

APPEAL NO. 93816

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8303-1.01, *et seq.*). On August 9, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether the respondent (claimant herein) suffered an occupational disease as a result of exposure to chemicals at work; 2. whether the appellant (carrier herein) waived its right to contest the compensability of this claim by failing to file a notice of their contest in a timely manner; and 3. whether the claimant has disability entitling her to temporary income benefits (TIBS) as a result of chemical exposure while at work. The hearing officer ruled that the claimant suffered from systemic lupus erythematosus but did not establish that the chemical exposure at work was causally related to this disease. The hearing officer also ruled that the carrier failed to timely controvert this claim and did not establish good cause for its failure to timely controvert, thereby waiving its rights to contest compensability. The hearing officer found that the claimant had disability resulting from systemic lupus erythematosus beginning on (date), and continuing thereafter. The hearing officer ordered temporary income benefits (TIBS) be paid to the claimant so long as her disability continues and she has not reached maximum medical improvement (MMI).

The carrier appeals the decision of the hearing officer contending that the hearing officer applied the wrong standard in determining whether the carrier was justified in filing its Notice of Refused or Disputed Claim (TWCC-21) late. The carrier argues that the proper standard is not "good cause," but rather "newly discovered evidence." The carrier requests we remand to the hearing officer for a factual determination applying the proper standard. In the alternative, the carrier argues that if "good cause" were the proper standard, the hearing officer erred in finding that it did not establish good cause for its failure to timely controvert and thus should be reversed. The claimant responds that the hearing officer did use the proper standard to determine whether the carrier waived its right to contest compensability and that the evidence established that the carrier did not timely controvert the claim in the present case. The claimant argues that we should affirm the decision of the hearing officer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The claimant worked at the (GGP) as a laboratory technician on assignment from (employer) from December 1990 to January 12, 1992. The claimant testified that her duties at GGP including testing chemical samples containing phenol, cumene, cumene hydroperoxide and other specific chemicals in various concentrations.

The claimant testified that she inhaled chemical odors throughout her employment at GGP and that when she first starting working at GGP she worked without gloves for some period of time, leading to skin contact with chemical samples. In (date), the claimant spilled

a chemical sample on her clothing causing her to suffer a chemical burn on her left thigh. The claimant testified that she did not initially miss work as a result of this burn. Claimant testified that she began to have chest pains in May 1991 followed by more severe symptoms that were diagnosed as pneumonia in December 1991 and as systemic lupus erythematosus (SLE) in January 1992. Claimant testified that she has been unable to return to work as a result of her SLE since January 12, 1992.

There is conflicting expert testimony in the record as to whether or not the claimant's exposure to chemicals at GGP caused her SLE. In a written report (Dr. M), an environmental toxicologist, stated that there was a reasonable scientific basis that the claimant's SLE was the probable result of chemical exposure at GGP. (Dr. E), M.D., opined in a written report that based upon his training and education, his review of the claimant's medical records and his examination of claimant, the claimant's SLE arose out of and was causally related to her employment at GGP. Medical toxicologist Dr. Eric Comstock (Dr. C) disagreed with the opinions of Dr. E and Dr. M. He testified that the etiology of many autoimmune disorders, including SLE, is unknown. Dr. C stated that based upon his review of the claimant's medical records, the chemicals to which she claimed to have been exposed at GGP, the specific chemicals that caused her (date) thigh burn, the medical literature, and scientific literature cited by Dr. E and Dr. M, the claimant's SLE was unrelated to chemical exposure at GGP.

On May 19, 1992, the claimant filed two separate workers' compensation claims. One claim, which was identified by the Texas Workers' Compensation Commission (Commission) as TWCC 91-173156, was for a (date), injury to the claimant's left thigh and whole body as a result of a chemical spill. The second claim, which is the claim in the present case, was identified by the Commission as TWCC 91-121001 and described a January 12, 1992, claim for injury to the claimant's lungs and whole body resulting from toxic chemical exposure. The hearing officer stated that Commission records reflect that the carrier did not file a TWCC-21 in regard to the (date), injury until November 1991 or in regard to the January 12, 1992, claim of injury until February 2, 1993. The carrier argued that it did not timely controvert the present claim because it had good cause to believe that the instant claim was an extension of the claim resulting for the chemical spill and burn incident.

Section 409.021 provides in relevant part:

- (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. . . .
- (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.

We have previously held that there is no good cause exception to the requirements

of this section. See Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992. In this regard the carrier is correct in stating that the hearing officer erred in tying the issue of waiver to good cause. It appears to us that this error may have been invited by the carrier which strongly urged in final argument that there was good cause for the carrier's failure to timely controvert compensability. However, we do not believe we have to reach the issue of invited error because any error of the hearing officer was harmless. We have held that to constitute reversible error, a finding by a hearing officer must be reasonably calculated to cause, and probably did cause, the rendition of an improper decision. See Texas Workers' Compensation Commission Appeal No. 91074, decided December 30, 1991. We do not find evidence of this in the present case, as the carrier has simply failed to provide any evidence at the hearing or to point out to us on appeal any newly discovered evidence to justify reopening the issue of compensability. We, therefore, find no need to remand this case for a finding on this issue.

As to the carrier's alternative argument that it had good cause for failing to timely controvert, we reject it on the basis stated by the carrier itself in its primary ground of appeal. There is no good cause exception for failure to timely controvert under Section 409.021. Appeal No. 92468, *supra*.

The decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge