APPEAL NO. 012374
FILED NOVEMBER 15, 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 (CCH) was held on May 22, 2001, with the record closing on June 20, 2001. In Texas Workers' Compensation Commission Appeal No. 011634, decided August 27, 2001, the Appeals Panel remanded the case for the sole purpose of compliance with HB2600 amending Section 410.164 for certain required insurance carrier information. That information has been obtained and is included as Hearing Officer's Exhibit Nos. 5 and 6.

The issues in this case were:

1. Did the respondent [claimant] sustain a compensable injury in the course and scope of her employment on _____?

2. Is the appellant [carrier] relieved from liability under Texas Labor Code Ann. Section 409.002 because of the Claimant's failure to timely notify her employer pursuant to Section 409.001?

3. Does the Claimant have disability as a result of her compensable injury, and if so, for what periods?

4. Is the Claimant barred from pursuing Texas Workers' Compensation benefits because of an election to receive benefits under a group health insurance policy?

5. What is the correct date of injury?

The hearing officer determined that the claimant sustained a compensable herniated disk injury on _____ (inferentially finding the date of injury to be _____); that the claimant gave timely notice of her injury pursuant to Section 409.001; that the claimant is not barred from pursuing workers' compensation benefits because of an election of remedies; and that the claimant had disability from November 29, 2000, through the date of the CCH, May 22, 2001.

The carrier appeals, principally on the basis that the claimant is barred from seeking workers' compensation benefits because of an election to use group health benefits, that the claimant had not sustained a compensable injury, that the claimant had not timely reported the injury, and that the claimant did not have disability. The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed as a convenience store clerk and testified that as she was stocking a "30 pack of beer" in the "vault" she twisted and felt low back pain. The claimant testified that this was around the first of _____, but some documentation and statements indicate that it was _____. The hearing officer found the date of injury to be _____, and that determination is supported by the evidence. The claimant testified that she continued to work and reported the injury to her supervisor, Ms. MA, the store manager, that same day or the next day. Ms. MA confirmed that the claimant reported her injury and further testified that at some later date she advised her supervisor, the area manager, of the claimant's injury. The claimant continued work and no accident report was filed because both the claimant and Ms. MA thought the injury would resolve itself.

The claimant testified that the pain became worse and that she sought medical treatment from Dr. H, a chiropractor, on _____, complaining of low back and leg pain. The claimant continued to work and received periodic chiropractic treatment through November 28, 2000, when the claimant was unable to work because of back pain. At some point the claimant had been referred to a medical doctor and subsequently was referred to Dr. R. The claimant paid for these treatments through her group health plan. An MRI performed on November 29, 2000, showed a "prominent right paracentral disk herniation at L5-S1 significantly displacing and compressing the right S1 nerve root." The claimant was initially referred to the (institute) for treatment but, the claimant testified, the institute was unwilling to see her because they were unable to verify workers' compensation coverage. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence indicates that the carrier's first written notice of the injury was received on December 5, 2000. The TWCC-21, dated December 7, 2000, denied liability based on no injury in the course and scope, no timely reporting, and an election of remedies. The claimant had what was referred to as "immediate" or "emergency" spinal surgery on December 15, 2000, "for a herniated disk with fragment."

The carrier's principal point on appeal is the election of remedies issue. There was conflicting evidence at the time as to whether the claimant was aware of the difference between group health benefits and workers' compensation. The hearing officer found:

FINDINGS OF FACT

6. Claimant had prior workers' compensation claims and voluntarily elected to use health insurance rather than workers' compensation insurance until she realized she had a serious injury and might have time off from work.

7. Two supervisors from Employer were aware Claimant was doing this.

8. No one explained the difference between workers' compensation and health insurance to Claimant and she was not aware she could waive her right to workers' compensation by using her health insurance

benefits to pay for her treatment.

The carrier comments that the Appeals Panel "has become extraordinarily hostile to the Election of Remedies Doctrine," cites other conflicting testimony and Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), Texas General Indemnity Company v. Hearn, 830 S.W.2d 257 (Tex. App.-Beaumont 1992, no writ); and Smith v. Home Indemnity Company, 683 S.W.2d 559 (Tex. App.-Fort Worth [2nd Dist] 1985, no writ), and quotes at length from Judge O'Neill's concurring opinion in Texas Workers' Compensation Commission Appeal No. 001321, decided July 26, 2000. The Appeals Panel has from time to time addressed the election of remedies doctrine and have followed the standard set out in Bocanegra, *supra*, wherein the court specifically 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 nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998; Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000.

In this case, the hearing officer found that the claimant had not made an informed choice between her group insurance and her workers' compensation benefits. The claimant, while promptly having given notice of the injury had not sought to file a claim for workers' compensation benefits until she was apprised of the seriousness of her injury after the MRI on November 29, 2000. After receiving notice of the claimant's claim on December 5, 2000, the carrier denied the claim on December 7, 2000, prior to the claimant's formal filing of a claim on December 11, 2000. Under these circumstances we find no error by the hearing officer in determining that the claimant was not barred from pursuing workers' compensation benefits because she elected to receive benefits under a group health plan.

The hearing officer's determinations on injury in the course and scope of employment and timely report of her injury to her supervisor are supported by the testimony of the claimant and Ms. MA. The carrier's appeal of the disability determination is premised on a noncompensable injury and that surgery had not been determined to be reasonable and necessary. The hearing officer's determination on disability is supported by the evidence.

There was conflicting evidence presented at the hearing on the issues. The hearing officer weighed the credibility and inconsistencies in the evidence, and the hearing officer's determinations on the issues are not so against the great weight and preponderance of the

evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTEE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissent from the majority's affirmance of the hearing officer's determination that the claimant did not elect the remedy of health insurance over workers' compensation insurance because that determination is both factually and legally incorrect. It is undisputed that the claimant had prior workers' compensation claims. The only reasonable inference from that fact is that she had some familiarity with the workers' compensation benefits scheme. It is also undisputed that with the knowledge of her supervisors, she obtained frequent chiropractic treatment from _____, until late November 2000, when she was referred for an MRI test and orthopedic consultation. The hearing officer states in Finding of Fact No. 6 that the "Claimant had prior workers' compensation claims and voluntarily elected to use health insurance rather than workers' compensation insurance until she realized she had a serious injury and might have time off from work." It strains credulity for the hearing officer, let alone the majority of the appeals judges in this case, to take the position that the claimant can voluntarily elect to pay for months of treatment with her health insurance and yet be found not to have elected that remedy. Further, the hearing officer, in Finding of Fact No. 8, states that "[n]o one explained the

difference between workers' compensation and health insurance to Claimant and she was not aware she could waive her right to workers' compensation by using her health insurance benefits to pay for her treatment." The majority cite no authority for the proposition that the defense of election of remedies is limited to "serious" injuries and does not apply to injuries until they become "serious." Further, the hearing officer, in Finding of Fact No. 8, introduces new elements into the election of remedies test stated by the Texas Supreme Court in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). The hearing officer's finding requires, in effect, that not only must an injured employee have the difference between the remedies of health insurance and workers' compensation insurance explained to them by the employer following an injury, but they must also be aware of the potential for waiver. In my opinion, the hearing officer has committed legal error in adding requirements for the successful prosecution of the election of remedies defense to those imposed in Bocanegra.

I wish to iterate here what I wrote in a separate concurring opinion in Texas Workers' Compensation Commission Appeal No. 001321, decided July 26, 2000, as follows:

> 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 was 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[, *supra*,] 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.

Please also see my dissenting opinion in Texas Workers' Compensation Commission Appeal No. 002763, decided January 11, 2001. I remind the majority that the Appeals Panel has, in the past, had ample occasion to apply the election of remedies doctrine against claimants who just resorted to their group health insurance for various reasons and later decided to file for workers' compensation coverage. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995; Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997; Texas Workers' Compensation Commission Appeal No. 970314, decided April 4, 1997; Texas Workers' Compensation Commission Appeal No. 970601, decided May 16, 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).

I would reverse the hearing officer's election of remedies determination as being against the great weight of the evidence.

Philip F. O'Neill
Appeals Judge