APPEAL NO. 992577

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 6, 1999. The issues at the CCH were whether the respondent/cross-appellant (claimant) is barred from pursuing workers' compensation benefits because of an election to receive benefits under a health insurance policy; whether the appellant/cross-respondent (carrier) timely contested compensability; and whether the claimant timely notified the employer, and, if not, whether employer or carrier had knowledge and/or did not contest the claim. The hearing officer determined that claimant did not make an election of remedies, that carrier timely contested compensability, and that the claimant's injuries of _____, were timely reported. The hearing officer also determined the claimant sustained a compensable injury; the fact that the injury was sustained while the claimant was in the course and scope of his employment not being in dispute. The carrier appeals the hearing officer's determination that the claimant did not make an election of remedies urging that the determination was against the great weight of the evidence constituting manifest injustice. The carrier also appeals the determination that timely notice of injury was given arguing that under the circumstances of this case, as a matter of law, timely notice was not given. Claimant appeals the determination that carrier timely disputed the compensability of the claim urging that the determination is against the great weight and preponderance of the evidence and incorrectly interprets and applies the law. Both parties filed responses to the other's appeal that essentially support the determinations of the hearing officer on the particular issue appealed.

DECISION

Affirmed.

The claimant, the president and CEO of employer, was very seriously injured (head injuries, broken collarbone and arm, collapsed lungs, multiple fractures below the knees and at the ankles) when the aircraft he was piloting crashed on _____, while on a business trip. The carrier provided workers' compensation coverage for the employer (claimant stated there were 77 employees at the time of the accident) on that date. The claimant was initially treated on an emergency basis near the crash area in (State 1) and was subsequently transferred to a (City 1), Texas, hospital. Because the only treatment offered in City 1 included amputation of one or both of his legs, he subsequently transferred to a specialist in (City 2), (State 2), where his legs were saved through multiple surgeries. In evidence was a December 10, 1998, form which indicates the claimant will be financially responsible for any charges not covered by his group health provider, which claimant stated was required to be signed before any services would be rendered. His medical bills, or at least part of them, were paid for by his group health insurance provider until he transferred to (City 2) when payment was then denied, apparently for not getting proper prior approval. Claimant stated he was under very heavy medication and that he does not know how the hospital in City 1 obtained his group health carrier. He stated that he talked to the agent, Mr. T, who sold him the workers' compensation policy in February, and Mr. T faxed him a

Employer's First Report of Injury or Illness (TWCC-1) form, which he filed with the carrier on February 16, 1999. Claimant testified that he never represented that his injury was other than work related to anyone; that he never had any experience with workers' compensation, reporting injuries or filling out forms; and that he never intended to waive any rights to workers' compensation benefits. Carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on April 15, 1999, disputing compensation.

Mr. T testified that he talked to Mr. R on or about December 4, 1998, and was told of the crash. Claimant stated that Mr. R was not an employee of employer but was rather a contract comptroller. In an interview, Mr. T stated Mr. R discussed the accident and the status of a passenger in the aircraft who was apparently an independent contractor. Mr. T stated he was an agent for the carrier for the purposes set out in an agreement between Mr. T's insurance agency and the carrier; that he recommended to Mr. R that they either file a workers' compensation claim or seek legal counsel. He stated he faxed a TWCC-1 at the time. He also stated that he talked with the claimant in late January or early February and advised him to either file a claim or seek legal counsel. He stated he never reported his conversations or the accident matter to the carrier because it was not his responsibility, that the responsibility for filing a claim lies with the employer.

A Preferred Agency Agreement between Mr. T's agency and the carrier was in evidence and set forth generally the authority granted Mr. T's agency to basically solicit, execute, bind, cancel, and service insurance policies and collect premiums. It does not provide for claims handling or adjudication, or services or responsibilities of that nature. Under a section entitled "Hold Harmless" the carrier agrees to hold harmless the agency for all claims, losses, damages, liabilities, etc. arising out of the relationship of the parties under the terms of the agreement and provides in the next paragraph that the agency will notify the carrier when they received notice of any claim or legal action, apparently relating to the hold harmless matters.

The hearing officer determined from the evidence presented that the claimant did not make an election of remedies, thereby foreclosing any entitlement to workers' compensation benefits. Whether a claimant has made an election of remedies in a given scenario is essentially a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993. The criteria for determining an issue of election of remedies is set forth in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) as follows: The election (1) must be an informed decision, (2) between two or more remedies, right or state of facts, (3) which are so inconsistent as to, (4) constitute a manifest injustice to a third party. We have addressed this very issue in several recent decisions and concluded that the demanding Bocanegra requirements were not met to bar workers' compensation benefits on the basis of an election of remedies. Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999; Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999. From our review of the evidence of record, we cannot conclude that the determination of the hearing officer on this issue was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain,

709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). In the final analysis, the evidence indicates that the employer, who was also the claimant here, as well as the president and CEO of employer, procured a workers' compensation policy; and presumably paid premiums for the coverage of the workers' compensation policy; the CEO was injured in the course and scope of his employment for which coverage the policy was procured; and now the employer seeks benefits under that policy.

As indicated, the hearing officer found that the carrier first received notice, which was written notice of the claimant, on February 16, 1999, and it timely contested compensability on April 15, 1999. In so holding, the hearing officer rejected the position advanced by the claimant that the carrier was provided notice on December 4, 1998, when Mr. R talked to Mr. T, the insurance agent. Mr. T denied the proposition that he was an agent for the carrier for purposes of notice of injury and/or of a claim for workers' compensation. Aside from the fact that there was no written notice until February 16, 1999, which triggers the carrier's requirement to initiate payments immediately and/or to dispute compensability within a 60-day period (Section 409.021(a) and (c)), the evidence did not support that Mr. T was an agent for the carrier for notice of injury/claim purposes or that he received appropriate notice on behalf of the carrier in December 1998. The hearing officer sets forth in his decision that the agency agreement did not, by its own terms, extend authority to Mr. T for purposes of receiving notices of workers' compensation injuries or claims. We do not find overwhelming evidence to the contrary and conclude there is no sound basis to disturb this determination of the hearing officer. Cain, *supra*; Pool, *supra*.

Carrier urges that under the circumstances of this case, that is, where the employer and the claimant are basically the same since the claimant was the president and CEO of employer, that the 30-day notice of injury provisions under Section 409.001 should be interpreted to require that the notice of injury be made by the claimant to the carrier within 30 days. Section 409.001 provides that an employee or person acting on his or her behalf notify the employer of an injury not later than the 30th day after the injury. Failure to provide notification relieves the employer and carrier from liability unless the employer, a person eligible to receive notice, or the carrier has actual knowledge of the injury, there is good cause for failure to timely notify, or the claim is not contested. The employer is required to notify the carrier within eight days of the notice of injury under penalty of an administrative violation. Section 409.005. Notice of injury to the employer here, or, in fact, actual knowledge of injury, was not seriously in question. Why a TWCC-1 was not filed by the employer until February 16, 1999, is not clear, although the carrier urges that the claimant had earlier made an election of remedies and only filed for workers' compensation when a dispute arose about medical coverage by the group health carrier. Nonetheless, and while other remedies may be provided, we cannot hold that Section 409.001 requires that a notice of injury be made to the carrier within 30 days when the injured employee and employer are virtually the same. We cannot read the specific and unambiguous language of Section 409.001 to say that under the circumstances of this case, notice of injury must be provided to the carrier, instead of the employer, within 30 days. Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Although we have not

specifically determined this precise issue advanced by carrier, we stated in Texas Workers' Compensation Commission Appeal No. 980112, decided March 3, 1998, a case involving a claimant who was the employer that "[w]e observe that there is no authority in the 1989 Act for the proposition that where the employer and the claimant are the same person a report must be filed with the carrier within 30 days of the injury, as the carrier contends." We adhere to that observation and reject the expanded reading of Section 409.001 advanced by the carrier on appeal.

For the reasons stated, the decision and order of the hearing officer are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Judy L. Stephens
Appeals Judge