APPEAL NO. 93662

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ? 401.001, *et seq*. (1989 Act). On May 19, 1993, a contested case hearing (CCH) was held. The hearing was recessed and reconvened on June 30, 1993, when the record was closed. The issues presented and agreed upon were:

1. Whether the Claimant, CF, suffered an injury within the course and scope of employment while working for (employer A) on _____ (approximate date)?

2. Whether the Claimant, CF, suffered disability as the result of a work related injury?

3. Whether the Claimant, CF, made an election to receive group benefits in lieu of workers' compensation benefits?

The hearing officer determined that claimant sustained an injury in the course and scope of her employment; that claimant had disability from _____, and continued to the date of the CCH; and that claimant did not make an election to receive group medical and disability benefits in lieu of workers' compensation benefits.

Appellant, carrier herein, contests several of the hearing officer's findings and conclusions, contending that claimant failed to prove she sustained a work-related injury, that claimant had made a conscious election of remedies at the benefit review conference (BRC), and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The evidence set out in the hearing officer's Statement of Evidence is a fair and accurate statement of the case and, accordingly, we adopt it for purposes of this decision. Briefly summarizing, claimant testified she was a 28-year-old production worker/frame builder for (employer B) (employer A is a subsidiary of employer B). Claimant states on November 16, 1992 (all dates are 1992 unless otherwise noted), as she and a coworker were lifting a large yellow rectangular mat which weighed approximately 100 to 150 pounds, she felt a "sting" in her lower back. She stated that the sting lasted for about 15 minutes and then became a pressure feeling in her low back. Claimant stated she went home the evening of November 16th, and told her husband of the injury. Claimant stated she continued working the 17th and 18th with the pressure feeling. One witness testified claimant complained of a back pain on the 17th. Claimant testified on the evening of the 18th she and her husband had a fight and claimant's husband struck her in the face with

his hand. On the morning of the 19th, several witnesses noticed claimant had a black eye and claimant told more than one coworker that her husband had hit her. It is undisputed claimant continued working her regular duties on the 19th. On the morning of the 20th, a Friday, claimant testified that when she woke up she felt a pain and that when she started to put on her shoe the pain began "hurting down my hip, all the way down my leg to my foot." Claimant testified that she attempted to go to work but after an hour she called her husband to take her to the doctor. A coworker witness testified she saw claimant limping on November 20th. Claimant told (Ms. NP), employer's benefits administrator, that her back was hurting and she needed to see a doctor. Claimant and Ms. NP both agree that claimant, at that time, did not state that her back pain was due to an on-the-job injury. Claimant consulted her family physician, (Dr. C). Claimant testified she continued to have pain over the weekend and went to the hospital emergency room (ER) on Sunday, November 22nd. Claimant again consulted Dr. C on Monday, November 23rd and reported her injury to her supervisor, (Mr. RP). Claimant testified Dr. C subsequently referred her to (Dr. V) who performed a lumbar diskectomy on December 9th. Claimant testified that she has been unable to return to work since November 20th and that neither Dr. C or Dr. V have released her to return to work.

Dr. C's progress notes of _____, indicated "S: Pain since Mon pm after work. Bending over. Weight gain Not assoc. [with] UT (illegible). Never before. Can't afford meds." A CT of the lumbar spine performed on November 24, 1992, showed "Degenerated narrowed L5-S1 disc with soft tissue density in the region of the right S1 nerve root suspicious for a disc herniation at this level. If the patient has right S1 radicular type symptoms, further evaluation with myelogram is suggested."

Dr. V, in a February 12, 1993, report, cites claimant's history and notes he ". . . attempted to treat her with conservative therapy, including Medrol, Dosepak, bed rest and pain medications, and this failed to resolve her symptoms and she eventually came to lumbar diskectomy. Her mechanism of injury, history, and course of treatment are all consistent with the work-related injury as she initially described to me. In my medical opinion, I feel that this could have happened on the job as she stated." Other medical records and notes in the record support the fact that claimant had a myelogram and subsequent diskectomy at L5-S1 level on December 9th with a subsequent satisfactory recovery.

Claimant filed her Notice of Injury and Claim for Compensation (TWCC-41) on December 4th. Claimant also filed a claim for benefits under the employer's major medical group policy and disability policy. Ms. NP testified benefits had been paid under these plans. Apparently, a BRC was conducted on February 3, 1993. Because that BRC report is not in the record we look to the testimony of the witnesses, principally claimant and Ms. NP, regarding what occurred at that meeting. It is undisputed that both workers' compensation and the group health and disability benefits were discussed. Carrier contends that claimant, with the assistance of the ombudsman, was given a choice of

either process. Ms. NP concedes that claimant was never precisely told that by taking the group health benefits that she would be precluded from receiving workers' compensation benefits. According to Ms. NP, claimant was told "she could pursue her workers' compensation benefits or she could pursue the disability." Although the benefit review officer (BRO) "caucused" with claimant, exactly what was said is unknown. Quite clearly, however, no BRC agreement was ever entered into. Ms. NP testified that claimant was left with this choice at the BRC and that claimant subsequently called Ms. NP and said she "wanted to go with disability." Ms. NP sent claimant disability forms which claimant completed and signed on "2-19-93" and returned to Ms. NP. We note in the description of the accident claimant stated that it happened lifting a yellow platform "at work." The hearing officer, and we, note that the statement of claim which carrier relies on as the election of remedies, contains a statement: "In consideration of benefit payment under this Group Policy, without reduction for any right of recovery under the Workers' Compensation Act, I assign to the (life insurance company) my right, title, and interest to any recovery of Workers' Compensation benefits for this disease or injury, however recovered, to the extent of benefits paid under this Group Policy." (Emphasis added.) It would appear, under this provision, the group health carrier would recover any benefits it had paid from the workers' compensation carrier. Claimant said that she understood that she would not be precluded from pursuing her workers' compensation claim even though she had filed a claim for medical and disability benefits under the employer's group policy.

As indicated previously, the hearing officer concluded that claimant had sustained an injury which arose out of and in the course and scope of employment with the employer on November 16th, that claimant had disability from November 20th and "continues to present date of this hearing" and that claimant did not make an election to receive group medical and disability benefits in lieu of workers' compensation benefits.

Carrier disputes the findings that claimant sustained an injury in the course and scope of employment while conceding at the outset ". . . that this appeal hinges mainly on a factual interpretation and that is within the realm of the [CCH] officer to determine that evidence which is credible and believable and interpret his findings from that evidence. . . ." Carrier's argument is that claimant did not "tell anyone at work" she hurt her back "until almost a week later." This ignores one coworker's testimony that claimant complained of her back hurting and that she didn't want to move a barrel on November 17th. Probably what carrier meant was that claimant didn't report the injury to anyone in management for almost a week. Claimant explained this by testifying she was afraid she would be fired and she had already accumulated a number of points under employer's point system. All of the testimony and evidence carrier refers to was available to the hearing officer and the hearing officer had the further advantage of hearing the witnesses and observing their demeanor. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer may accept some parts of a witness' testimony and reject other parts of that testimony where the testimony is

inconsistent (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)) and may resolve any inconsistencies in the testimony. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Claimant testified that she felt the "sting" on November 16th, a coworker testified claimant complained of her back on the 17th and claimant eventually was determined to have a herniated disc. Carrier argues that claimant's fight with her husband where she got a black eye and putting on her shoe after getting up were "conducive to back injuries." The hearing officer found otherwise and we will uphold that finding unless it is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not so find.

As to the issue of election of remedies, carrier argues that the claimant had the assistance of an ombudsman and had been advised, in the February 1993 BRC, by a BRO, and made an election to receive benefits under the group health policy. Carrier cites the testimony of Ms. NP and "the [BRO's] Report that the issue of election was fully discussed at the [BRC]." As previously noted, that report was not available to us and was not offered as an exhibit. Carrier concludes: ". . .that it is unconscionable to allow the claimant to go to a [BRC] to make an election of remedies, to receive 100% of the benefits of the alternative choice and not until after all of those benefits have been received does she decide to again pursue her workers' compensation case."

The question of election of remedies has been addressed most recently in Texas Workers' Compensation Commission Appeal No. 93618, decided on September 7, 1993. Relying on the leading case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the Appeals Panel determined that in order to bar a workers' compensation claim under the theory of election of remedies, the election must be:

(1) an informed choice

(2) between two or more remedies, rights, or states of facts

(3) which are so inconsistent as to

(4) constitute a manifest injustice to a third party.

Whether claimant made an informed choice is hotly disputed. Carrier alleges claimant had the assistance of an ombudsman and the options had been fully explained. Claimant testified that the options had not been explained as being mutually exclusive, and indeed it would appear from the provision in the group claim form, not to be mutually exclusive. Claimant obviously has a limited formal education (carrier cites "she did go through high school," but the transcript at page 64 indicates claimant only had a 9th grade education) and testified she did not understand the difference between the group health and disability policy and the workers' compensation coverage. Claimant testified she heard

or understood that the employer did not like employees to file workers' compensation claims. There is sufficient evidence to support the hearing officer's finding that claimant did not have a full and complete understanding that when she filed for medical and disability benefits she would not be entitled to workers' compensation benefits.

Because election of remedies is a disfavored doctrine (Texas Employers Insurance Ass'n v. Miller, 370 S.W.2d 12 (Tex. Civ. App.-Texarkana 1963, writ ref'd n.r.e.)) it will not be assumed or inferred in the absence of direct evidence showing the choice of exclusive remedies is fully and clearly understood. Texas Workers' Compensation Commission Appeal No. 92634, decided January 14, 1993, and Texas Workers' Compensation Commission Appeal No. 93225, decided May 12, 1993. In addition, the Appeals panel has not found inconsistency amounting to manifest injustice to carriers arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered. *See* Texas Workers' Compensation Commission Appeal No. 92678, decided January 29, 1993, and Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992.

In the instant case, the hearing officer found that the claimant did not make an effective election of remedies. Her testimony and the other evidence provides sufficient basis for the hearing officer's finding of fact on this issue. The carrier can point to no "manifest injustice" that it would suffer by upholding the finding of the hearing officer. On the contrary, the claim form for group medical benefits completed by the claimant would appear to preserve the rights of the two insurance carriers.

As carrier notes, the issue of disability relies strictly on a finding of injury in the course and scope of employment. Claimant's unrefuted testimony is that she has not gone back to work and could not do so at the time of the CCH. Claimant stated, and there is no evidence to the contrary, that neither Dr. C or Dr. V had released her to return to work. The hearing officer's finding that claimant has disability, as defined by the 1989 Act, is supported by sufficient evidence.

Finding no reversible error and that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust (In re Kings Estate, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986)), we affirm.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge