APPEAL NO. 002763

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 18, 2000. The issues before the hearing officer were injury, election of remedies, carrier waiver and disability. The hearing officer found that the appellant (claimant herein) suffered an injury which prevented her from working for periods of time, but he found this injury not to be compensable and that the claimant did not have disability because the claimant was barred from pursuing workers' compensation benefits because she elected to receive benefits under a group health insurance program. The hearing officer also found that the respondent (self-insured herein) had not waived its right to dispute the compensability of the claim. The claimant challenges the hearing officer's resolution of the election-of-remedies, injury, disability and carrier waiver issues. The self-insured's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Reversed and rendered.

Not appealed are findings that the claimant was injured at work over a three-day period from _____ through _____; that from _____ through _____, she was performing repetitive traumatic activities at work; that she knew on _____, that her job caused the injury; and that there is a causal relationship between her current lumbar problems and her work activity between _____ and _____.

With regard to the carrier waiver issue, the claimant disputes the finding that the self-insured properly and timely disputed the claim pursuant to Section 409.021, relying solely on Downs v. Continental Casualty Company, 32 S.W.3d 260 (Tex. App.-San Antonio 2000, pet. filed) (hereinafter Downs). In Downs, the Fourth Court of Appeals issued a decision on rehearing again determining that a carrier waives the right to contest compensability if it fails to either agree to begin payment of benefits or provide written notice of its refusal to pay within seven days after it receives written notice of an injury. On August 28, 2000, the Executive Director of the Texas Workers' Compensation Commission (Commission), issued Advisory 2000-07 acknowledging the Court of Appeals decision on rehearing in Downs. However, the advisory states that the "August 16th decision in the *Downs* case should not be considered as precedent at least until it becomes final upon completion of the judicial process." In addition, the Director of the Hearings Division has informed the Hearings Division that the Commission's position is that a carrier has 60 days to contest compensability and that Hearings staff are to follow the Commission's position statewide pending final resolution of Downs. The Director of Hearings reissued this directive following the issuance of the decision on rehearing in Downs. Based on these directives, the hearing officer did not err in determining that the self-insured did not waive its right to contest compensability by not initiating benefits or filing its dispute within seven days of receiving notice of injury.

Concerning the election-of-remedies issue, the claimant testified that she has been employed in the employer's plant as a machinist for over 18 years; that her work involves much bending and lifting of the steel parts she machines; that during the _____ to __, ____, period when she worked three 12-hour shifts, she bent over and lifted 30-pound castings to machine and during that three-day period, she lifted approximately 6,000 to 8,000 pounds per shift; and that she developed low back pain which radiated into her right hip and down her right leg. She said that after an epidural steroid injection (ESI) failed to provide lasting relief and testing revealed that she had a ruptured lumbar disc, she underwent lumbar spine surgery on July 24, 1999; and that she filed her medical bills with her group health insurance carrier and also applied for short-term disability benefits. The claimant further testified that on July 12, 1999, she told her boss, Mr. M, that her back had been hurting since _____, from lifting parts and that she would be off work for medical treatment, which included a series of three ESIs. She also said that on July 26, 1999, she told the employer's nurse, Ms. B, that she had injured her back lifting parts and had undergone surgery; that she needed help with her medical expenses and felt the employer was "partly at fault" for not obtaining a hoist that had been requested and that she "should get some kind of comp"; that Ms. B helped her contact an adjusting company and said "it would go back to the 1994 injury"; and that she and the adjusting company "went back and forth for a couple of weeks." She stated that in the late September/early October 1999 period her back symptoms increased; that she tried to work for one and one-half days but could not stand it; that another doctor took her off work again; that three ESIs in December 1999 failed to provide relief; that diagnostic testing on January 31, 2000, revealed that the operated disc had re-ruptured; that her current surgeon performed another operation on the disc on March 29, 2000; that additional testing has shown that the disc at the level above has ruptured; and that her surgeon has said that she may need a lumbar spine fusion procedure.

The claimant further testified that she sustained a low back injury at work in 1994 which did not require surgery but which caused her to miss several weeks of work; and that the human resources manager, Mr. B, then threatened her with termination if she had any more problems with her back. Asked exactly what Mr. B had said, she replied: "He said that it was a very thinly-held threat, that if I had any more trouble with my back, that I may not have a job there very long." The claimant stated that on two occasions following her 1994 injury, and before the injury which we here consider, she had to take off work on two occasions for back treatment after lifting incidents at work and did not seek further workers' compensation benefits but filed with her group health insurance carrier instead because she feared she would be fired. She further stated that although she realized that the injury she sustained from the repetitive bending and the lifting of thousands of 30-pound castings during the _____ through _____, period was caused by her work, she again filed with her group health insurance carrier and also filed for short-term disability insurance benefits because she feared she would lose her job if she filed for workers' compensation benefits. Asked on cross-examination about having made her decision to place her treatment under her group health insurance plan because of a comment she "felt was threatening," the claimant responded, "I didn't feel it was threatening, it was threatening" and that "I was afraid I was going to get fired if I put it on workers comp." She also stated

on cross-examination that no second-opinion process was required for the two operations she underwent following her _____, injury and she acknowledged not yet having suffered any adverse employment consequences as a result of her first workers' compensation claim.

The claimant challenges findings that she made an informed decision to pursue group insurance benefits as opposed to workers' compensation benefits; that she knew the difference between workers' compensation and group insurance; that she was not persuaded by the self-insured to file a group claim as opposed to a workers' compensation claim; and that her conscious, informed decision to pursue group insurance compromised the self-insured's rights under the 1989 Act.

In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) (hereinafter Bocanegra), the Texas Supreme Court stated that the election of one legal remedy may constitute a bar to relief under another remedy "when (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 Court stated that the choice of remedies, rights, or states of facts must be "made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice." As far as election of remedies is concerned, we have held that to prove or establish an election of remedies all four prongs of the disjunctive test set out by the Texas Supreme Court in Bocanegra must be met. *See* Texas Workers' Compensation Commission Appeal No. 980898, decided June 17, 1998. Further, election of remedies is an affirmative defense. Allstate Insurance Co. v. Perez, 783 S.W.2d 779 (Tex. App.-Corpus Christi 1990, no writ). As such, the burden is on the self-insured to prove each of the four prongs of the Bocanegra test.

In the present case, the self-insured fails to prove that the third and fourth prongs were met. Filing for group medical benefits is not inherently inconsistent with filing for workers' compensation benefits. This is particularly the case when workers' compensation benefits are denied. It is true that in the present case the claimant filed for group medical benefits prior to filing for workers' compensation benefits. However, once the claimant did file for workers' compensation benefits, the self-insured denied such benefits not solely on the grounds that the claimant had made an election of remedies but on the grounds that the claimant was not injured on the job and that her condition was not work-related. Under these circumstances, the claimant's pursuit of group insurance benefits was not inconsistent with pursuing a claim for workers' compensation benefits because workers' compensation benefits were not available to the claimant until the question of whether she was injured on the job was resolved. This question was not resolved until the hearing officer's determination that the claimant's lumbar problems were work-related became final pursuant to Section 410.169 when his findings on this issue were not appealed from the CCH under review. Prior to this time, pursuing group benefits and workers' compensation benefits were not mutually exclusive remedies. It is the pursuit of a mutually exclusive remedy that would be a basis for finding remedies inconsistent. Medina v. Herrera, 927

S.W.2d 597 (Tex. 1996). Thus the self-insured has failed to prove that the claimant pursued inconsistent remedies, failing to establish the third prong of Bocanegra.

The self-insured also did not prove the fourth prong of Bocanegra. It argued that manifest injustice resulted from its inability to challenge the claimant's need for surgery under the spinal surgery process pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206). The self-insured, however, was prevented from pursuing this process as much from its denial of a work-related injury as any action by the claimant. Under these circumstances, the self-insured has simply failed to establish manifest injustice. Because the self-insured failed to establish all four of the disjunctive prongs of Bocanegra, we reverse the decision of the hearing officer and render a decision that the claimant did not make an election of remedies.

Based upon unappealed factual findings of the hearing officer that the claimant was injured at work and that as a result she was unable to work because of this injury from _____ through January 5, 2000, and again from January 9, 2000, to the date of the CCH, we reverse the decision of the hearing officer and render a decision that the claimant suffered a compensable injury and had disability from _____, through January 5, 2000, and from January 9, 2000, continuing through the date of the CCH. We order the carrier to pay workers' compensation benefits, including statutory interest, based upon our decision.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent because in my view the majority's reversal of the hearing officer's determination of the election of remedies issue does violence to both the facts and the law in this case.

The election of remedies doctrine is an affirmative defense. Allstate Insurance Company v. Perez, 783 S.W.2d 779 (Tex. App.-Corpus Christi 1990, no writ). "Even though the election of remedies doctrine is not viewed with judicial favor [citations omitted],

it is nevertheless a viable defense when properly pleaded and affirmatively proven." Texas General Indemnity Company v. Hearn, 830 S.W.2d 257 (Tex. App.-Beaumont 1992, no writ). The Appeals Panel has recognized that this defense may be raised in the dispute of claims under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the majority opinion observes, the court in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) (hereinafter Bocanegra), set out four elements which the carrier must establish in order to prevail with this affirmative defense and the Appeals Panel has recognized that those elements must be established for a carrier to prevail. Texas Workers' Compensation Commission Appeal No. 93618, decided September 7, 1993. Given that the election-of-remedies defense is not a favored doctrine and that carriers who raise this defense have the burden of proof, the Appeals Panel has had frequent occasion to affirm decisions of hearing officers who found that claimants had not made an election of the remedy of group or private health insurance (cases which sometimes also involve short-term disability benefits). *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 94052, decided February 28, 1994, and cases cited therein. However, the Appeals Panel has also had occasion to affirm decisions of hearing officers who found that carriers had indeed met their burden of proof and that the claimants in those cases had elected their remedy or right to pursue health insurance benefits in lieu of workers' compensation benefits. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 970314, decided April 4, 1997; Texas Workers' Compensation Commission Appeal No. 980577, decided May 7, 1998; Texas Workers' Compensation Commission Appeal No. 980898, decided June 17, 1998; and Texas Workers' Compensation Commission Appeal No. 991403, decided August 16, 1999 (Unpublished). In the latter case, the claimant understood that workers' compensation insurance was for work-related conditions but went ahead with spinal surgery using his group health insurance because he did not want the surgery delayed for procedures and approvals involved with using workers' compensation insurance. The Appeals Panel has also had occasion to reverse hearing officer determinations that claimants had not made an election of remedies and render new decisions that they had. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995; and Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997.

In Smith v. Home Indemnity Company, 683 S.W.2d 559 (Tex. App.-Fort Worth 1985, no writ), the court affirmed a summary judgment for the insurer where the employee, who filed claims for workers' compensation benefits for work-related bilateral foot injuries after having first pursued treatment including foot surgery, admitted he understood the difference between the coverage of his group health and disability insurance and the workers' compensation insurance. The court found that the employee's admissions that he filed a claim for group insurance benefits, received medical and disability benefits including surgery, and knew when he applied for group insurance benefits that those benefits were for nonwork-related injuries while workers' compensation benefits are for job-related injuries, "satisfy the requirements of the election of inconsistent remedies enunciated in Bocanegra." Unlike certain recent Appeals Panel decisions, *see* Texas Workers' Compensation Commission Appeal No. 001321, decided July 26, 2000, and

cases cited therein, the court did not specifically address the "manifest injustice" factor let alone attempt to isolate it from the other factors. The court went on to state the following:

> We fail to see how there could be a clearer case of election of remedies, or rights, or states of facts than exists in this case. If this summary judgement proof does not bar a later claim for workers' compensation after an earlier filing under a group insurance policy, on the theory of an election, then there can be no election of remedies, rights, or states of fact in this type of case. *See Bocanegra*, 605 S.W.2d at 851, 852. Under the proof in this record . . . we hold that Smith made a successful, informed choice between two or more remedies, rights, or states of fact which was so inconsistent as to constitute manifest injustice. One cannot eat his cake and have it too.

Notwithstanding the evidence that the claimant had previously pursued and received workers' compensation benefits for a prior injury with the same employer and knew the basic difference between the coverage of her group health insurance and the employer's workers' compensation insurance, and that she obtained treatment under her group health insurance including two spinal operations without having to have those operations vetted through the Texas Workers' Compensation Commission's (Commission) spinal surgery process involving second opinions and Commission approval, the majority opinion states that the self-insured failed to prove the third and fourth prongs of Bocanegra and hold that the hearing officer's determination to the contrary is against the great weight of the evidence. In my opinion, the majority plainly err and impermissibly take the fact-finding call away from the hearing officer.

The majority further state, with no citation to authority, that "filing for group medical benefits is not inherently inconsistent with filing for workers' compensation benefits." However, the unrefuted evidence in this case shows that the claimant did far more than simply "file" for benefits. She received group health insurance medical benefits over a substantial period of time including two spinal operations for which she did not have to seek approval from the Commission.

The majority further state that the claimant's pursuit of group health insurance benefits was not inconsistent with her pursuit of workers' compensation benefits because when she did finally file a workers' compensation claim, the self-insured not only raised the defense of election of remedies but also denied the claim on the merits of its being job-related, and thus workers' compensation benefits were not available to the claimant until the issue of whether she was injured on the job was resolved. This contention is patently untenable because the claimant knew from her prior experience that workers' compensation benefits were available for her claimed injury and yet knowingly opted to pursue group health insurance benefits, which included two spinal operations, because she feared another workers' compensation claim would put her job in jeopardy.

Finally, the majority appear to contend, at least by implication, that a workers' compensation carrier can never prevail with the affirmative defense of election of remedies if it also defends the claim on other grounds, and that a carrier can only succeed with such defense if it waives all other potential defenses including compensability of the injury. I would only note the absence in the majority's decision of any legal authority whatsoever for this novel proposition. In my view, the majority opinion invade the fact-finding province of the hearing officer; trample on the legal rights of the self-insured, a party; ignore the evidence which is largely undisputed; and misconstrue and misapply the applicable law. I would affirm.

Philip F. O'Neill
Appeals Judge