APPEAL NO. 990525

On February 18, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). The issue at the CCH was whether the appellant (claimant) is barred from pursuing workers' compensation benefits because of an election to receive benefits under a health insurance policy. Claimant requests reversal of the hearing officer's decision that claimant is barred from pursuing workers' compensation benefits because of his election to receive benefits under a health insurance policy. The respondent (self-insured) requests affirmance.

DECISION

Reversed and rendered.

The parties stipulated that on _____, claimant was an employee of the (State Agency); that the State Agency has workers' compensation insurance through self-insurance; that on _____, claimant sustained an injury to his left shoulder that arose out of and in the course and scope of his employment; that claimant reported his injury to the self-insured within 30 days after the injury; and that claimant was able to obtain and retain employment at wages equivalent to his preinjury wage.

Claimant testified that in 1971 he began employment with (State Agency B); that he was the assistant executive director and chief pre-hearing officer of State Agency B; that from 1979 to 1987 he was the executive director of State Agency B; that through his state employment he has group health insurance with (HS); that based on his experience and knowledge of workers' compensation law, no one was ever denied workers' compensation medical benefits because they initially chose to use their group health coverage; that based on his experience it was routine to receive subrogation notices in workers' compensation claims for matters that were first filed with a group health insurer and workers' compensation carriers routinely reimbursed group health insurers; that he never intended to waive his rights to workers' compensation benefits; that he used his HS coverage because of the convenience and expediency of getting into the medical system through his primary care physician; that he has not been enriched in any way by using his HS coverage for his injury; that at the time of his injury he realized he was in the course and scope of his employment; that in _____ he was aware that there was a difference between workers' compensation insurance coverage and his HS coverage; and that he has previously filed claims for workers' compensation.

Within a few days of his injury of _____, claimant saw a chiropractor for pain in his shoulder and paid for that treatment himself. Claimant was then referred to Dr. N by his primary care physician and he saw Dr. N a few times. Claimant was then treated by Dr. S and underwent left shoulder surgery by Dr. S on December 3, 1997. Claimant completed an Employee's Notice of Injury and Claim for Compensation (TWCC-41) for his injury of _____ on December 31, 1997. It is undisputed that claimant's coverage with HS does

not cover work-related injuries, that Dr. N and Dr. S billed HS for their medical services, that HS has paid a portion of the amounts billed, and that claimant knew that HS was being billed. It appears from documents in evidence that HS is requesting that claimant reimburse it for payments it made to health care providers for his injury of _____ and has filed a lien for repayment.

In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), 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 court further stated that one's choice between inconsistent remedies, rights or states of fact does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problems, facts, and remedies essential to the exercise of an intelligent choice. In Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993, the Appeals Panel noted that it had not found inconsistency amounting to manifest injustice to carriers arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered. *Compare* Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997, a decision cited by self-insured where manifest injustice in an election of remedies issue is not discussed. In Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999, the Appeals Panel stated:

> However, the Bocanegra case is equally significant for its entire discussion concerning the equitable underpinnings of the election of remedies doctrine, and it makes clear that election should be imposed sparingly, reserved for instances where 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. This, in our opinion, calls for a situation in which there is more than the mere filing of health care claims through a regular group insurance policy, even if there is a subjective appreciation that regular health insurance does not usually cover work-related injuries. There is no manifest injustice when a workers' compensation insurer is asked to pay for a work-related injury which it has agreed to cover in return for premiums from the employer, and none to the health insurer who has the subrogation right to the money paid out.

The claimant appeals the hearing officer's finding that he successfully exercised an informed choice to have HS pay his medical costs. While the claimant may well have exercised an informed choice, we doubt that it can be termed successful inasmuch as HS is asking him for reimbursement for amounts paid for medical services related to his work injury. The hearing officer also found that "it would be manifestly unjust for the claimant to have the health insurance pay for his work-related medical costs, since it is not liable for such medical costs. The claimant would be reimbursed for his co-pay amounts by the self-insurance if it became liable for benefits." The claimant appeals that finding contending

that there is no manifest injustice in requiring the self-insured to pay the medical costs for his work-related injury, including reimbursement of HS and his co-payments. It is undisputed that claimant sustained an injury in the course and scope of his employment and that he gave timely notice of injury. At the CCH, the self-insured presented no evidence or argument on how it would be manifestly unjust for it to pay medical benefits for a work-related injury for which it is liable. The only manifest injustice that would result to HS is if claimant were barred from pursuing workers' compensation benefits as that would affect its subrogation rights. Thus the hearing officer's finding of manifest injustice to HS in support of his decision barring claimant from pursuing workers' compensation benefits is simply unsupportable. There is no evidence as to how reimbursement of co-payments amounts to manifest injustice. The self-insured does not assert that the medical treatment, including claimant's shoulder surgery, was not reasonable and necessary or that medical costs were not reasonable and necessary.

The evidence in this case does not meet the standards set forth in Bocanegra for imposing a binding election, and we accordingly reverse the hearing officer's decision that claimant is barred from pursuing workers' compensation benefits based on an election to receive benefits under a health insurance policy, and we render a decision that claimant is not barred from pursuing workers' compensation benefits based on an election of remedies.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge