

APPEAL NO. 011504  
FILED AUGUST 6, 2001

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 May 31, 2001. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained repetitive trauma injuries, bilateral carpal tunnel syndrome (BCTS) and bilateral tarsal tunnel syndrome (BTTS), while in the course and scope of his employment; that pursuant to Section 408.007, the date of injury for the BCTS was \_\_\_\_\_, and the date of injury for the BTTS was \_\_\_\_\_, that the respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer of his occupational disease injuries under Section 409.001 and did not have good cause for failing to timely notify his employer of his injuries; that the claimant did not have disability resulting from the occupational disease; and that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The claimant appealed the hearing officer's determinations on the dates of injury, untimely reporting, election of remedies, and disability. The carrier appealed the hearing officer's determination on repetitive trauma injuries.

#### DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer did not err in her determinations on the issues of repetitive trauma injury, date of injury, timely notice of injury, and disability. Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, which is defined in Section 401.011(36). 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 may be related to the employment. Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The parties stipulated that the claimant reported his injury to his employer on October 10, 2000. 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. Conflicting evidence was presented on the issues of repetitive trauma injury, date of injury, timely notice to the employer, and disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's determinations on the issues of repetitive trauma injury, date of injury, timely notice to the employer, and disability are supported by sufficient evidence and are not so against the great weight and preponderance of the

evidence as to be clearly wrong and unjust. Accordingly, we affirm those determinations of the hearing officer.

The hearing officer erred in determining that the claimant is barred from pursuing Texas workers' compensation benefits under an election of remedies. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court held that the election doctrine may constitute a bar to relief when one successfully exercises an informed choice between two or more remedies, rights, or states of fact which are so inconsistent as to constitute manifest injustice. In the instant case, the hearing officer found that the claimant knowingly chose to pursue payment for medical treatment through his private health insurance, but made no finding that any manifest injustice resulted from receipt of health insurance benefits and we decline to imply such a finding. In Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993, the Appeals Panel noted that it had not found inconsistency amounting to manifest injustice to the carrier arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered. We conclude that all of the requirements for an election of remedies to constitute a bar to relief have not been shown. Thus, we reverse the hearing officer's decision that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy and we render a decision that the claimant is not barred from pursuing workers' compensation benefits under the doctrine of election of remedies. However, because we are affirming the hearing officer's decision that the claimant failed, without good cause, to give timely notice of injury to his employer, the carrier is relieved of liability under Section 409.002.

We affirm the hearing officer's determinations on the issues of repetitive trauma injury, date of injury, timely notice of injury, and disability. We reverse the hearing officer's decision on the issue of election of remedies and render a decision that the claimant is not barred from pursuing Texas workers' compensation benefits under the doctrine of election of remedies.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Michael B. McShane  
Appeals Judge