

APPEAL NO. 002023

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 August 2, 2000. The issues were:

1. Did the Claimant [respondent] sustain a compensable injury on _____?
2. Does the Claimant have disability as a result of the claimed injury of _____, and if so, for what periods?
3. Is the Carrier [appellant] relieved from liability under Tex. Labor Code Ann. Sec. 409.002 because of the Claimant's failure to timely notify her employer pursuant to Sect. 409.001?
4. Is the Claimant barred from pursuing Texas Workers compensation benefits because of an election to receive benefits under a private health insurance policy?

In response to those issues, the hearing officer determined that the claimant sustained a compensable (neck) injury on _____ (all dates are 1999 unless otherwise noted); that the claimant had disability from February 17 through February 27 and from April 13 through the date of the CCH; that the claimant timely gave notice of the injury to her employer; and that the claimant did not make an election of remedies to use her group health insurance.

Carrier appealed the decision on all the issues, stressing evidence that supports its position and arguing that testimony from two witnesses subpoenaed by the claimant should not have been admitted. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds to the points raised by the carrier and urges affirmance.

DECISION

Affirmed.

The claimant was employed as a licensed vocational nurse on the acute care unit of the employer's hospital. It is undisputed that the claimant has had a longstanding condition (variously spelled "achalasia" or "achelasia") where food sticks to the esophagus and she has been receiving treatment for that condition. The claimant testified that on New Year's Day, _____, she was helping move a patient in the bed when she felt a "pop" and sharp pain in her neck. The claimant's testimony is supported to some extent (the carrier points out inconsistencies) in the statements by two coworker registered nurses, Mr. JG and Mr. RG. The claimant testified that she finished her shift, completed an incident report and, because her supervisor, the unit manager, Mr. OD, was not there, she slipped the report under the door of his office. One of the employer's associate administrators testified that slipping reports under the door when the supervisor was gone

was "standard procedure." Mr. OD had applied for a reassignment and left his position as unit manager on January 7. The claimant testified that she saw Mr. OD only briefly on January 6 and they did not discuss her injury report. In a recorded statement Mr. OD denies ever seeing the claimant's incident report. Various witnesses testified that Mr. OD was not very good with paperwork, which contributed to his reassignment.

The claimant testified that she sought treatment for her neck on January 5 from Dr. J, who had also been treating her achalasia. In evidence of that visit is a prescription slip with Dr. J's letterhead, dated January 5, with Dr. G name on it, the word "neurosurgeon," a telephone number, and "cervical radiculopathy" "cervical disc disease." Also in evidence is a diagnostic study performed on January 5 in the employer hospital which showed "severe degenerative disc disease and spondylosis at C5-6 and C6-7." Dr. G, a neurosurgeon, in a report dated January 28, commented on the claimant's achalasia and that the claimant's chief complaint was "right arm problems, numbness and pain." Dr. G goes on to state:

The pain began back in November [apparently 1998] and it started off in her neck. She noticed neck strain during a very tense period when she was involved in a code while at work and a week later, she noticed that the pain began to radiate down her shoulder and entire right arm and her hand became numb.

Dr. G recommended physical therapy (PT). A cervical MRI performed on February 10 showed a disc bulge with foraminal narrowing at C5-6 and a "prominent central disc bulge" at C3-4. Dr. G, in a report dated February 16, refers to a large spur at C6-7 and indicates this is the most "significant level." Dr. J, in a report dated January 20, 2000, states:

[The claimant], age 62, is disabled due to a large bone spur at C6-7 which presses on her spinal cord or nerves. She has intense pain and is currently on pain management by [Dr. E] (with epidural steroid injections; the last injection being given (1/7/00)). This severe neck problem is work related and occurred [sic] while working at [employer] hospital in the coronary care unit. The problem began 1/1/99 and I saw her on 1/5/99 (and periodically thereafter). [The claimant] is still disabled from his problem.

In a "progress note" dated April 20, Dr. DG, apparently an independent medical examination doctor although saying this is a "designated doctor" evaluation, refers to a "DOI: _____" and is asked to comment on whether the claimant sustained an injury on _____. Dr. DG recites the _____ neck pop working with a patient, recites her treatment by Dr. G and Dr. E and the diagnostic testing and concludes:

Conclusion: It is my opinion based on the patient's history and based on review of the medical records that the claimant did sustain injury to her cervical area from the incident that occurred on _____. Her mechanism of injury is consistent with a cervical spine injury which could cause a herniated disc and cervical radiculitis and/or aggravation of cervical

degenerative disc disease and spinal stenosis. It must be noted that a work injury, which causes aggravation of a pre-existing injury is treated as a new injury under worker's [sic] compensation law in Texas.

Diagnosis: #1 Right cervical radiculitis #2 Cervical degenerative disc disease #3 Cervical spondylolysis #4 Cervical spinal stenosis.

Based on the claimant's testimony, Dr. DG's report and other documentary evidence, we find sufficient evidence to support the hearing officer's decision that the claimant sustained a compensable neck injury.

The testimony regarding the claimant's disability (the inability to obtain and retain employment at the preinjury wage as defined in Section 401.011(16)) is vague. The claimant's attorney, in closing argument, asserts disability "from 2-17 through 2-27 . . . that's the year 2000 through the present." The hearing officer recites that the claimant "was placed off work in order to participate in [PT]. Claimant returned to work on February 27, 1999, and was again placed off of work on April 13, 1999" in finding disability for those dates. Dr. G, in his February 16 report, indicates the claimant "has been going to [PT]" but does not indicate that she is off work. PT notes indicate the claimant received "12 treatments" between April 22 and May 26, and another 12 treatments "3xwk for 4 wks" to be taken October 10 through October 30, in a "certification notice" dated September 13. In addition, prescription pad slips indicate as follows: one dated January 28 for "P.T. to C-spine . . . 3x/wk for 4 wks," apparently signed by Dr. G; a slip dated February 24 which indicates the claimant is off work February 17, 18, 22 and 23 "due to illness"; a note dated April 15 which refers to PT "evaluate and treat include cervical traction" "3-5 times a week for 2-3 wks (12 total treatments)"; a note dated June 2 which states "not able to work until further notice off work April 1999 until now. Problem: cervical radiculopathy" signed by Dr. J; and a note dated January 20, 2000, for three visits over three months with Dr E for pain management. We find the testimony and evidence marginally sufficient to support the hearing officer's findings on disability.

Regarding the timely reporting of the injury to the employer, the resolution of that issue rests solely on how the hearing officer evaluates the evidence. The hearing officer could, and did, find that the claimant completed an incident report, slipped it under Mr. OD's door and it subsequently got lost or thrown away during Mr. OD's reassignment. We find sufficient evidence to support the hearing officer's decision on the reporting issue, evidence to the contrary notwithstanding.

Regarding the election-of-remedies issue, there is little evidence regarding this issue in the record. The carrier relies principally on an application for short-term disability benefits and a statement the claimant allegedly made to the employer's human resources representative. The claimant responds, basically, that "she did not know the difference between worker's [sic] compensation and group health insurance" and that the hearing officer witnessed her "testimony, demeanor and actions" during the cross-examination on this issue. In evidence is an application for short-term disability income benefits dated July 6. The claimant testified that she did not fill out the first two pages, but agrees she signed

it. The form indicates the last day the claimant worked was April 13, and that the reason for stopping work was "Illness." In response to the question whether the employee's condition was work related, the box marked "No" is checked and written in is "None filed." In the box asking whether a workers' compensation claim has been filed, the "No" box is checked. (The claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) is dated November 22.) The form lists that the date first treated by a physician was April 13. In response to a question "Is your condition related to your occupation," the word "Possibility" is written. Another section has similar answers. In an affidavit dated March 23, 2000, Ms. RM stated, in part:

At the time of my conversation with [claimant], she said it did not matter to her if her workers' compensation claim was denied, because she was trying to get short term disability benefits. She further indicated that, in order to be able [sic] for short term disability benefits, her claim for workers' compensation benefits would have to be denied first. I understand that a previous application for short term disability benefits was denied because [claimant] had indicated "there was a possibility" her problems might be related to her work.

The hearing officer made no specific findings nor did she discuss this issue other than to summarize the facts and the carrier's position. The hearing officer found that the claimant "did not make an informed choice when she elected to receive benefits under a private health insurance policy." The Appeals Panel has addressed the issue of election of remedies numerous times and, generally, we have cited the Texas Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), as establishing the standard. In Bocanegra 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, 1997. Critical to a finding of an election of remedies is the determination that the election of non-workers' 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. 990222, decided February 19, 1999, we discussed the equitable underpinning of the election-of-remedies doctrine. In this case, while the hearing officer does not do an analysis of the Bocanegra elements, neither does the carrier, who bears the burden of proof on this issue, attempt to address the various elements and show how they have been met. Although another fact finder could have certainly reached a different conclusion on the same facts, that alone is not a sufficient basis on which to reverse this decision.

Last, the carrier complains that the testimony of the employer's associate administrator and the employer's Director of Special Care should not have been admitted

on the basis that those individuals had not been timely identified as persons with knowledge of relevant facts, citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12(c)(1)(D) (Rule 142.12(c)(1)(D)). The benefit review conference (BRC) was on June 29, 2000, and 15 days thereafter would have been July 14, 2000. The claimant's attorney represented, without contradiction, that the presence of these witnesses was discussed at the BRC. The claimant subsequently requested subpoenas for the witnesses on July 19, 2000, and the carrier received notice of the request for subpoenas on July 21, 2000. The carrier verbally objected to their testimony at the CCH and then argued that the hearing officer disregarded certain aspects of the testimony of these witnesses which was favorable to the carrier. The hearing officer did not discuss the carrier's objection or make findings of good cause. We review the hearing officer's ruling on the carrier's objection on an abuse-of-discretion standard. In determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have reviewed the record and do not conclude that the hearing officer's ruling allowing the two witnesses to testify constitutes an abuse of discretion. Even if it was error to allow the testimony, it would be harmless error. To obtain reversal based upon an error in admitting evidence, a party must first show that the ruling was in fact error and, second, that the error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Upon review of the record submitted, we find no reversible error and 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:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge