APPEAL NO. 001787

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 12, 2000. The hearing officer determined that the respondent (claimant) sustained a repetitive trauma injury to his back. Although the hearing officer declined to allow a new motion to add date of injury as an issue, stipulations were taken based upon _____, the injury date that had been claimed to that point. The hearing officer further found that the claimant did not make a knowing election of remedies by using group health coverage to initially pay for treatment. The hearing officer finally found that disability began on March 21, 2000, and generally ordered payment of income benefits "in accordance with this decision" and the 1989 Act. An issue on timely notice of injury to the employer was resolved by stipulation.

The self-insured employer has appealed the finding that claimant sustained a repetitive trauma injury. The self-insured, who had opposed adding date of injury as an issue at the CCH, argues that evidence in the record proves that a specific injury occurred and that as the only issue before the hearing officer was whether the claimant sustained an injury "on" _____, there was no evidence to support such a finding and the decision must be reversed. The self-insured further argues that there cannot be any disability before the date of injury and points out that the claimant was not treated after March 30, 2000, for a back strain but solely for a preexisting condition. The self-insured disputes findings that the claimant's preexisting condition made him more susceptible to repetitive trauma. Although the claimant responds that his date of injury was March 20, 2000, he made no timely appeal of the hearing officer's decision to deny bringing forth a dispute that the date of injury was not _____. He argued that he did not make an election of remedies. He asks that the decision be affirmed.

DECISION

Affirmed as modified.

The claimant began working as a forklift mechanic six months prior to the date he first felt pain on March 20, 2000. He said that he had been sedentary immediately before this job and in addition was out of shape. His job required more strenuous activity and holding his torso in flexed and awkward positions. The claimant agreed he had fallen from a roof in 1996 but said he had completely recovered and felt fine the morning of March 20.

However, after working for a few hours, he began to develop pain in his lower back and down both legs. By that evening at home, the pain was nearly intolerable and he went to the emergency room (ER). The claimant testified that he believed this was caused by his digestive system. However, he was given pain medication and was advised to seek treatment from an orthopedic surgeon. He began treating with Dr. M on March 22, 2000.

The claimant was kept off work and prescribed a course of physical therapy (PT), as well as anti-inflammatory drugs. He said that Dr. M told him he had a "flat spine" and an extruded left hip, which caused strain in the ligaments and then inflammation over time. The claimant had not returned to work by the time of the CCH, but he stopped taking his anti-inflammatory medication around March 30, 2000. He said that the pain had gone down considerably by then.

It was not until _____, that the claimant told the self-insured that he thought he hurt himself at work. The self-insured's human resources administrator, Ms. P, said that prior to that date, the claimant said that he was told his injury was a complication or flare-up from his old injury. Ms. P said that there were no indications of back problems during the claimant's pre-employment physical. The claimant was sent to the company doctor, Dr. C, on April 17, according to the claimant and Dr. C's notes, although Ms. P said that it was April 19. Dr. C recorded that the claimant wanted to know if his injury was work related. Dr. C said that the claimant had a lumbar strain that "could be" work related.

Medical evidence in the record shows that Dr. M initially considered the etiology of the claimant's pain unknown. Dr. M advised the claimant on March 30 to take over-the-counter pain medication and continue his prescribed hydrocone. On April 24, Dr. M wrote that the claimant's symptoms were of lumbar mechanical origin. He repeated this opinion on May 15. He continued to hold the claimant off work. An MRI was noted to show only mild degenerative changes. The PT notes throughout this time period indicate a working diagnosis of lumbosacral strain. Dr. M's notes record that throughout his treatment, the claimant was taking medication.

The self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on May 11, 2000. This disputed the injury, in part, on the basis that the claimant's condition was preexisting and that the claimant could not describe any specific incident that caused his injury.

There was scant evidence developed on election of remedies, an issue on which the self-insured had the burden of proof. The claimant said that when he went to the ER, he initially thought that he was having an abdominal problem and it was not until he was treated that he was advised to see an orthopedic surgeon for back pain. The claimant testified that he knew his pain was work related on March 22 and that he did not really believe or acknowledge that this was the case on that date. However, he gave Dr. M his regular health insurance information. There was also evidence that on April 17, 2000, Dr. M completed a form used by the self-insured for its short-term disability benefits, but Dr. M also indicated that the injury was due to repetitive activity at work. There was no evidence that the claimant had actually been paid any short-term disability.

At the beginning of the CCH, the claimant asked that an issue be added on the correct date of injury, which had been listed in the BRC report (and earlier on the Employer's First Report of Injury or Illness (TWCC-1)) as _____. The self-insured opposed this and the hearing officer declined to add this as an issue. The claimant did not

change his consistent assertion, however, that his injury was in the nature of repetitive trauma and not a specific accident.

WHETHER THE CLAIMANT SUSTAINED A COMPENSABLE REPETITIVE TRAUMA INJURY

When there is no issue over a date of injury, this does not mean that there is *no* date of injury for purposes of the CCH. The issues at the CCH, and most certainly coverage and venue stipulations, depend upon a date of injury. In this case, the issues relating to election of remedies (that have to do with whether an election is knowing at the time it is made) or the date the order requires the carrier to initiate payment of temporary income benefits (TIBs), depend upon a date of injury. In the absence of a timely dispute (or appeal of the hearing officer's declining to make it an issue), the undisputed date of injury for purposes of this CCH and appeal (and future proceedings) was _____, whether expressly found by the hearing officer or not. (Indeed, circumspection about the date of injury is not in order when the date that income benefits accrue, or whether a knowing election of remedies was made, are determined.)

Because the claim for injury as one of repetitive trauma, the date of injury is the date that the injured worker knew, or should have known, that he may have an injury that was related to his employment. Therefore, the lack of evidence of a specific incident's occurring on _____, is irrelevant. We agree that there is sufficient evidence to support the hearing officer's finding that the claimant's back strain resulted from repetitive trauma due to the postures he had to assume in his job. An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

Because the self-insured asserted that the claimant's condition relates to his 1996 back injury, it is worth noting that in case law having to do with aggravation, the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.- Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects and, unless a first condition is one for which compensation is payable under the act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). If the prior condition is compensable, the appropriate reduction for a prior compensable injury must be allowed through contribution determined in accordance with Section 408.084.

For these reasons, we affirm the determination that the claimant sustained a repetitive trauma injury and observe that the undisputed date of that injury was _____.

WHETHER THE CLAIMANT HAD DISABILITY

TIBs are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." In this case, there was sufficient evidence to support the hearing officer's determination that the claimant had disability through the date of the CCH.

However, we agree with the self-insured that compensable disability cannot be found before the date of injury. Section 408.082(b) and (c) make clear that accrual of income benefits payable for disability begins "after the date of injury." TIBs cannot be paid for the period of time prior to _____. *See* Texas Workers' Compensation Commission Appeal No. 950521, decided May 18, 1995. Because the accrual of income benefits is a matter of statute rather than fact, we modify Conclusion of Law No. 4 to read:

> Claimant has had disability resulting from the occupational disease beginning March 21, 2000, and continuing through the date of the hearing in this matter. However, accrual of income benefits did not begin until after the _____, date of injury.

We note that the provision of medical benefits is not likewise circumscribed. Texas Workers' Compensation Commission Appeal No. 94991, decided September 7, 1994.

WHETHER THERE WAS AN ELECTION OF REMEDIES

As pointed out in the discussion, evidence on this point was scant. It appears that the election is claimed for merely filing for medical treatment under regular health insurance for less than a month. There was no testimony that short term disability benefits were actually paid to the claimant.

As recently stated in Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999:

> The Appeals Panel has frequently cited the case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) in support of the proposition that any election of remedies which is held to bar a claimant from seeking an alternative relief must be made as a result of an (1) informed choice, (2) between two rights, remedies, or states of fact that (3) are so

> inconsistent (4) *as to constitute manifest injustice*. (Emphasis added.) 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.

As the court in Bocanegra also points out (at page 851), mere assertion of inconsistent theories and remedies does not, in and of itself, rise to the level of an "election." As we note in this case, there was also evidence that claimant was not sure at the outset that his problems were related to work or even (initially) stemmed from a back injury as opposed to a bowel disorder. We affirm the hearing officer's determination that the facts in this case do not support a knowing election of remedies.

Subject to the modification as to the inception of the period for which income benefits may be paid, we affirm the hearing officer's decision, not finding it to be against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge