

APPEAL NO. 011400
FILED AUGUST 13, 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 22, 2001. The hearing officer resolved the sole disputed issue by deciding that the respondent (claimant) is not barred from pursuing Texas workers' compensation benefits because of the election of remedies doctrine. The respondent (self-insured) appealed and the claimant responded.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the claimant is not barred from pursuing Texas workers' compensation benefits because of the election of remedies doctrine. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court held that the election doctrine may constitute a bar to relief when one successfully exercises an informed choice between two or more remedies, rights, or states of fact which are so inconsistent as to constitute manifest injustice. The court stated that "an election will bar recovery when the inconsistency in the assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust." *Id.* at 851. The court also stated: "One's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice." *Id.* At 852. Election of remedies is an affirmative defense. Allstate Insurance Co. v. Perez, 783 S.W.2d 779 (Tex. App.-Corpus Christi 1990, no writ). The self-insured had the burden to prove an effective election of remedies. Texas Workers' Compensation Commission Appeal No. 002682, decided December 22, 2000. There is conflicting evidence in this case regarding the disputed issue. The hearing officer found that the carrier failed to establish by the preponderance of the credible evidence that the claimant made an informed choice between her husband's group health insurance coverage and workers' compensation coverage. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Thomas A. Knapp
Appeals Judge