APPEAL NO. 950056
FILED FEBRUARY 21, 1995

Following a contested case hearing held on November 30, 1994, the hearing officer resolved the sole disputed issue by concluding that the respondent and cross-appellant (claimant) had disability which began on June 10, 1994, and continued through September 10, 1994. The appellant and cross-respondent (carrier) asserts both no evidence and insufficient evidence challenges to four findings of fact and also challenges the dispositive conclusion as well as the decision and order. The carrier further asserts error in the admission of four of claimant's exhibits. The disputed issue reported from the benefit review conference was: "Did the Claimant have disability resulting from the injury, and if so, for what periods." The claimant's appeal asserts that at the hearing, the hearing officer restated the disputed issue as: "Did the claimant have disability from May 12, 1994, through August 15, 1994." Accordingly, claimant asks the Appeals Panel to reform Finding of Fact No. 7 and the dispositive legal conclusion (finding disability from June 10 through September 10, 1994) to reflect the period of disability as June 10 through August 15, 1994, pointing out that claimant would have been free to offer evidence of disability after August 15th had he known the hearing officer was going to consider disability after that date. There is no indication that carrier objects to the claimant's request for this reformation.

DECISION

Affirmed as reformed.

Claimant testified that he had worked at a meat packing plant, that on _____, (all dates are in 1994) his right arm and wrist became painful and swollen, and that he was seen at the plant on three occasions by (Dr. T) who told him there was no problem and to return to work. Claimant said he did so and that his hand swelled up again. Dr. T's records indicate that on April 26th he diagnosed wrist sprain and returned claimant to work with restrictions on the use of his right hand for 14 days. Claimant said he could not perform physical work after Dr. T's telling him he could work. He then went to the company nurse and was given a 15 day "pass." Claimant said that when he took the pass to the manager the latter told him he must not want to work there anymore because Dr. T said there was nothing wrong with him and that they were going to fire him. Claimant said that the next day he could not move his hand because it was swollen and inflamed and the pain was such that he "couldn't stand it," so he went to St. Anthony's hospital where a doctor told him that he could not work with his hand like that. Claimant testified that he could not perform his normal activities at home either. He said that on May 10th he was working the "taco belt," a job he could do with his left hand which did not require the use of knives, and that "what affected me was the knives." He said he had not been able to work since his last day at the plant (May 11th, when he was terminated for "eating meat") because his hand was "damaged," that on his last day his hand was swollen and

painful, that his work at the plant was "heavy," that his two prior jobs were in a meatpacking plant and cleaning up at an automobile shop, and that he had a ninth grade education in Mexico and could neither read nor write English.

Dr. T's May 10th report indicates "continued tenderness along the radio carpal region of the right wrist," restrictions on repetitive gripping to the right wrist, unresponsiveness to anti-inflammatory medication or initial local care, and a referral to Dr. H. Dr. H's May 24th report diagnosed possible avascular necrosis (AVN) of the lunate and he restricted claimant's use of the right upper extremity from grasping, pulling and lifting. Dr. H's June 1st record indicates that a bone scan was consistent with lunate AVN and that Dr. H was referring claimant to Dr. M for continued treatment. Claimant similarly testified that he saw Dr. H who obtained x-rays and a bone scan and referred him to Dr. M who diagnosed Keinboch's Disease. Claimant introduced, over carrier's objection grounded on relevance, an article describing Keinboch's Disease as AVN of the carpal lunate and stating that although a history of acute trauma or occupational excessive hand use, especially of the dominant extremity, may be obtained, many individuals have no known association. Dr. M's several reports and records of June 10th stated that x-rays showed Stage II AVN of the lunate, that a bone scan showed diffuse synovitis of the wrist, that Dr. M diagnosed Stage III Keinboch's disease, that claimant would require some type of intercarpal fusion, and that Dr. M prescribed "absolutely no use of [right] hand." Dr. M's records also reflected claimant's history as beginning to have pain on _____ while cutting meat and that Dr. M scheduled claimant's surgery for August 25th. Claimant testified that he had the surgery on that date.

The carrier's evidence, including the testimony of the employer's nurse, Ms. M, indicated that although claimant's last day at work was May 11th, his employment was "formally" terminated on May 16th for destruction of company property ("cooking meat").

At the outset of the hearing claimant suggested narrowing the time period of the disability issue. With the carrier's stating it had no objection the hearing officer restated the disputed issue to be: "Did the claimant have disability from May 12, 1994, through August 15, 1994." It was the claimant's position that he was unable to obtain employment from June 10th to August 25th because of his injury. It was the carrier's position that claimant did not have disability from after May 11th to August 25th (when the carrier indicated it commenced payment of income benefits) because his employment had been terminated for cause on May 11th and he had not thereafter looked for work.

The carrier challenges the findings that claimant injured his right wrist while working as a brisket boner on _____ and was ultimately diagnosed by Dr. M with AVN, that Dr. M advised claimant not to use his right hand for a three month period beginning June 10th, that claimant was terminated from his employment on May 16th and has not been employed since that date, and that claimant was unable to obtain employment at wages equivalent to his pre-injury wages from June 10th through September 10th because of his right wrist condition. The 1989 Act defines disability as "the inability because of a

compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Except for the end date of the period of disability, we are satisfied that the evidence is sufficiently supportive of the challenged findings and that they are not so against the great weight and preponderance of the evidence as be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The Appeals Panel has recognized that an injured employee can have disability even after the employment has been terminated for cause. *See* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, where the Appeals Panel stated, among other things, that "[i]f and when an injured employee, who is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at preinjury wage levels, temporary income benefits once again become payable." In Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992, the Appeals Panel stated: "We note that while the reason for termination may be a factor to evaluate, the focus of an inquiry as to disability is on the inability to 'obtain and retain' employment at equivalent wages. In this regard, the fact that a termination may have been for cause does not, in and of itself foreclose the existence of disability." The Appeals Panel has also held that disability may be proven by the testimony of the injured employee alone and that objective medical evidence is not required. *See* Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

As for the inception date of the disability period, in addition to claimant's testimony concerning his inability to work after May 11th, Dr. M's June 10th report stated that claimant was "absolutely" not to use his right hand. As for the end date of the period of disability, claimant represented to the hearing officer at the time he suggested narrowing the disability period from May 12th to August 16th that "[t]he carrier has paid all times after that. . . . The carrier began payments on August 16th." The carrier also represented that "we paid August 16th." Accordingly, we reform Finding of Fact No. 7, Conclusion of Law No. 2 and the Decision to state the period of disability as ending on August 15, 1994.

We are also satisfied that none of the evidentiary rulings complained of resulted in reversible error. The article on Keinboch's Disease (Claimant's Exhibit No. 1), objected to by the carrier on the basis of relevance, was quite obviously relevant given the diagnosis and paucity of other evidence of record concerning that malady. Section 410.165(a) provides not only that the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence but also that "[c]onformity to legal rules of evidence is not necessary."

The carrier objected to the admission of Claimant Exhibits No. 3 through 6 contending they were not exchanged by claimant until November 17th when the carrier received claimant's November 15th pre-hearing document exchange letter forwarding them and, thus, that they were not exchanged within 15 days of the benefit review conference (BRC) held on October 17th and should be excluded from evidence. The hearing officer found, pursuant to Section 410.161, that good cause existed for claimant's not having

timely disclosed those documents as required by Section 410.160 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)), the latter requiring the exchange of such documents not later than 15 days after the BRC. We find no abuse of discretion in the hearing officer's finding good cause with respect to exhibits No. 3 (Dr. H's records), No. 5 (Dr. M's records) and No. 6 (various doctor's slips) based on claimant's having previously sent such of those documents are were in his possession at the time to the carrier on September 7th. As for Exhibit No. 4 (May 25th bone scan report), however, claimant conceded this document, in his possession in September, was not among those forwarded to carrier with his September 7th letter and offered no explanation for its not being exchanged until November 15th. While we regard this ruling as an abuse of discretion, we do not find its admission to constitute reversible error. The document was cumulative of other evidence of the bone scan results; the whole case did not turn on the document; and the document was not reasonably calculated to cause and probably did not cause the rendition of an improper decision. *See* Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993.

Finding the evidence sufficient to support the challenged findings as reformed, and further finding no reversible error, we affirm the hearing officer's decision as reformed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge