APPEAL NO. 980187
FILED MARCH 17, 1998

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 December 29, 1997. The hearing officer determined that respondent (claimant) sustained a compensable injury to her back on _____, and had a certain period of disability. Those determinations have not been appealed and have become final pursuant to Section 410.169 and will not be discussed further. With respect to the sole appealed issue, the hearing officer determined that claimant was not barred from pursuing workers' compensation benefits under the election of remedies doctrine by receiving (medical) benefits from her group health carrier.

The appellant (worker's compensation carrier) referred to simply as carrier, appealed citing Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980); Smith v. Home Indemnity Co., 683 S.W.2d 559 (Tex. App.-Ft. Worth 1985, no writ); and Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995. Carrier contends that claimant made an election of remedies by filing for medical benefits under a group health plan and requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant testified through a translator that she was a (sewing) machine operator at employer's garment manufacturing plant (employer); that on _____, she began to feel some pain in her back; that she went to her family doctor; that she was eventually referred to a specialist; and that she did not know the cause of her pain until employer's nurse accompanied her to the specialist's office and the nurse showed the doctor a video of claimant's work. Claimant said that the doctor, after seeing the video, was of the opinion that claimant had sustained a work-related repetitive trauma injury. Claimant reported the injury to the employer as a workers' compensation injury but carrier apparently denied the claim.

An MRI dated July 10, 1997, indicated that claimant had a "prominent HNP L4/5 in a right paracentral location with free fragment extrusion." Claimant testified that both her treating doctor, (Dr. G), and the referral specialist surgeon, (Dr. S), told her that she needed immediate surgery, because of the fragment, or she might suffer permanent paralysis. A note dated July 23, 1997, from Dr. G states "[n]eeds surgery ASAP - HNP - free fragment. Work related." Claimant testified that the carrier continued to deny the claim and that the employer and Dr. S told her that she could file for medical benefits for her surgery under her group health plan and that one insurance company would merely reimburse the other company, if necessary. Claimant had spinal surgery on August 27, 1997. Carrier had

continued to deny the claim on the basis of noncompensable injury, through the CCH on December 29, 1997.

As previously noted the hearing officer determined that claimant "did not intend to preclude receipt of workers' compensation benefits when she proceeded under her group health insurance policy." Carrier appealed citing Bocanegra, *supra*, Smith, *supra*, and Appeal No. 950636, *supra*. Carrier argues that claimant admitted that she knew the difference between workers' compensation insurance, and that it (workers' compensation insurance) was for work-related injuries, and group health insurance covered non-work-related injuries. Carrier contends that filing for group health benefits and thinking "one company would reimburse the other" made this case "directly on point with Appeal No. 950636," *supra*. We could not disagree more. The key distinction in this case is that carrier denied liability and refused medical benefits when claimant filed under workers' compensation. Claimant's doctors told her she needed surgery "ASAP" or she would risk paralysis. It is a completely disingenuous argument by carrier to say that claimant's attempts, at the urging of her doctors, to obtain near emergency medical care after carrier denied those benefits, amounted to an election of remedies. We categorically reject that argument.

The Appeals Panel, as noted by carrier, has followed Bocanegra, *supra*, which in our opinion is the defining 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. 980024, decided February 12, 1998, and the other cases cited therein. We distinguish Appeal No. 950636, *supra*, a case 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. This case perhaps has more similarity to Appeal No. 980024, *supra*, where the claimant, in that case, having sustained what he believed was a minor work injury told the employer he would go to the medical clinic where his wife worked and would use his group health, but "if the injury turned out to be more serious than a muscle strain he would want to file a claim on workers' comp." In that case, we held that the claimant had not made a decision or election at all and that he was reserving his option to pursue his workers' compensation claim until he knew the full extent of his injury. Similarly in this case, claimant has not made an election of remedies at all, but merely sought to have her medical expenses covered for necessary medical care. In Appeal No. 950636, *supra*, the claimant was given an option of proceeding under workers' compensation which might take longer or to go under his group health which allowed a more convenient time frame. Claimant in this case, was never assured that she would ever be offered the surgery because carrier was denying the claim. Claimant was not given a choice of two remedies and never made an election, she merely proceeded with the only

avenue available to her at the time which allowed timely medical care. Further, she was urged in this course by her doctors, and according to claimant's testimony, the employer. There was no choice, claimant had only the group health coverage available because carrier had denied coverage; claimant's selecting the group health plan under these circumstances is not inconsistent with pursuing her workers' compensation claim and certainly there has not been a "manifest injustice" to the carrier.

Upon review of the record we find no error, and accordingly affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge