saw Dr. J on January 14, that the MRI was performed on January 17, and that she continued to be in severe pain. The claimant said that she went to another hospital ER (ER 2) on January 26 because of the severe pain, that she told the clerk/receptionist at ER 2 that her injury was under "workers' comp" and also gave them her group health card, that the clerk assured her "they would take care of it," that she was admitted, that a CT scan was performed, that emergency spinal surgery was performed on January 29, and that she was released from the hospital on January 30. The claimant testified that she called her employer on or about January 27 and asked about the status of her claim and was told that the employer was still investigating. On cross-examination,

the claimant testified that she was aware that group health coverage was not for work-related injuries and that the employer had workers' compensation coverage but that "I was is so much pain; I had to get help right then and there." Who, if anyone, paid the initial bills for ER 1, Dr. J, and the MRI is unclear as are the circumstances how ER 2 apparently billed the claimant's group health carrier.

The claimant changed treating doctors from Dr. J to Dr. BK, on February 7, and was approved by the Texas Workers' Compensation Commission on February 10. Dr. K performed the surgery on January 29. Dr. E, an orthopedic surgeon in a postsurgical consultation, comments that the "MR scan" showed a herniated disc and referenced the work-related fall. Dr. BK, in several reports, references the claimant's fall and the surgery. Dr. BK and Dr. K both reference a "foot drop" condition which required emergency surgery to reverse.

The parties stipulated that the claimant sustained a compensable injury on January 10. The carrier contends that this injury was merely a left leg strain or contusion and that something else must have happened in the two and one-half weeks between the compensable injury and the emergency surgery to cause the back herniation. The carrier also complains about the absent records from ER 1, Dr. J, and the MRI, asserting that the CT scan in evidence did not warrant emergency spinal surgery. The carrier does not address the "foot drop" problem.

On the extent-of-injury issue, we agree that the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the liability from common knowledge to find a causal basis. In this case, a finding that a fall, as testified to by the claimant, caused the herniated disc does not require expert medical evidence and, even if it did, there was sufficient medical documentation to support the hearing officer's decision.

On the election of remedies issue, we agree Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) is the defining case in this area. In Bocanegra, the Texas Supreme 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 court further stated that one's choice between inconsistent remedies, rights or states of fact does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problems, facts, and remedies essential to the exercise of an intelligent choice. We view the court of appeals case of Smith v. Home Indemnity Company, 683 S.W.2d 559 (Tex. App.-Fort Worth 1985, no writ), as merely applying the Bocanegra, *supra*, elements to the specific facts of that case rather than changing or establishing new or different elements. One of the elements in Bocanegra was that by making the election, it would constitute a manifest injustice. The carrier, neither at the CCH nor on appeal, even mentions this element, let alone shows how this case constitutes a manifest injustice. *See* Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999, for a recent Appeals Panel decision applying Bocanegra.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge