APPEAL NO. 931101

On October 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The issues at the hearing were: (1) whether the respondent (claimant) sustained a compensable injury on (date of injury), while working for her employer, (employer); (2) whether the appellant (carrier) contested the compensability of the injury on or before the 60th day after being notified of the injury, and if not, whether the carrier's contest of compensability is based on newly discovered evidence that could not reasonably have been discovered at an earlier date; and (3) whether the claimant has had disability.

The hearing officer determined that the claimant sustained a compensable injury; that the carrier did not contest compensability of the injury on or before the 60th day after the date on which it was notified of the injury; that the carrier's contest of compensability is not based on newly discovered evidence that could not reasonably have been discovered at an earlier date; that the carrier waived its right to contest compensability of the claimant's injury; and that the claimant has not had disability and is not entitled to temporary income benefits (TIBS).

In its appeal, the carrier contends that the hearing officer erred in: (1) finding that the claimant sustained an injury in the course and scope of her employment; (2) finding that its contest of compensability is not based on newly discovered evidence; and (3) concluding that it waived its right to contest compensability. The carrier also asserts that the hearing officer erred in making certain evidentiary rulings. The carrier further contends that the hearing officer's finding of no disability is supported by the evidence. The claimant did not appeal the hearing officer's decision and did not file a response to the carrier's appeal.

DECISION

Finding no reversible error, the decision of the hearing officer that the claimant sustained a compensable injury on (date of injury), is affirmed.

The claimant testified that three years prior to her employment with the employer, which began in (month year), she had experienced "chemical sensitivity" to ammonia that was on maps that she handled for another employer, that she was diagnosed with "chronic bronchitis," and that as a result of her condition she transferred to the accounting department of the previous employer.

The claimant further testified that while working for the employer on (date of injury), she was injured when (FM) dropped copy toner into a garbage bag the claimant was holding and the toner blew in the claimant's face causing her to inhale it. The claimant said that there was a "dark carbon cloud" and "powder" was everywhere. She also said that when

she went to the restroom to clean up, she saw "dark around my nostrils" and "there was some on my face and on my hands." The claimant said her nostrils and throat burned and it "stung intensely." In a written statement dated May 12, 1993, FM said that the toner got on the claimant's hands and on the floor and that both she and the claimant went to the restroom to wash their hands. When FM was asked whether "chemicals" got in the claimant's face, she said "[w]ell, I had to take the cartridge and dump it into the garbage bag and she was just holding the bag for me."

The claimant testified that her "situation became progressively worse," that she had difficulty breathing and speaking, and that she was "gasping for air;" however, she continued to work until January 18, 1993, when she reported to her employer that she had inhaled copy toner at work on (date of injury), and that she had some burning in her lungs and had lost her voice. The employer sent her to (hospital) on January 18, 1993, where she was examined by (Dr. S) who, in a report dated January 18th, diagnosed sinusitis and angioedema, which he stated was possibly related to toxic exposure. Dr. S prescribed antihistamines, antibiotics, and bronchodilator medicine, and stated that the claimant could return to work on January 20th, but that she was to be "segregated away from certain chemicals found in photographic toner." Dr. S referred the claimant to (Dr. J) for follow-up care. Reports of Dr. J were not in evidence. The claimant said she was examined by Dr. J on January 20th and that Dr. J told her she had been "poisoned," that her situation was "beyond his specialties," and referred her to (Dr. C). The claimant said that Dr. C refused to see her because his office had determined that the employer would not pay for treatment. The claimant quit her job on January 23, 1993, obtained a part-time job with another employer the last week of February 1993, and filed a claim for workers' compensation on or about April 8, 1993, wherein she alleged that as a result of inhaling the copy toner she had chronic, severe asthma and laryngitis, and that her nose, throat, voice box, and lungs were injured. The claimant quit her part-time job in April 1993, and obtained full-time work with another employer in August 1993.

According to the evidence, the next health care provider the claimant saw was (Dr. R) whom she first saw on April 29, 1993. In a report dated May 30, 1993, Dr. R diagnosed: 1. chemical exposure (xerox toner); 2. asthma, chemical induced; 3. fatigue; 4. chest pain; 5. rhinosinusitis; 6. shortness of breath; and 7. laryngeal edema. Dr. R stated that in his opinion the claimant's "illness" is work related. Dr. R recommended various lab tests, a SPECT scan of the brain, and a physical therapy program for four weeks. Dr. R further stated that the claimant needed to get on a treatment program as soon as it was approved because her illness is "life threatening." The claimant testified that she treated with Dr. R for several weeks in May 1993, but stopped going to Dr. R when the carrier refused to pay for further treatment with Dr. R. According to articles from medical journals which were introduced into evidence by the carrier, Dr. R practices "clinical ecology." The articles were highly critical of the practice of clinical ecology and contended that clinical ecology lacks "scientific validation."

In a letter dated May 28, 1993, the carrier asked (Dr. K) to review medical records to determine if "treatment to be reasonable or necessary." Dr. K is certified in preventive medicine and medical toxicology. In a report to the carrier dated June 7, 1993, Dr. K said he had reviewed Dr. R's medical documents, which included the diagnoses set forth above, and stated to the effect that a SPECT scan and physical therapy program were not necessary. He further stated that "the problems that occur with copier machine chemicals usually consist of mild temporary allergies of a nasal, respiratory, or skin type that promptly improve with correct treatment, and upon removal from exposure." Dr. K added that "[t]hese chemicals are not bound to the body for long periods of time, but rather are present for only a short period of time, such as a few days, where such a detoxification treatment as advised by [Dr. R] is of no benefit." He also said that the type of treatment recommended by Dr. R had been labeled as "unscientific and of no benefit" by several medical peer review publications. A date stamp indicated that the carrier received Dr. K's June 7th report on June 14, 1993.

In a letter dated May 24, 1993, a representative of the carrier advised the claimant that an appointment had been scheduled for her with Dr. C on June 2, 1993. Dr. C practices occupational medicine and toxicology. At the hearing, the claimant described Dr. C as the carrier's doctor, but also described him as her "attending physician." The claimant began treatment with Dr. C on June 2nd and has continued under his care. On June 4th Dr. C diagnosed "noxious vapor inhalation" and "allergic urticaria." Dr. C recommended that the claimant be seen by (Dr. P), a neuropsychologist whom the claimant saw sometime in June 1993. In a report dated June 22, 1993, Dr. P stated that the claimant's neuropsychological functioning was not indicative of a cerebral dysfunction and that psychological factors were playing a significant role in her symptomatology. He further stated that "she has been told that she is poisoned and she appears to choose that explanation as opposed to any other explanation at this time." In a report to the claimant dated August 4, 1993, Dr. C told the claimant that he believed she had a "hypersensitivity urticaria with laryngeal spasm and a potential conversion reaction which led to your perception of your shortness of breath." Dr. C further stated that he believed that "all of your symptoms were the sequelae of noxious vapor inhalation and the subsequent medical treatment which you received as a result." In another report dated August 4, 1993, Dr. C stated that "[claimant] has been under my care since June 2, 1993 for work-related inhalation injury and its sequelae." Dr. C also stated that the claimant had reached maximum medical improvement (MMI) on July 28, 1993. In a Report of Medical Evaluation (TWCC-69) dated September 22, 1993, Dr. C certified that the claimant reached MMI on September 22, 1993, with a zero percent impairment rating.

A Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) dated May 7, 1993, reported that first written notice of injury was received by the carrier on January 20, 1993, and that payment (apparently of TIBS) was refused or disputed because "no compensable lost time, the [claimant] RTW (returned to work) within 7 day waiting period." The nature of the injury was stated to be "respiratory sys."

A TWCC-21 dated June 22, 1993, stated the reasons for refusing or disputing the claimant's claim as follows: 1. "Carrier denies that claimant's symptoms were caused by injury on the job at [employer]. 2. If there was any medical problems at all, this would be an ordinary disease of life." January 20, 1993, is again shown as the date first written notice of injury was received and the nature of injury is again shown as "respiratory sys."

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Compensation" means payment of a benefit. Section 401.011(11). And, "benefit" includes, among other things, a medical benefit. Thus, an injured employee who does not have disability, and consequently is not entitled to TIBS, may nevertheless have sustained a "compensable injury" and be entitled to medical benefits. The claimant has the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). A claimant's testimony is that of an interested party and it only raises an issue of fact for the fact finder to determine. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer may believe all, part, or none of the testimony of any witness, and may believe one witness and disbelieve others. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Where there are conflicts and contradictions in the testimony, it is the duty of the finder of fact, in this case the hearing officer, to consider these conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The fact finder also resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The carrier contends that "[t]he hearing officer erred in finding that [claimant] sustained an injury in the course and scope of her employment on (date of injury)." The hearing officer found that on (date of injury), the claimant inhaled copier toner while in the course and scope of her employment with the employer, and that the claimant has not had disability as a "result of her (date of injury) injury." We agree with the carrier that the hearing officer did find that the claimant was injured in the course and scope of her employment on (date of injury), and we are satisfied from a review of the hearing officer's statement of the evidence and her fact findings that her finding of injury in the course and scope of employment and her conclusion that the claimant sustained a compensable injury were arrived at based on the evidence of a work-related injury and independently of her conclusion that the carrier waived its right to contest compensability. We disagree with the carrier's contention that causation was not established by the evidence. In this case, the hearing officer was entitled to believe the claimant's testimony that as a result of an accident at work she inhaled copy toner which caused a burning sensation in her nose and throat and later experienced problems breathing for which she sought medical treatment. There

is a conflict in the medical evidence as to whether inhalation of the copy toner caused an injury. Drs. S, R, and C provide evidence of a causal connection, while Drs. K and P indicate to the contrary. However, even Dr. K agrees that some physical problems may be caused by inhalation of copier toner, albeit of a temporary nature. The conflicts in the medical evidence were for the hearing officer to resolve. Campos, *supra*. In its appeal, the carrier urges that no weight should be given to Dr. R's opinion as to causation because Dr. R's opinion is based on the "theory of clinical ecology." Even if we were to accept the carrier's argument regarding Dr. R's opinion, there would still be medical evidence of causation from Dr. C which would support the hearing officer's determination that the claimant sustained a compensable injury. We observe that an issue as to the scope or extent of the claimant's compensable injury is not before us. The carrier simply requests that we find that the claimant did not sustain "an injury" in the course and scope of her employment with the employer. We conclude that the hearing officer's finding of an injury in the course and scope of employment and her conclusion that the claimant sustained a compensable injury are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Although the evidence may have supported inferences different than those reached by the hearing officer, that is not a basis to set aside her findings where the findings are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

In regard to the carrier's contention that the hearing officer erred in concluding that it waived its right to contest compensability, we note that Subsections (c) and (d) of Section 409.021 provide as follows:

> (c)If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.
>
> (d)An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

In the Statement of Evidence portion of her decision the hearing officer states:

> Other evidence showed the Carrier was notified of the claimant's (date of injury) injury on January 20, 1993. However, the Carrier did not contest the

compensability of the Claimant's injury until June 22, 1993, although the Carrier disputed the Claimant's alleged disability resulting from her (date of injury) injury on May 7, 1993.

In Finding of Fact No. 9, the hearing officer found that: "The Carrier did not contest the compensability of the Claimant's (date of injury) injury on or before the 60th day after the date on which the Carrier was notified of the injury."

In its appeal, the carrier states that it "concedes that it did not file its controversion within 60 days. It is the carrier's argument at the CCH and on appeal that it promptly disputed compensability upon receiving new medical evidence not previously available." The new medical evidence the carrier points to is Dr. K's report of June 7, 1993. In Finding of Fact No. 10, the hearing officer found that "[t]he Carrier's contest is not based on newly discovered evidence that could not reasonably been (sic) discovered earlier."

In Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993, we affirmed the hearing officer's decision that the carrier was entitled to reopen the compensability issue because of evidence that could not have been reasonably discovered earlier. In that case, the carrier first received written notice of injury on February 13, 1992. The claim involved, among other things, chemical sensitivity from exposure to chemicals. The carrier requested the claimant's medical records from the treating doctor and received them sometime after February 28, 1992. Apparently, the carrier had another doctor review the claimant's medical records and tests, and in a report dated April 30, 1992, that doctor stated that he did not believe that the claimant's symptoms were causally related to the chemicals to which the claimant said he was exposed. The carrier filed a TWCC-21 on May 27, 1992, which disputed the claim based on its doctor's report.

In the instant case, the evidence indicated that other than a visit to the hospital emergency room on January 18, 1992, where she was diagnosed with sinusitis and angioedema, and her visit to Dr. J on January 20, 1993, for which no medical report was offered, the claimant did not have medical treatment until April 29, 1993, when she began seeing Dr. R. Upon receiving Dr. R's medical reports, the carrier requested that Dr. K review them, and, on June 7, 1993, Dr. K issued a report questioning Dr. R's diagnoses and the relationship between the claimant's symptoms and her exposure to copy toner. The carrier received the report on June 14, 1993, and a TWCC-21 was filed on or about June 22, 1993, which disputed that the claimant's symptoms were caused by an on-the-job injury. In our opinion, the hearing officer erred in failing to find that Dr. K's report constituted evidence that could not have reasonably been discovered earlier under Section 409.021(d) inasmuch as Dr. K's opinions were generated after a review of Dr. R's reports which reports were not in existence until after April 29, 1993. However, notwithstanding our determination that the hearing officer erred in concluding that the carrier waived its right to contest compensability of the claimant's (date of injury), injury, such error does not present reversible error under the particular circumstances presented because we have determined

that the hearing officer's finding of an injury in the course and scope of employment and her conclusion that the claimant sustained a compensable injury, which were arrived at independently of her conclusion concerning the carrier's waiver of its right to contest compensability, are supported by sufficient evidence and are not against the great weight and preponderance of the evidence.

The carrier complains of certain evidentiary rulings of the hearing officer. We agree that the hearing officer erred in admitting Claimant's Exhibits No. 6 (Texas Workers' Compensation Commission [Commission] document requesting a claim file be established), No. 13 (a document showing Dr. J's medical specialty), and No. 24 (claimant's handwritten notes of telephone calls--she testified about the calls at the hearing), over the carrier's objection that the exhibits had not been exchanged prior to the hearing without first making a finding of good cause for admitting the exhibits. A determination of good cause should have been made under Rule 142.13(c)(3). However, it has been held that to obtain reversal of a judgment based upon error of the trial court in the admission or exclusion of evidence, the appellant must not only show that the evidentiary ruling was in fact error, but must also show that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Having reviewed the record, including the complained of exhibits, and the carrier's appeal, we conclude that the carrier has not shown that the hearing officer committed reversible error in the admission of the complained of documents.

The carrier also complains on appeal that the hearing officer erred in excluding the testimony of (EE). The witness was identified as a potential witness by the claimant, but was not so identified by the carrier who was the party that offered his testimony at the hearing. The carrier states that EE's testimony would have gone "to the issue of disability." We conclude that error, if any, in the exclusion of EE's testimony did not amount to reversible error because the hearing officer ruled in the carrier's favor on the issue of disability and the hearing officer's determination of no disability has not been appealed.

The carrier further complains on appeal that the hearing officer erred in excluding a purported transcription of a recorded statement of the claimant. The claimant said that she was unaware that her conversation was being recorded, the statement itself fails to indicate that the claimant was advised of the recording, and, perhaps most importantly, no one, neither the claimant nor the adjustors who purportedly recorded the statement, signed the statement. Section 410.165(b) provides that the hearing officer may accept a written statement signed by a witness. We hold that the hearing officer did not err in excluding the purported transcription of the claimant's recorded statement.

The carrier also complains that the hearing officer erred in excluding from evidence a "patient manual" produced by Dr. R's clinic. The manual was not exchanged prior to the hearing by either party. The claimant simply had the manual at the hearing and the carrier's attorney asked her to hand it to him, which she did, and then the carrier offered it into evidence. The claimant objected on the basis that it was her personal copy of the manual and that if the carrier wanted a copy it could write to Dr. R, and presumably, pay for its own copy. On appeal, the carrier asserts that the manual would have demonstrated the "bizarre" methods of Dr. R. We hold that error, if any, in excluding the manual from evidence would not amount to reversible error because disputes over medical treatment are not resolved in benefit contested case hearings, but instead, are governed by Section 408.027 (formerly Article 8308-4.68) and Section 413.031 (formerly Article 8308-8.26). *See* Texas Workers' Compensation Commission Appeal No. 92395, decided September 16, 1992.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge