APPEAL NO. 060779
FILED JUNE 19, 2006

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 March 17, 2006. The disputed issues were: (1) whether the appellant/cross-respondent (claimant) sustained a compensable injury on _____; (2) whether the claimant had disability, and if so, for what periods; (3) whether the respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and (4) whether the claimant is barred from pursuing Texas workers' compensation benefits because of an election of remedies. The hearing officer resolved the disputed issues by deciding that: (1) the claimant sustained a compensable right shoulder injury on _____; (2) the claimant did not have disability as a result of her compensable injury of _____; (3) the carrier is not liable for compensation for the claimant's compensable injury of _____, because the claimant without good cause failed to give her employer timely notice of the injury; and (4) the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive private group health insurance benefits. The claimant appeals the hearing officer's determinations on the issues of disability, timely notice to the employer; and election of remedies. The carrier appeals the hearing officer's determination on the issue of compensable injury. Both parties filed a response.

DECISION

Affirmed in part and reversed and rendered in part.

TIMELY NOTICE TO THE EMPLOYER ISSUE

Section 409.001(a) provides that, for injuries other than 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 injury occurs. Section 409.002 provides that failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or carrier has actual knowledge of the employee's injury, the Texas Department of Insurance, Division of Workers' Compensation (Division) determines that good cause exists for failure to provide notice in a timely manner, or the employer or the employer's insurance carrier does not contest the claim. In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the court noted that to fulfill the purpose of the notice of injury statute, the employer need only know the general nature of the injury and the fact that it is job related. The hearing officer found that the claimant first reported her injury of _____, to her employer on September 29, 2005, and that the claimant did not have continuing good cause for not reporting her injury to her employer by the 30th day after _____, which was September 26, 2005. The hearing officer concluded that the carrier is not liable for compensation for the claimant's compensable injury because the claimant without good cause failed to

give her employer timely notice of injury. It is clear from the hearing officer's decision that he determined that any good cause for not reporting the injury to the employer ceased by September 22, 2005. The hearing officer's determination that the claimant failed without good cause to timely notify her employer of her injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We affirm the hearing officer's determination against the claimant on the timely notice issue.

COMPENSABLE INJURY ISSUE

The hearing officer's findings that on _____, while in the course and scope of her employment, the claimant reached overhead to pull down some bags and that the act of reaching overhead caused a right shoulder injury 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. However, the hearing officer erred in concluding that the claimant sustained a compensable injury because the carrier is relieved of liability under Section 409.002 based on the claimant's failure without good cause to give timely notice of her injury to her employer. Section 401.011(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." The Appeals Panel has previously held that if an employee fails without good cause to timely notify the employer of an injury sustained in the course and scope of her employment, thereby relieving the carrier of liability under Section 409.002, the employee does not have a compensable injury because compensation is not payable. Appeals Panel Decision (APD) 020960, decided; June 5, 2002; APD 011685, decided August 24, 2001; APD 991704, decided September 23, 1999; and APD 951709, decided November 29, 1995. Consequently, we reverse the hearing officer's determination that the claimant sustained a compensable injury and render a decision that the claimant did not sustain a compensable injury because she failed without good cause to timely notify her employer of her injury.

DISABILITY ISSUE

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." Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16). APD 020960, *supra*; APD 011685, *supra*. We affirm the hearing officer's determination that the claimant does not have disability.

ELECTION OF REMEDIES ISSUE

In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the Texas Supreme Court explained that election of remedies is an affirmative defense and may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice. The court further explained that

one's choice between inconsistent remedies, rights, or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. The court noted an election will bar recovery when the inconsistency in 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. In Bocanegra, the facts reflected that there was uncertainty as to whether the employee had an occupational disease or a nonoccupational disease, and the court held that the employee did not make an informed election that barred her action. The court stated that the case illustrated the reason that election should not bar a suit when a previous course of action or a settlement for less than the claim was grounded upon uncertain and undetermined facts. In McCrary v. Taylor, 579 S.W.2d 347 (Tex. Civ. App.-Eastland 1979, writ ref'd n.r.e.), the court noted that election of remedies is a harsh doctrine, that its scope should not be extended, and that the doctrine is used to prevent double recovery for a single wrong.

In the instant case the claimant testified that prior to beginning work for the employer, she had developed bilateral carpal tunnel syndrome (CTS); that she had had some right shoulder pain from time to time; and that she attributed the shoulder pain to her CTS. The claimant further testified that on _____, she was working for the employer using a hook with a handle to pull down merchandise when she felt pain in her right shoulder. The claimant said that she again thought the shoulder pain was due to her CTS. On September 15, 2005, she went to the doctor she had previously seen for her CTS and she said that the doctor told her that her shoulder pain may not be related to her CTS and that it could be due to a torn rotator cuff. The doctor's report of September 15, 2005, reflects that the doctor was concerned that the claimant may have a rotator cuff tear as well as CTS and wanted an MRI done. The September 19, 2005, right shoulder MRI report states an impression of a full-thickness supraspinatus tendon tear.

The claimant returned to the doctor on September 22, 2005, and she said that she was informed of the MRI results, that the doctor told her she had a torn rotator cuff, and that shoulder surgery was discussed. The doctor's report of September 22, 2005, notes that he discussed the MRI results, shoulder surgery, and CTS surgery with the claimant on that day. The claimant said that on September 22, 2005, she told the doctor how she had pulled merchandise down at work and that the doctor said that he figured that is how it happened, that is, how her shoulder was injured. It appears to be undisputed that the claimant used her employer's group health insurance to pay for the visits to the doctor and the MRI. The claimant said that the doctor scheduled her for right shoulder surgery to be done on October 4, 2005. The claimant said that she was going to use the group health insurance to pay for the surgery.

The claimant's employment was terminated on September 23, 2005, for allegedly using profanity in front of a customer at an earlier time. The claimant told the employer on September 23, 2005, after she was told that her employment was terminated, that

she was going to have surgery. The employer's human resources manager testified that the claimant did not report a work injury on September 23, 2005, that Cobra medical benefits were discussed with the claimant, and that it was not until September 29, 2005, that the claimant notified the employer that she had a work-related injury. The employer cancelled her group health insurance on September 24, 2005. The claimant said that she reported her work injury to her employer on September 29, 2005, because she no longer had medical insurance. The claimant said that she has not had her shoulder surgery because she has no medical insurance and her workers' compensation claim has been denied.

As noted, the claimant went to her doctor on September 15th and 22nd, 2005, and had an MRI done on September 19, 2005. The evidence clearly reflects that the claimant was uncertain of the cause of her right shoulder pain until she was informed of the MRI results on September 22, 2005, and the doctor indicated to her at that time that she had a work-related shoulder injury. She had been attributing the pain to a preexisting CTS condition. Under these facts, we conclude that the hearing officer's finding that the claimant made an informed choice of group health benefits in place of workers' compensation benefits is not supported by sufficient evidence and is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. As noted in Bocanegra, *supra*, election of remedies should not be a bar to further action when a previous course of action was grounded upon uncertain and undetermined facts. We also disagree with the hearing officer's finding that the claimant's use of her group health insurance created manifest injustice as being unsupported by the evidence. *See* APD 990525, decided April 16, 1999. While not dispositive of this case, the hearing officer was apparently led to believe by the carrier that the claimant's MRI of September 19, 2005, would have required the carrier's preauthorization, the basis for which we are unable to locate in Section 413.014 or 28 TEX. ADMIN. CODE § 134.600 (Rule 134.600) (it was not a repeat diagnostic study). We reverse the hearing officer's determination that the claimant is barred from pursuing workers' compensation benefits because of an election to receive group health insurance benefits and we render a decision that the claimant is not barred from pursuing workers' compensation benefits under the doctrine of election of remedies.

We affirm the hearing officer's determinations that the claimant failed without good cause to timely notify her employer of her injury and that the claimant has not had disability. We reverse the hearing officer's determination that the claimant sustained a compensable injury and we render a decision that the claimant did not sustain a compensable injury because she failed without good cause to timely notify her employer of her injury. We reverse the hearing officer's decision that the claimant is barred from pursuing workers' compensation benefits because of an election to receive group health insurance benefits and we render a decision that the claimant is not barred from pursuing workers' compensation benefits based on an election of remedies. The carrier is not liable for benefits.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge