APPEAL NO. 980024

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 December 3, 1997. With respect to the only issue before her, the hearing officer determined that claimant was not barred from pursuing workers' compensation benefits as claimant had not made an election to receive benefits under a group health insurance policy.

Carrier appeals, reciting facts favorable to its contention, and Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant urges affirmance.

DECISION

Affirmed.

The facts are not in dispute. Claimant is a 39-year-old commercial construction superintendent who had had two minor no lost time workers' compensation claims in the past. Claimant testified how he suffered a low-back lifting injury on _____ (the parties stipulated that claimant had sustained a work-related injury on that date). Claimant testified that after the injury he secured the site and went to the employer's office to report the injury. Claimant testified that he reported a work-related injury, completed the top portion of an Employer's First Report of Injury or Illness (TWCC-1) and told the employer's president that he was going to his family doctor who practiced at a clinic near his home where his wife worked so that it would not cost him or the employer any money. Claimant also testified and is supported by the employer's statement that he told the employer's president "that if [the injury] turned out to be more serious than a muscle strain that he would want to file a claim on workers' comp."

Claimant was seen at a medical association clinic (clinic) on _____, assessed as having "lower back pain, muscular strain" and given a prescription for muscle relaxants and anti-inflammatories. The office visit was apparently billed under his wife's group health plan and claimant said he paid a five dollar co-pay for the prescriptions. X-rays were taken which indicated a normal lumbosacral spine. Claimant testified that he returned to work the following day but over the next few weeks continued to be bothered by back pain. Claimant returned to the clinic on November 4, 1996, continuing to complain of back pain with the doctor having an impression of "early right sciatica," however, a CT scan was ordered. A CT scan of the lower lumbar spine performed on December 2, 1996, had an impression of "small left-sided postero-lateral herniated disk at L5 is suspected." Claimant testified that the doctor advised him that he had a back strain/sprain because claimant had pain in the right side and the suspected disc was on the left. Claimant continued working and continued having back pain. Finally on July 22, 1997, a lumbosacral MRI was performed.

(Claimant had not seen a doctor since the December 1996 CT scan and it was unclear how the MRI came to be ordered.) The MRI revealed a "focal protrusion in the far lateral right neural foramen causing compromise or [sic] the exiting nerve root and severe stenosis of the neural canal." Claimant testified, and the employer's statement supports, that claimant notified the employer that his injury was much more severe than he had first thought and that he wanted to pursue his workers' compensation claim on July 29, 1997. The employer completed the bottom portion of the TWCC-1 that claimant had completed in September 1996 and sent it to the carrier. Carrier on a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated August 4, 1997, denied benefits based on an election of remedies citing Appeal No. 962512, *supra*, and Texas Workers' Compensation Commission Appeal No. 970314, decided April 4, 1997.

The hearing officer, in her discussion, commented:

> The evidence showed that Claimant did initially choose his wife's group health insurance for coverage of a work-related complaint. Claimant's intentions were to alleviate himself and Employer from having to pay for the treatment, particularly if it turned out to be trivial. Essentially, while claimant's intentions were less than honorable, Claimant's intentions and acts are not tantamount to Claimant having made an informed election between two remedies which are inconsistent as to constitute manifest injustice.

Carrier appeals the following factual determinations:

FINDINGS OF FACT

2. Claimant knew on _____ that he sustained a work-related injury before seeking medical treatment, that same day, with his wife's group health insurance. Claimant was not aware of the consequences when he used his wife's group health insurance.

6. Claimant's initial use of group health insurance did not cause harm to the Carrier.

7. Claimant's choice to use group health insurance versus workers' compensation benefits was not made with a full and clear understanding of the problem, facts, and remedies "essential to the exercise of an intelligent choice."

We would only disagree with the hearing officer's language when she characterizes the claimant's intentions as less Athan honorable." Claimant at the CCH, and in his response on appeal, refers to Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) as the defining Texas Supreme Court case on the election of remedies doctrine. Bocanegra is also cited in Texas General Indemnity Company v. Hearn, 830

S.W.2d 257 (Tex. App.-Beaumont 1992, no writ) which stated that "[i]n order for the election of remedies doctrine to apply as a bar to the relief sought, it must be affirmatively shown that (1) one has successfully exercised 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." *See also* Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995, and the other cases cited therein, also cited by claimant at the CCH.

Carrier cites Appeal No. 962512, *supra*, as a case having very similar facts to the instant case, referencing that in both cases the claimant was a supervisor who knew the difference between workers' compensation benefits and group health care coverage. Carrier argues that in Appeal No. 962512 the employee did not pursue workers' compensation benefits "because it was discouraged by his employer" and in the instant case "to avoid liability for Claimant and Employer." First, we distinguish Appeal No. 962512 as a case having multiple issues and that the election of remedies issue was only superficially addressed. The critical distinction we make here is that based on claimant's testimony and the employer's statement it is questionable that claimant ever made an election at all when claimant said that if the injury "turned out to be more serious than a muscle strain he would want to file a claim on workers' comp." It would seem to us that what claimant was doing was deferring a decision on the election, or reserving his option to pursue his workers' compensation claim until such a time as he knew the full extent of his injury. We know of no requirement that claimant must pursue his claim, or make an election of remedies, within any given time frame after giving timely notice and within one year of the date of injury.

We believe that none of the tests set out in Bocanegra, *supra*, and Hearn, *supra*, to have an election of remedies have been met in that of claimant's undisputed statements to the employer would indicate that no choice was made, there was not necessarily a choice between two inconsistent remedies and certainly the result does not constitute a manifest injustice. As the hearing officer notes, claimant's use of his wife's group health plan has not harmed carrier, nor for that matter provided claimant with some dual inconsistent recovery.

The Appeals Panel has on occasion noted language from Hearn that states that the election of remedies doctrine is not viewed with judicial favor. Appeal No. 950636, *supra*. Certainly this is not such a case which would require us to bar claimant from all benefits because he sought to benefit his employer by deferring his workers' compensation claim until he knew the full extent of his injury. Further, we find no merit in carrier's contention as a defense that ignorance by the claimant of knowing the legal consequence of using his wife's group health plan precludes claimant from later exercising his options. The mere fact that claimant chose to use his wife's group health plan, or for that matter, pay for minor medical expenses, or treat himself with home remedies, does not necessarily constitute an election of remedies. One must look to the entire circumstances of the situation in order to determine whether the injured employee made a conscious, informed decision to pursue one set of benefits to the exclusion of another inconsistent set of benefits. We are satisfied that there is sufficient evidence to support the hearing officer's decision.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find so and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I agree with the decision of the majority in this case and only write separately to express some dismay concerning the carrier's reading of Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997. The carrier appears to contend that under that decision an election of remedies can be inferred from the fact that an injured worker is a supervisor who knows of the existence of both group health and workers' compensation coverage and files medical bills under group health coverage. I do not believe that this proposition is legally correct. I admit that it is difficult to decipher the rationale of Appeal No. 962512 regarding election of remedies based upon what the majority kindly refers to as its "superficial" rendition of the facts on this issue. I would note that the only legal precedent that Appeal No. 962512 cites in regard to election of remedies is Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1994, a case in which I joined in the majority and in which the claimant explicitly stated in his own testimony that he elected to use his group medical insurance rather than filing under workers' compensation for his own convenience when he was well aware of the existence of and difference between these remedies. That is a far cry from the facts of the present case. While such explicit statements are not cited in the opinion in Appeal No. 962512, *supra*, I cannot understand its reliance upon Appeal No. 950636, *supra*, absent such evidence. In my view such evidence must have existed in Appeal No. 962512, *supra,* or it was wrongly decided. I therefore presume such evidence must have existed in the record of Appeal No. 962512 and was inadvertently not mentioned in the opinion, which as the majority points out addresses a number of issues. Only by reading Appeal No. 962512, *supra*, in this way can I square it with the decision of the Supreme Court of Texas in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) and with our

own prior jurisprudence in the election of remedies area. Read in this way Appeal No. 962512 clearly is not controlling in the present case as there is no testimony from the claimant himself in the present case that establishes that he made a knowing waiver. This is also consistent with the fact that we have never applied Appeal No. 962512 in any later case for the proposition that an election of remedies may be inferred from the fact that the injured worker is a supervisor who knows of the existence of both group health and workers' compensation coverage and files medical bills on group health coverage.

Gary L. Kilgore
Appeals Judge