APPEAL NO. 002682

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 October 18, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) sustained a repetitive trauma injury to her low back; that the date of injury pursuant to Section 408.007 was _____; that the claimant failed to timely report her injury to her employer and did not have good cause for failing to do so; that the claimant did not have disability; and that the claimant is barred from receiving workers' compensation benefits because she made an election of remedies. The hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury with a date of injury of _____, have not been appealed and have become final pursuant to Section 410.169.

The claimant appeals the determinations on timely notice to the employer and election-of-remedies issues as being against the great weight of the evidence. By inference, the claimant appeals the disability determinations, as those determinations are based on no compensable injury. The claimant requests that we reverse the hearing officer's decision on the appealed issues and render a decision in her favor. The respondent (self-insured), a retail store chain, responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant had been employed by the self-insured at one of their stores for a number of years and had been promoted from a "level 1" to a "level 3" position. The claimant testified as to her duties in the stockroom of heavy lifting, squatting and climbing. The hearing officer found that the claimant sustained a repetitive trauma injury on _____, "while moving merchandise in the stockroom." The claimant testified that she reported her injury to Ms. PN that day. What was said is in dispute and Ms. PN even denied such a conversation took place. It is undisputed that no accident report was completed. The claimant said that she thought Ms. PN would complete the report. A coworker, Ms. GS, testified that she was going to the stockroom, saw the claimant "holding her back," asked the claimant what happened, and the claimant said "I hurt my back" as Ms. PN "was coming up." Ms. GS said the claimant told Ms. PN "I hurt my back" and then Ms. GS walked away. Ms. PN denied a work-related injury had been reported to her. The claimant emphasized a transcribed statement Ms. PN had made which stated:

> A. [Claimant] was first complaining about her back that I had walked by and she was getting up off the floor from being on her knees setting a plantagram and when she stood up she was uhhh you know aching and paining and I asked her you know if she was all right and she said that her back hurt and I said did you hurt it at [employer].
>
> Q. Uh-huh.

A. And she said no.

The claimant also testified that on September 3, 1999, she met with Ms. PN and Mr. DV and again reported her injury. Ms. PN denied that she was at that meeting. Mr. DV, the self-insured's human resource manager, testified that he met with the claimant on September 3 and that the claimant said she had "a personal injury" and "wanted to go out on a personal medical leave." The claimant testified that Mr. DV (and Ms. PN) forced her to file under her group health plan (which was also a self-insured plan). It is undisputed that the claimant filed under her group health plan and the early medical reports and treatment were under the group health plan. (One progress note dated August 24, 1999, refers to "lifting at work.") The claimant argues that this reference gave the self-insured "constructive knowledge" that the claimant had been injured at work because the self-insured was self-insured for both workers' compensation coverage and the group health plan.

Regarding whether the claimant gave timely notice to the employer pursuant to Sections 409.001 and 409.002, the evidence is in conflict. The claimant argues that Ms. GS's testimony is more credible and unbiased than that of Ms. PN or Mr. DV. The claimant also speculates that it would be more beneficial to the self-insured, which had closed the store where the claimant was employed, to have this as a health claim than a workers' compensation claim. These were all factors for the hearing officer to consider. 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). 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 hold that the hearing officer's decision was supported by sufficient evidence and affirm the hearing officer's decision on this issue. We also reject the claimant's contention that a stray phrase in medical records submitted to the self-insured's group health plan somehow constitutes constructive or actual knowledge by the self-insured that she is giving notice of a workers' compensation injury.

Regarding the election-of-remedies issue, 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. In this case, there is little, if any, evidence that the claimant made an informed choice that, on the one hand, she could file under the group health plan for "personal injuries" and workers' compensation for work injuries, and the acceptance of one precludes the other. Nor is there any evidence that there was a manifest injustice to the self-insured. We have held that the mere acceptance

of other health benefits is normally not sufficient, in itself, to establish an election of remedies. We hold that the hearing officer's decision on this point is against the great weight and preponderance of the evidence, and we reverse the decision on this issue and render a new decision that the claimant had not made an election of remedies which would bar workers' compensation benefits.

In that we are affirming the hearing officer's decision that the self-insured is relieved of liability for workers' compensation benefits, we are also affirming the hearing officer's decision on disability.

Accordingly, we affirm the hearing officer's decision on lack of timely notice to the employer and reverse the decision on election of remedies, rendering a new decision that the claimant had not made an election of remedies; however, this does not change the ultimate outcome that the self-insured is not liable for benefits.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Susan M. Kelley
Appeals Judge