APPEAL NO. 002039

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 30 and July 27, 2000, a contested case hearing (CCH) was held. With respect to the five issues before her, the hearing officer determined that: (1) pursuant to Section 408.007, the appellant's (claimant) date of injury is _____; (2) the claimant did not, on that date, sustain a compensable injury in the form of an occupational disease; (3) the claimant did not timely report his claimed injury and no good cause exists for failing to do so; (4) the claimant is barred from workers' compensation benefits because of the election of remedies doctrine; and, (5) the respondent (self-insured) timely disputed the notice, date of injury and election-of-remedies issues.

The claimant appeals all the issues and in his appeal summarizes the evidence from his point of view on the issues. The claimant takes issue with some of the hearing officer's rulings, alleges the hearing officer "appeared to be totally disinterested" and requests that we order the self-insured to pay "lost wages" to the witnesses the claimant had subpoenaed. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The self-insured responds to the points raised by the claimant and urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

This is a hearing loss case. Many of the facts are in dispute. The claimant began work for a large (employer) in 1980. A pre-employment physical dated February 28, 1980, showed high frequency hearing loss at that time. (The claimant contends that the records were mixed up with another employee with the same last name and similar first name). In any event, clearly the employer's premises were noisy (in dispute is whether they exceeded OSHA standards or were noisy enough to induce hearing loss). The claimant's baseline hearing test of 1983 showed significant high frequency hearing loss bilaterally. Other annual hearing tests (with the exception of 1990) through 1999 were also in evidence and the hearing officer commented that the tests showed "some hearing loss for speech sounds and a greater loss for higher pitched sounds (right ear)." After the _____, audiological evaluation, the claimant was sent to or received hearing aids from Jones (hearing clinic). The hearing aids were paid for by "personal insurance" (apparently group health insurance).

The claimant's hearing apparently continued to deteriorate. The sequence of what happened next in 1999 is not entirely clear. Apparently there was an incident where the claimant did not hear some instructions which almost caused an accident in August 1999. The claimant testified that he reported his hearing loss injury to his supervisor on August 23, 1999. Around this time, the claimant spoke with JJ, a coworker who also had hearing loss, who told the claimant that he, JJ, had been able to get new, computerized, digital hearing aids through workers' compensation and who recommended Dr. S.

Dr. S, in office notes of an October 20, 1999, visit and a report dated October 10, 1999, recited that the claimant "has been aware of gradually decreased hearing over at least the past ten years"; that the claimant has worn hearing aids away from work, which "worked well" until about four or five weeks ago; and that the cause of the hearing loss was "working around loud machines for years." The hearing officer found that the "Claimant reported his claimed work related injury on _____," after talking with Dr. S. Dr. S, in a report dated October 31, 1999, indicates that an audiogram obtained on September 27, 1999, "shows a sudden and inconsistent change from previous audiograms."

The claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated October 27, 1999, where he listed the date of injury and when he knew his injury may be related to his employment as "9-20-99." The self-insured, in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated December 1, 1999, stated it first received written notice of the injury on November 8, 1999 (either through the claimant's TWCC-41 or Dr. S's report of October 31, 1999). In its TWCC-21, the self-insured disputes compensability "from bilateral hearing loss." In evidence is a written statement from the claimant taken on November 9, 1999, by the self-insured's adjuster. Among other items in that statement, the claimant says the machines he was working around "did not give any warning of impact and the noise was like a bomb going off." The self-insured argued that initially it believed the claimant was alleging a single loud explosion had caused his hearing loss and that only later did it find out that the claimant was claiming an occupational disease. The self-insured filed another TWCC-21 dated February 3, 2000, disputing lack of timely notice, asserting any injury was years before and alleging an election-of-remedies defense.

The medical evidence is conflicting. In a report dated November 22, 1999, Dr. R, a self-insured's otolaryngologist, noted the 1983 baseline test, reviewed the "multiple audiograms" and a report from Dr. S, and concluded:

> The baseline audiogram shows significant hearing loss most marked in the high frequencies. A company audiogram performed Sept. 10, 1999 showed mild progression of the hearing loss but not more than might be expected with the aging process that would occur over the 16 years between the tests. An audiogram performed in [Dr. S's] office on Sept. 22, 1999 showed results 10 to 20 decibels worse in many frequencies with the loss being sensorineural.
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> * * * *
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> [T]he etiology of the hearing loss could be due to noise exposure, but if his employment began in 1983, the noise exposure would have preceeded [sic] that. If there had been hearing loss prior to employment the progression shown on the audiograms could have been solely due to normal progression of diminished hearing with age. No other physical reason is indicated in [Dr. S's] letter.

The hearing officer references a January 20, 2000, note from Dr. E which notes that the claimant had a "history of hearing loss for years." The claimant argues that that report was not in evidence; however, that note is on page 3 of the self-insured's Exhibit No. 6.

The hearing officer made the following disputed findings of fact:

FINDINGS OF FACT

2. The date the Claimant knew or should have known that his bilateral hearing loss might be work-related was no later than _____.

3. The preponderance of the credible evidence has established that Claimant had a pre-existing bilateral hearing loss that has worsened over the years due to the normal aging process.

4. Claimant reported his claimed work-related injury on _____.

5. Claimant made a knowing and informed election to receive benefits under a group health insurance policy.

6. Carrier filed its dispute of timely reporting, date of injury, and election of remedies on February 3, 2000, when it received newly discovered information that could not have reasonably been discovered at an earlier date.

The claimant appeals each of these findings, and the conclusions of law based on those findings, in some detail. On the key issue of the date of injury, Section 408.007 provides that the date of injury for an occupational disease "is the date on which the employee knew or should have known that the disease [in this case the hearing loss] may be related to the employment." The hearing officer determined that date to be _____, when the claimant was referred to the hearing clinic for his first hearing aids. The claimant alleges the date to be, variously, August 23, 1999, when he testified he reported the injury to his supervisor; or either September 20, 1999, as alleged on his TWCC-41; or _____, after he talked with Dr. S. Testimony and documentary evidence regarding the noise level on the self-insured's premises was strictly a factual determination for the hearing officer to resolve. Testimony from DJ, the self-insured's safety officer, distinguishes JJ's case from that of the claimant.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact

may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We affirm all of the hearing officer's determinations as being supported by the evidence except those related to the election of remedies.

Regarding the election of remedies, the hearing officer, in her Statement of the Evidence, comments:

> The credible evidence is that Claimant made a knowing and informed choice to pursue benefits under his group health insurance policy, and only when he was informed that another co-worker's hearing loss was work-related, and that a digital hearing aid would cost in excess of $6000.00, did he decide to file this as a work-related claim.

Our review of the evidence discloses that the claimant did, indeed, pay for the 1992 hearing aid through his group health policy, but that was long before he filed a claim alleging a 1999 injury. Who paid for the annual hearing tests was not developed, but presumably it was the self-insured. The claimant testified that Dr. S had not been paid because the self-insured had denied the claim. On election of remedies, the Appeals Panel has generally 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 self-insured 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 a non workers' compensation remedy 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. Further, in Texas Workers' Compensation Commission Appeal No. 000115, decided March 3, 2000, the Appeals Panel discusses the manifest injustice provision. In any event, we hold that the determinations that the claimant exercised an informed choice between two inconsistent remedies is so against the great weight and preponderance of the evidence as to require reversal. We render a new decision that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy. This reversal, however, does not change the ultimate disposition of the case being that the claimant is not entitled to workers' compensation benefits based on the other issues.

Regarding other points raised by the claimant in his appeal, that DJ “should be investigated . . . for the misinformation and false statements” and that the self-insured be ordered to pay witnesses subpoenaed by the claimant “for lost wages,” the Appeals Panel has no jurisdiction to grant the requested relief, even if it was disposed to do so.

Accordingly, the hearing officer's decision and order is affirmed on all issues except that of the election of remedies, which we have reversed and rendered a new decision as noted.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Tommy W. Lueders
Appeals Judge