APPEAL NO. 992861

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 November 2, 1999. Claimant had sustained two injuries and the issues involved argued periods of concurrent disability and whether each carrier who covered the injuries should be responsible for a percentage, or all, of the temporary income benefits (TIBS) due for the period of disability, which began November 12, 1998. Claimant's right upper extremity injury of Injury date 1, was covered by the (self-insured). Her left extremity injury of injury date 2, was covered by respondent (Carrier). It was the claimant's position that the operation of both injuries together resulted in her disability from November 12, 1998, to the date of the CCH.

The hearing officer found the each carrier and the self-insured should pay 50% of the TIBS due for the period of time in question.

Self-insured appeals; it argues that carrier waived the right to dispute disability because it did not timely file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) and did not have newly discovered evidence. Self-insured also complains of error in the admission of carrier's evidence, which had been initially exchanged by carrier in error to its own insured rather than to self-insured. Self-insured also argues that the hearing officer erred in not determining the extent of injury, which it states is effectively subsumed anytime there is an issue on disability. Self-insured states that the hearing officer has made no findings as to how he allocates the percentages he found. Self-insured argues that the case should now be remanded to allow trial of whether there was a "new injurious exposure" sometime in _____ or _____, pursuant to its "oral motion" made at the CCH. Carrier responds that the evidence fully supports the hearing officer's assessment that disability resulted from claimant's combined injuries, and that the 50/50 apportionment is supported overwhelmingly by the evidence. Carrier argues that it would be erroneous had the hearing officer simply calculated liability based on the number of injured body parts with no analysis of the magnitude of each injury and its effect on the claimant's ability to work. It argues that any error in the apportionment of equal responsibility favored self-insured, as the claimant testified that her right extremity (the injury covered by self-insured) was more disabling than her left. There is no response from the claimant.

DECISION

Affirmed.

The claimant worked for a (medical facility) which was owned by the (employer 1, also the self-insured in this case), through _____ and by (employer 2) beginning on January 1, 1998. The coverage of carrier also began on that date. It was agreed that the claimant sustained repetitive trauma right elbow and wrist injuries on injury date 1, [1] as a

[1] A CCH decision determined that claimant had not undergone a last injurious exposure for this injury while employed by employer 2. It was issued on September 30, 1998, and affirmed by the Appeals Panel in Texas

result of her job as a clerk in the medical records department, which involved data entry and filing. She lost very little time from this injury standing alone. The agreement on the scope of the claimant's Injury date 2, injury was that it involved the left wrist, elbow and shoulder and the neck. To the extent that claimant also had depression from either injury, it was agreed by all parties at the CCH that it did not result in disability for the period of time under review. The claimant contended that her disability, which began November 12, 1998, was caused by both injuries. All parties agreed that the claimant had the inability to obtain and retain employment as of this date.

Claimant's treating doctor was Dr. F. The claimant said she had only one surgery, in June 1999, for her right arm. In November 1998 she was working in the laundry room of the medical facility, as part of a light-duty job that she had been assigned to for about a month. Prior to that, she had worked answering a telephone. She said she worked under restrictions for both injuries. She stopped working by November 12th because the folding of laundry still constituted repetitive motion. The claimant testified that she had never been released to work due to her right hand and that since her surgery, her right ring and little finger could not be opened and she had no grip strength. She contended it was worse than before the surgery and she was due to have another MRI. The claimant said she had muscle spasms in her neck and had an injection for pain relief in October 1998. It was her continued testimony that while her left arm bothered her up to her shoulder, her right arm, as her preferred extremity, caused more difficulty than her left. Asked at the very end of the CCH if working in the laundry room made her hands and arms hurt "worse," claimant responded, "Yes."

Dr. F's records indicate that he restricted claimant to sedentary duty with no continued use of the upper extremities in November 1998 and January 1999. June 1998 EMG testing was reported as showing bilateral enervation. Claimant indicated she left work because of her injury and because there was no available work to accommodate the November 1998 restrictions. Dr. F noted on February 18, 1999, that her left hand had improved with therapy and the right hand was more symptomatic. Essentially all of the medical evidence in the record document bilateral problems at the wrists and elbows as well as some problems with cervical pain.

At the beginning of the CCH, self-insured objected to all of carrier's exhibits due to failure to exchange within 15 days after the benefit review conference. All records were ultimately exchanged with self-insured over two weeks before the CCH, after the adjuster for self-insured called carrier to complain that no documents were exchanged. The attorney for carrier discovered that the first exchange had been erroneously mailed to the adjuster in care of employer 2. They were forthwith properly mailed to self-insured. The hearing officer found good cause for the untimely exchange in that timely exchange was attempted but not made due to an inadvertent error.

The adjuster for self-insured testified that the self-insured had paid claimant for disability from June 19th through June 25th and stopped paying because her employer

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Workers' Compensation Commission Appeal No. 982661, decided December 30, 1998 (Unpublished).

gave her modified duty. He said that he had not been aware that she was transferred to the laundry room doing light-duty work by November 1998 as she testified at the CCH. He said that he was not aware of any dispute from carrier "disputing disability" until claimant's surgery for her right extremity. The adjuster said that the claimant contacted him after she went off work in November 1998, and that the adjuster informed her that any TIBS should be claimed through carrier. Self-insured filed a TWCC-21 at this point disputing liability because of the involvement of the left arm. Based upon the adjuster's testimony that he was not subjectively aware of claimant's laundry duty until the present CCH, self-insured's attorney informed carrier and claimant at the end of the CCH that it would be filing a TWCC-21 based upon purported "newly discovered evidence" that the claimant had been working the year before in the laundry room of employer 2, and that "we can all agree that laundry work is a whole lot different and more impact" than answering the telephone, her previous light-duty job. No motions were made at this juncture to add the issue or reconvene the CCH.

## ADMISSION OF CARRIER'S EXHIBITS

A party wishing to present evidence at the CCH which had not been exchanged per Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) must show good cause for its failure to exchange per the rule. Our standard of review for determining the appropriateness of the hearing officer's good cause finding is also one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. However, a hearing officer's error is not reversible error unless the party raising the point of error shows that the admission of the document was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 941533, decided December 30, 1994.

There were three exhibits involved: the TWCC-21 filed by carrier, claimant's operative report for her right hand, and records of the treating doctor that primarily constituted her release. Although we do not agree that the hearing officer abused his discretion by admitting them in this instance, the decision of the hearing officer is sustainable on the claimant's testimony and the other documentary evidence. Both her off-work status and her operation were testified to or described in other records; the TWCC-21 is not relevant to the issues before the hearing officer. We therefore find no reversible error.

## WHETHER THE HEARING OFFICER ERRED IN FINDING SPLIT LIABILITY FOR THE PERIOD OF UNDISPUTED DISABILITY

We affirm the hearing officer's decision and find that the record well supports his determination that each carrier is equally liable for TIBS for the period of undisputed disability. We do not agree with self-insured's argument that an issue relating to disability necessarily subsumes issues of extent of injury. There were no issues of extent activated by the parties prior to this CCH convening only the liability for each insurer for TIBS during the period of disability. Moreover, all injuries that were argued to have played a part in disability were stipulated before or during the CCH and attributed to either the first or the

second injury. Although the appellate brief decries the failure of the hearing officer to adjudicate the extent of injury, the involved injuries were stipulated by all parties and claimant said that depression was not a factor in her inability to work.

Self-insured essentially asserts that the number of body parts should be arithmetically tallied and any split of TIBS should, in some fashion, be based on the proportion of injured regions to the whole. We do not agree. The matters before the hearing officer did not involve an aggravated injury but the combination of two injuries to result in claimant's inability to work, even if she might have had ability to work if either injury were the only one she had sustained. The hearing officer had the discretion to make an appropriate apportionment of liability based upon his analysis of how the two injuries in combination resulted in the inability to obtain and retain employment, and he need not have believed that every injured region contributed in equal measure to this. Plainly, there was testimonial and medical evidence in the record to meet the claimant's burden of proof that her right extremity injury was a factor in her restricted (or lack of) ability to work. Claimant's very restricted releases from Dr. F were based on bilateral injuries. She further offered testimony that, if anything, her right hand caused greater difficulty, although both arms were factors. The medical evidence makes clear that her debilitating condition was a bilateral injury. Finally, a claimant's testimony alone is sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989).

Self-insured did not offer evidence that claimant's injury date 2, injury was the "sole cause" of disability. (Indeed, its defense was largely based on its argument that carrier, by virtue of paying TIBS for so long, "waived" a claim for shared responsibility.)

The hearing officer evidently believed that both upper extremities were the cause of the claimant's inability to work, whatever else may have been treated, and that each extremity contributed in equal measure. He could determine that any part that the neck and left shoulder played would be offset by the fact that her right extremity was her preferred extremity.[2] Under the facts of this case and the injuries involved, he was not required to consider the disability from the first injury as if the second injury had never happened. There is sufficient support in the evidence for the decision of the hearing officer, and we cannot agree that he erred.

## WHETHER CARRIER "WAIVED" AN ARGUMENT THAT SELF-INSURED HAS FULL OR PARTIAL LIABILITY FOR THE PERIOD OF DISABILITY

Self-insured has somewhat miscast the underlying controversy as a "dispute" about disability. It was not. All parties agreed that the claimant had the inability to obtain and retain employment due to a compensable injury or injuries. Carrier's argument was that all or part of this period resulted from the first injury, and not the one for which it had coverage.

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[2] Carrier has not appealed the 50/50 split, although it asserted and there was evidence to indicate, that surgery to the right extremity arguably caused the injury date 1, injury to predominate for some period of time over the left extremity as a cause of disability.

Because carrier had paid the entire TIBS amount during the disputed period of time, the essence of the case was whether any reimbursement was due to carrier because of a concurrent cause of disability. Any inability of the claimant to obtain or retain employment was neither put in issue nor actually litigated.

However, whether or not it could be said that carrier came to "dispute disability," self-insured misconstrues Advisory 97-02 and Texas Workers' Compensation Commission Appeal No. 990679, decided May 17, 1999, when it argues that either compels a waiver in the absence of a TWCC-21 filed by a certain date to dispute disability. The general issue of "compensability" of an injury, which is dealt with in the "waiver" and newly discovered evidence provisions set out in Sections 409.021 and 409.022, is different from issues that mature later concerning entitlement for the various tiers of medical or income benefits or rights to reimbursement or offset that may arise from payment of those benefits.

Advisory 97-02 clarified Advisory 96-05, and both were an attempt, in the interest of reducing the use of the TWCC-21 form, to inform carriers about the circumstances under which a TWCC-21 would or would not be required when disability was in dispute. The advisory itself draws the distinction between a dispute over disability and a compensability dispute. The advisory concludes with a prohibition on disputing disability that has not yet occurred, noting that a carrier could not predict that an injured worker would never have future disability. There is frankly nothing in the advisory giving any notice that the Texas Workers' Compensation Commission would construe a dispute of disability filed after payment of TIBS had taken place as a waiver of the right to mount such a dispute. The cases cited by self-insured from the Appeals Panel have largely to do with filing of disputes over compensability of the extent of injury.

If there is a waiver in the case, it may be self-insured's 12th hour revival of its "last injurious exposure" and aggravation argument rejected in Appeal No. 982661, *supra*, for the new periods of time under review in this CCH. Self-insured's concluding announcement at the end of the CCH of its intent to file a TWCC-21 established no sound basis for the hearing officer to inject the "issue" into his decision, nor need the Appeals Panel at this late date remand the proceeding to consider the fruits of a deferred investigation.

We affirm the hearing officer's decision and order as based on sufficient evidence in the record. We find no merit in the legal arguments raised for setting aside the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge