APPEAL NO. 011067
FILED JUNE 20, 2001

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 May 1, 2001. With regard to the issues before him, the hearing officer determined that the appellant's (claimant) compensable feet and legs injury did not extend to or include a low back injury, and that the claimant was barred from pursuing Texas workers' compensation benefits because he had made an election of remedies. The claimant appealed both decisions, apparently on a sufficiency of the evidence theory. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant was employed as a "sheet metal man" when, on _____, as he was standing on a forklift-mounted pallet which dropped some distance to the floor, he sustained a compensable injury. The carrier accepted an injury to the claimant's feet and legs. The claimant testified that he did not notice the injury to his low back until about a month later after he was released to return to work for his foot and leg injury. He continued to work and did not arguably seek treatment for his back until July 6, 1999, when he went to an emergency room (ER) for pain in his hips. The claimant was subsequently diagnosed with "a neuroma or subneuroma" of the lumbar spine.

Extent of an injury is a question of fact to be resolved by the fact finder. Here, the medical evidence showed that the claimant did not complain of a back problem until several months after his initial fall. The hearing officer weighed the credibility of the evidence, and his determination on this issue is not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer's decision on this issue is affirmed.

On the election of remedies issue, after the claimant sustained his injury, the employer took the claimant to a doctor. There was documentary evidence that the employer gave instructions to the doctor's office to bill the company directly and that they would not be filing a workers' compensation claim. The claimant visited this doctor three more times, and was released back to full duty in May 1999. Mr. V, the employer's owner, testified that he paid the three doctor bills and the claimant's salary during the time the claimant was off work. On July 6, 1999, the claimant awoke with the pain in his hips. After visiting the ER and his family doctor, and being referred to an orthopedic surgeon, it was indicated that he would need lower back surgery. The medical records were confusing as to what exactly the problem was; whether the claimant merely had a spinal tumor or additional spinal problems. On September 7, 1999, the claimant visited the employer to attempt to get workers' compensation help for the upcoming surgery, on the basis that it resulted from the _____ injury. The claimant testified that he had paid his interim

medical bills through his wife's group health policy. His testimony was supported by the uncontroverted evidence that the employer did not file an Employer's First Report of Injury or Illness (TWCC-1) until after the September conversation between the employer and the claimant. The TWCC-1 stated that there was no lost time for the claimant; and the origin, date, and time of the accident were unknown.

On election of remedies, the Appeals Panel has cited the Texas Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), as establishing the standard. In Bocanegra the court stated that the election of remedies doctrine may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice. The carrier has the burden of proving an effective election of remedies, and whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Critical to a finding of an election of remedies is the determination that the election of a nonworkers' compensation remedy was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. Further, in Texas Workers' Compensation Commission Appeal No. 000115, decided March 3, 2000, the Appeals Panel discussed the manifest injustice provision. It also appears that the employer had not even filed its TWCC-1 while the claimant was receiving the group health benefits. In any event, we hold that the determination that the claimant exercised an informed choice between two inconsistent remedies is so against the great weight and preponderance of the evidence as to require reversal. We render a new decision that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy. This reversal, however, does not change the ultimate disposition of the case, being that the claimant is not entitled to workers' compensation benefits for his lower back. *See* Texas Workers' Compensation Appeal No. 002039, decided October 12, 2000.

Accordingly, the hearing officer's decision and order are affirmed on the extent of injury issue and we reverse the hearing officer's decision on the election of remedies issue

and render a new decision that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health policy.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

In Texas Workers' Compensation Commission Appeal No. 001321, decided July 26, 2000, I expressed my views on the viability of the defense of election of remedies. I feel that my concurring opinion in that case is applicable to this case and I set it out below.

> Given the lack of evidence going towards all of the criteria in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), I concur in the result. However, I write separately to state that I do not regard it to be settled as a matter of law (recent decisions by the majority and several other of my colleagues could give rise to that impression) that the defense of election of remedies can never be made out in the situation where a claimant has first pursued health insurance benefits and later pursued workers' compensation benefits because there can never be a "manifest injustice." My colleagues' decisions seem to assume that there can be no "manifest injustice" to a health insurance carrier who has paid medical benefits for a compensable injury because such carrier has received premiums and will inevitably be able to successfully pursue a subrogation claim against the workers' compensation carrier for medical benefits paid. My colleagues, in this and other recent decisions, seem to focus exclusively on the "manifest injustice" criterion in Bocanegra to the virtual exclusion of the other criteria.
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> As the court stated in Texas General Indemnity Company v. Hearn, 830 S.W.2d 257 (Tex. App.-Beaumont 1992, no writ), a case involving workers' compensation insurance and health insurance, "[e]ven 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

proved. [Citations omitted.]" I observe that this is a post-1989 Act decision. The post-Bocanegra decisions in Overstreet v. Home Indemnity Company, 669 S. W. 2d 825 (Tex. App.-Dallas 1984), rev'd, 678 S.W.2d 916 (Tex. 1984), and Smith v. Home Indemnity Company, 683 S.W. 2d 559 (Tex. App.-Fort Worth [2nd Dist.] 1985, no writ), also involve workers' compensation insurance and health insurance and, like Hearn, *supra*, recognize the viability of the election of remedies defense and do not focus on "manifest injustice" to the exclusion of the other criteria.

I have authored a decision reversing and rendering a new decision that there had not been an election of remedies (Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998) where health insurance benefits had been pursued and I have authored a decision reversing and rendering a new decision that there had been an election of remedies (Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995). *See also* Texas Workers' Compensation Commission Appeal No. 991403, decided August 16, 1999 (Unpublished). The outcome of raising the defense of election of remedies, as with all disputed issues, will depend on the quality of the evidence.

Philip F. O'Neill
Appeals Judge