APPEAL NO. 93618

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act). TEX. LAB. CODE ANN. § 401.001 *et seq.* On June 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) did not make an informed choice of remedies and was entitled to benefits under the 1989 Act. Appellant (carrier) asserts that claimant made an election of benefits which is an affirmative defense to the payment of benefits under the 1989 Act. Claimant replied that she did not know the areas covered by health insurance as opposed to workers' compensation.

DECISION

We affirm.

At the hearing the issues were stated to be: (1) whether claimant elected group health benefits instead of workers' compensation benefits, (2) was there a work related injury, (3) was the injury timely reported to the employer, (4) does claimant have disability, and (5) what is the average weekly wage. The parties agreed, however, that the only issue was whether claimant elected group health benefits instead of workers' compensation benefits. The hearing officer announced that since this issue involved an affirmative defense, the burden of proof was on the carrier.

Section 410.204 (a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

The carrier asserted on appeal that claimant made a valid election of benefits because the four criteria of Bocanegra v. Aetna Life Ins Co, 605 S.W.2d 848 (Tex. 1980) were met. In the alternative, carrier asserts that claimant harmed the group carrier and the workers' compensation carrier by the election resulting in the barring of her claim under "the exception to the usual Bocanegra test."

The Appeals Panel determines:

That the hearing officer did not err in finding that claimant was not aware of the consequences when she filed a claim for group benefits.

That the hearing officer did not err in finding that the carrier is not an injured party.

That no exception to the Bocanegra test has been found applicable by the appeals panel in determining whether an election of remedies has taken place.

The requirements set forth in Bocanegra for an election of remedies that may bar a claim are:
(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 carrier in its appeal cites Texas Workers' Compensation Commission (Commission) Appeal No. 93155, decided April 14, 1993, as allowing an election of remedies under the Bocanegra case. Carrier states that there are no material disputes as to the facts in the case on review. Claimant worked part time for a law firm. She was a receptionist; she took messages by hand and made entries in a computer. She had arm and wrist problems and went to see (Dr. A) on (date of injury). Claimant testified that Dr. A told her she had bilateral carpal and cubital tunnel syndrome. She also said Dr. A told her "that this was a work-related injury."

She departed his office and reported to her supervisor, (CB), the office manager of the law firm. CB testified that claimant came to the office after seeing Dr. A on (date of injury), and told her that Dr. A did not want her to work for 30 days, that her injury was from a repetitive motion. CB added that after claimant's appointment at the end of October with Dr. A, claimant told her that Dr. A said it was a work related injury, but that claimant also said she told Dr. A that she would "put this on her group medical, her husband's group medical, because she did not want to file a Workmen's Comp claim and have that on her record." CB said that she did not say anything one way or the other in regard to what should be filed when claimant told her this.

Claimant then testified that Dr. A told her the injury was work related on (date of injury), and she told CB of his opinion that same day. She made the decision about using group medical insurance before she reported her visit with Dr. A to CB. Claimant's decision to use group medical coverage was examined by the carrier:

Q.It seems apparent from what you've told us so far that you realized there was some difference between group health insurance and Workers' Compensation insurance at the time (Dr. A) told you you had a work-related injury. Do you agree with that?

A.No, I don't. I wasn't aware that there was any difference in Workers' Comp insurance versus my group health insurance.

Q.Well-

A.All I was--had said at that point in time is because I did not--all I knew about Workers' Comp is if you had a claim, you were scarred, and I did not

want that on my record. That is the reason why I chose to go with the group health.

Q.Well, let's explore that. Are you telling me that you did not know that there might be some differences about the extent of coverage that you would have under Workers' Compensation versus your husband's group health insurance?

A.That's correct.

Q.Did you understand generally that Workers' Compensation insurance was an insurance program available for people who got injured on the job? Did you realize that?

A.All I knew of Workers' Comp. insurance was that it was an insurance company and that it provided just the same as what my group health insurance provided. That is all I knew. That's all I was aware of.

Q.My question is: Did you realize that Workers' Compensation insurance was for work-related injuries?

A.Yes.

Q.Did you realize that group health insurance was for nonwork-related injuries?

A.No, I didn't.

Q.You had no idea of that?

A.No. I always had just group health insurance. Everything went on group health and --

Claimant agreed that there was no discussion with CB as to what the benefits were of either insurance. The carrier asked claimant:

Q.Did you open the phone book and look up Workers' Compensation Commission and give this office a call?

A.No, I did not.

Q.Did you agree that that--will you agree with me that that is something you very easily could have done?

A.Yes. I easily could have done it, but I had already heard these other rumors of what Workers' Comp was, I didn't want that.

Claimant testified that she learned of the benefits of workers' compensation after her health insurance would not pay for work hardening. She told her physical therapist that the health insurance would not pay for work hardening and that person, on December 29, 1992, told her that workers' compensation would cover all her work hardening and therapy. She went straight to the workers' compensation office that day and filed a claim, stating that the date of injury was (date of injury). She added that at the same time she filed a workers' compensation claim she told Dr. A's office of that fact. She agreed that after filing the workers' compensation claim, her husband's health insurance continued to pay various medical bills, including surgery to her right wrist and elbow on January 7, 1993. (She had also had surgery in November, 1992.) Claimant could not remember whether she called the health insurance company to tell them she had filed a workers' compensation claim. The carrier also asked claimant whether the workers' compensation carrier had any opportunity to investigate the injury between October 2nd and December 29th. The hearing officer questioned claimant about submission of bills to the health insurance company, developing the point that claimant did not submit each bill because the doctor's office did, marking the blocks relative to whether the injury was work related or not; claimant's signature was reported on each as "signature on file".

Carrier states that the facts of this case are comparable to (S) v. Home Indemnity Co, 683 S.W.2d 559 (Tex. App.-Fort Worth 1985, no writ). (S) did not report his injury to his employer within 30 days; 11 months after the event he filed a claim; and 13 months after the event he filed his notice of injury with the employer. In the trial court, the carrier's motion for summary judgment was granted, and the appellate court affirmed that judgment, pointing out that Mr. (S) never answered a request for admissions which were deemed admitted by the court. Pointing out Mr. (S)'s failure to comply with either notice in a timely manner, the court stated that Mr. (S)'s admissions satisfied the requirements for election set forth in Bocanegra. It then listed those admissions (set forth in substance, as follows):

Mr. S filed a claim for group insurance benefits;

Mr. (S) received both medical and disability benefits, including surgery, under the group insurance;

Mr. (S) knew at the time he applied for group insurance that those benefits were for non-work-related injuries. (Emphasis added)

Mr. (S) knew at the time he applied for group insurance that workers' compensation was for job-related injuries.

The appeals panel points out that the evidence in the case under review, admittedly with no material dispute as to the facts, is significantly different from the admissions listed by (S), which that case states are sufficient to satisfy Bocanegra. Claimant never admitted that she knew group insurance was for non work-related injuries at the time she applied for it.

More recently, Allstate Insurance Co. v. Perez, 783 S.W.2d 779 (Tex. App.-Corpus Christi 1990, no writ), stated that the carrier therein had used the wording in the findings in (S), supra, for its special issues. This court then determined that even by using (S) as guidance in this case there was no "issue of an informed choice, a key part of the Bocanegra requirements for establishing an election of remedies." This court also stated that since the cause of injury was uncertain at the time a claim was made, "the defense of election or remedies is not available in this case." Neither Perez nor (S) mentioned any exception to the Bocanegra requirements that, when applied, could place the claimant in the same position as if she had made an election of remedies.

The testimony of the claimant and the other evidence of record provide sufficient support for the finding of fact of the hearing officer that claimant was not aware of the consequences when she filed for group benefits. This finding and the evidence of record sufficiently support the conclusion of law that claimant did not make an informed choice when she elected to receive group benefits. The decision in the (S) case is distinguishable on its facts from the case on review.

Carrier also asserts that if an informed choice was not found to have been made, then the exception to Bocanegra's requirements allows a claim to be barred if "harm was caused to an innocent party." Carrier also cites Texas Workers' Compensation Commission Appeal No. 93225, decided May 12, 1993, for this principle.

The Bocanegra case examined many defenses to which election of remedies was "confused with or likened to" including judicial estoppel, equitable estoppel, ratification, waiver or satisfaction. The requirements set forth by Bocanegra were set forth earlier in this opinion and comprise four (4) elements. After these four elements were stated by the court to make up the election of remedies, the court then discussed inconsistent positions that do not constitute an election and rights or remedies that are unfounded before it discussed the first two (of four) requirements that were previously dealt with in assorted cases. In that context, Bocanegra mentioned that the informed choice had to refer to the problem, facts and remedies. It then said, "(a)n exception to that rule exists when the choice of a course of action, though made in ignorance of the facts, will cause harm to an innocent party." (The "rule" this last quotation alluded to was the rule immediately above it, describing prior treatment of what was to become the first two elements of the court's doctrine, not the Bocanegra requirements themselves.) We observe that the court in

Bocanegra chose to incorporate similar language involving choice, and to what the choice referred, into the requirements it specified, but did not choose to incorporate any exception into or in lieu of the four (4) requirements the court set forth and which have been quoted herein, *supra*.

Even if the exception provision were part of the test or could be used in lieu of the test, the cases quoted for the exception do not set forth broad principles. One involves a trust situation that will not be discussed, and the other, Employers' Indemnity Corp v. (F), 277 S.W. 376 (Tex. Com.-App 1925), dealt with a party, Mrs. (F), who had chosen to take action against a third party for her husband's death. Mrs. (F)'s case went to judgment which was rendered against her, so the court said to now allow her recovery against the workers' compensation carrier would deprive the carrier "of its valuable right of subrogation." The carrier in its appeal before us does not assert a lost right of subrogation, but says that because claimant did not file a claim when she knew she had a work-related injury, the carrier was deprived of an "opportunity to promptly investigate" the matter. The carrier does not say why it could not investigate based on claimant's notice to her employer given the same day she learned of the basis for the injury. Carrier also says that because medical care was provided elsewhere, it had no chance to have claimant examined prior to surgery. While the latter assertion is not insignificant, we would point out that claimant's notice was not only timely to the employer, but was without any delay, and claimant filed a claim within three months when she had no obligation to file the claim prior to one year. Once notice to the employer was given, nothing in the 1989 Act would preclude the carrier from requesting the injured party to submit to examination, even prior to filing of a claim, to protect its interest. In any event, Section 408.004 of the 1989 Act requires the carrier to first ask the claimant before the Commission may require the claimant to be examined. No assertion was made that claimant would not cooperate.

The evidence, in the form of assertions, on behalf of the carrier in regard to the injury it sustained does not rise to a level sufficient to conclude that the hearing officer's finding of fact that the carrier is not an injured party is against the great weight and preponderance of the evidence.

Carrier pointed out that Appeal No. 93225, *supra*, contained language from Bocanegra that indicated the Appeals Panel had recognized an exception to the four (4) requirements in Bocanegra. Appeal No. 93225 did refer to the language used by the court in developing the choice and areas of choice elements, later used as two of the four requirements in the test, and the fact that an exception had been formulated as to those two points. Appeal No. 93225 did not add that language to the test which it quoted as containing the same four (4) requirements as were set forth in Bocanegra. In addition, there was no issue in Appeal No. 93225 as to an exception to the test, so any comment regarding an exception would not provide the guidance that a similar comment would when necessary to determine the case. The appeals panel has not found an exception to the four (4)

requirements of Bocanegra applicable to questions of election of remedies.

The decision and order of the hearing officer are supported by sufficient evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge