

APPEAL NO. 032248
FILED SEPTEMBER 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 24, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that she did not have disability; that the respondent (self-insured) waived the right to contest compensability of the claimed injury by not contesting it in accordance with Sections 409.021 and 409.022; and that the claimant did not timely report the claimed injury to her employer and did not have good cause for failing to do so, but, due to the self-insured's waiver of the right to contest compensability, it is not relieved of liability for the claimed injury. The claimant appeals the adverse determinations and asserts that the hearing officer erred in excluding several witness statements that were offered into evidence at the hearing. The claimant also attaches a three-page narrative to her appeal that is essentially her version of the events in question. The respondent (carrier) urges affirmance of the hearing officer's decision and asserts that the aforementioned three pages should not be considered on appeal. The waiver determination has not been appealed and has, therefore, become final pursuant to Section 410.169.

DECISION

Affirmed as reformed in part, reversed and rendered in part.

NEW EVIDENCE

In determining whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that was not submitted into the record at the hearing. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the document attached to the claimant's request for review and, consequently, we decline to consider it on appeal.

EVIDENTIARY OBJECTION

Regarding the exclusion of Claimant's Exhibit No. 7 for lack of timely exchange, we have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the 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). 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 Mut. Ins. Co. v. Middleman*, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We find no abuse of discretion in the hearing officer's application of the exchange of evidence rules.

TIMELY NOTICE

Section 409.001 requires that an employee, or a person acting on the employee's behalf, shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The date upon which the claimant gave notice of the injury to her employer was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93761, decided October 4, 1993. Nothing in our review of the record indicates that the hearing officer's timely notice determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986). However, we note that despite the finding of fact that the claimant did not give timely notice or have good cause for failing to do so, the hearing officer concluded that the self-insured is not relieved from liability because it waived the right to contest compensability of the claim and this conclusion is not adverse to the claimant.

DISABILITY

Disability is likewise a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. "Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Under the facts of this case, we do not perceive error in the hearing officer's resolution of the disability issue, as it is clear from his decision that irrespective of the compensability determination, he was not persuaded that the claimant proved that she had disability.

COMPENSABILITY

The hearing officer erred in determining that the "claimant did not suffer harm to the physical structure of her body from any cause" and impliedly concluding that the claimant did not sustain a compensable injury. As previously explained, the hearing officer determined that the self-insured waived the right to contest compensability of the claimed injury and that determination has not been appealed and has become final. In *Continental Casualty Co. v. Williamson*, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), the court held that if a hearing officer determines that there is no injury, and that

finding is not against the great weight and preponderance of the evidence, a carrier's failure to contest compensability cannot create an injury as a matter of law. The Appeals Panel has held that Williamson is limited to situations where there is a determination that the claimant did not have an injury; that is, no damage or harm to the physical structure of the body. However, if the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when a carrier waives its right to dispute compensability. See Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000, and Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998.

The claimant claimed that she injured her back lifting at work. In the present case, the MRI in evidence reflects that the claimant has damage to her lumbar spine. Because of this, and the fact that the self-insured waived the right to contest compensability of the claimed injury, Finding of Fact No. 6 and Conclusion of Law No. 4 are reversed and a new decision is rendered that the claimant has suffered damage or harm to the physical structure of her body and that the claimant's injury became compensable as a matter of law due to the self-insured's waiver of the right to dispute compensability. In order to comport with the reversal, Conclusion of Law No. 6 is reformed to reflect the following:

The self-insured waived the right to contest compensability of the claimed injury by withdrawing its timely contest of the injury, pursuant to Sections 409.021 and 409.022.

CONCLUSION

The hearing officer's waiver determination has not been appealed and has become final pursuant to Section 410.169. The determinations relating to timely notice and disability are affirmed. The hearing officer's determination that the claimant did not suffer damage or harm to the physical structure of her body is reversed and a new decision is rendered that the claimant has suffered damage or harm to the physical structure of her body and, due to the self-insured's waiver of the right to contest compensability of the claimed injury, the claimant's injury has become compensable as a matter of law.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**PRESIDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge