

APPEAL NO. 010593

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 February 27, 2001. The hearing officer resolved the disputed issues by concluding that the respondent (claimant) sustained a compensable injury on _____, and had disability therefrom through February 27, 2001. The hearing officer further determined that the appellant (carrier) contested compensability in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 124.2 and 124.3 (Rules 124.2 and 124.3) and that the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the carrier February 27, 2001, was sufficient to dispute timely notice of injury by the claimant. The carrier appeals and argues that the hearing officer abused his discretion in making two evidentiary rulings over the carrier's objection. In addition, the carrier avers that the claimant failed to prove he sustained a compensable injury and thus failed to show any resultant disability. The claimant filed a response urging affirmance.

DECISION

Reversed and remanded.

The claimant's underlying allegations are that he sustained a compensable injury in the form of stridor¹ and shortness of breath on _____, when, while in the course and scope of his employment, he was exposed to and inhaled fumes from the chemical "epoxy." The carrier contested the claimant's contentions and argued that the claimant suffers from a disease of life, reactive airway disease, and that his inhaling the fumes from epoxy, if it happened, did not cause his current conditions of stridor and shortness of breath. The claimant's treating doctor testified that the claimant's current condition is a conversion reaction to psychological problems, i.e., that the claimant is exhibiting physical manifestations of some psychological "injury."

The crux of this case involves the hearing officer's exclusion of one of the carrier's exhibits. The carrier argues that the hearing officer abused his discretion in excluding from evidence Carrier's Exhibit No. 6, which included medical records showing that the claimant had been hospitalized with pneumonia in 1998, and had been previously diagnosed with reactive airway disease (asthma). The records also showed that the claimant's asthma had a strong component of anxiety, giving the claimant similar symptoms to those at issue here. Hence, had the exhibit been admitted into evidence, it might have supported the carrier's position, bolstered by no other independent evidence, that the claimant suffered from a disease of life that had been previously diagnosed.

Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165,

¹"Stridor" is defined in Dorland's Medical Dictionary as "a harsh, high-pitched respiratory sound such as the inspiratory sound often heard in acute laryngeal obstruction."

decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in exclusion of evidence, an appellant must first show that the exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see also Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

We agree that the hearing officer abused his discretion in excluding Carrier's Exhibit No. 6. When the carrier sought to introduce Exhibit No. 6, the claimant objected, claiming it was not timely exchanged; each party agreed that the documents were exchanged on February 22, 2001, for the February 27 CCH. Because a February 22 exchange date was not timely, the carrier then argued that it showed due diligence in procuring the records, given the late date it was notified of the claimant's claim, and that it consequently had good cause for exchanging the documents only five days prior to the CCH. The carrier argued that it first had knowledge of the claim at issue on January 19, 2001, and that it requested, on January 31, 2001, the claimant's previous medical records. The carrier contended this was after learning of the records immediately after a January 30, 2001, benefit review conference, which also involved another insurance company, and during which it was determined that the other carrier was not liable for the workers' compensation coverage for the employer.

The claimant argued that because the law firm representing the carrier (the lawyers) had notice of the claimant's past medical history, vis-à-vis its representation of the first insurance company involved (client insurer), the lawyers' knowledge was therefore imputed to the carrier. As a result, the claimant argued, the carrier did not show due diligence in procuring the claimant's medical records constituting Exhibit No. 6 as it had known of them as long as had the client insurer and the lawyers, months before January 30, 2001. We determine that this argument is untenable as the lawyers could not have imparted knowledge to the carrier from the client insurer because they would have then violated the client insurer's attorney/client and investigatory privileges and would thus be subject to professional discipline and possible civil liability. We agree that the hearing officer abused his discretion in finding that the knowledge of the lawyers was imputed to the carrier, such that the carrier could not have shown due diligence in attempting to or good cause for failing to timely exchange the documents comprising Carrier's Exhibit No. 6. Therefore, the hearing officer's decision and order is reversed and the case remanded for the hearing officer to review and reconsider his determination to exclude Carrier's Exhibit No. 6, along with the other evidence in the record, to assign whatever weight he deems appropriate to all of the evidence, and to reconsider and resolve the issue of the claimant having sustained a compensable injury and ensuing disability.

The hearing officer subsequently denied the carrier's request to use Exhibit No. 6 to refresh the claimant's memory, but not for admission. To the extent the hearing officer based this denial on his earlier ruling to exclude Exhibit No. 6 from evidence, this ruling was also erroneous.

In addition, we observe that the carrier is correct in its contention that counsel may ask leading questions on cross-examination of witnesses. Here, though, while the hearing officer did not allow the carrier to ask the claimant a leading question, he allowed the carrier an opportunity to rephrase the question, to which the witness (claimant) ultimately responded. Even if this refusal were an abuse of discretion, any possible error was not reasonably calculated to cause, nor did it probably cause, the rendition of an improper judgment. For that reason, the hearing officer's error was harmless.

Given our resolutions with respect to the above evidentiary questions, we do not address the appealed issues of compensable injury or disability, as they will have to be reevaluated in light of whatever further evidentiary rulings the hearing officer deems appropriate.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge