

APPEAL NO. 032608
FILED NOVEMBER 7, 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 (CCH) was held on August 28, 2003. The hearing officer determined that: (1) the respondent/cross-appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting compensability in accordance with Section 409.021; (2) that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; and (3) that the claimant did not have disability resulting from an injury sustained on _____. The claimant appealed the hearing officer's injury and disability determinations based on sufficiency of the evidence grounds. The carrier filed a conditional cross-appeal of the hearing officer's waiver determination, asserting that the hearing officer erred in excluding evidence to show that the carrier did not waive its right to dispute compensability. The carrier urges affirmance of the hearing officer's injury and disability determinations. The claimant did not file a cross-response.

DECISION

Reversed and remanded.

CARRIER WAIVER

The carrier asserts that the hearing officer erred by excluding Carrier's Exhibit No. 1, page 1, a date-stamped copy of the carrier's "cert-21." The claimant objected to the admission of the document at the hearing, questioning its authenticity and asserting that it was not exchanged within 15 days after the benefit review conference as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The hearing officer excluded the document on the basis that it was not timely exchanged and there was no good cause for the untimely exchange. Section 410.163(b) provides, in part, that a hearing officer shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made. In order to resolve an issue of waiver, a hearing officer must know the date on which the carrier agreed to pay or disputed benefits. For this purpose, we have required that a hearing officer admit essential Texas Workers' Compensation Commission (Commission) records, such as a Payment of Compensation or Notice of Refused/Disputed Claim, where compliance with the 1989 Act is at issue. See Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994; Texas Workers' Compensation Commission Appeal No. 002287, decided November 13, 2000; Texas Workers' Compensation Commission Appeal No. 010696, decided April 26, 2001; Texas Workers' Compensation Commission Appeal No. 012101-s, decided October 22, 2001; and Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003. Accordingly, the hearing officer erred in excluding the carrier's "cert-21." Because the carrier's "cert-21" may be dispositive of the issue of waiver, we reverse the

hearing officer's determination and remand for admission of Carrier's Exhibit No. 1, page 1. After admitting the "cert-21," the hearing officer may consider its authenticity in reaching a determination on the issue of waiver.

COMPENSABLE INJURY

The claimant testified that she suffered injuries as a result of a slip and fall onto her left side, while making a sales call for her employer on _____. The claimant testified that she injured her head, left shoulder, left side, and left lower back. She subsequently sought medical treatment and was diagnosed with neck pain, left shoulder pain, radiating arm pain, back pain, and lower back pain. The medical records, however, also reveal severe spasm in the cervical spine with reduced range of motion and associated tingling and numbness into the left hand, palpable spasm in the lumbar spine, and tenderness in the left shoulder with positive impingement signs. The claimant testified that she was diagnosed with a headaches, neck strain, shoulder strain, and low back strain. The hearing officer found that the claimant failed to establish that she sustained an injury in the course and scope of her employment. While the basis of this determination is unclear, it appears from the hearing officer's Statement of the Evidence that the she found against the claimant in the absence of a diagnosis other than pain.

The hearing officer erred in determining that the claimant did not sustain a compensable injury on _____. While we have said that pain alone is not an injury, those cases involved a lack of objective or clinical indications of damage or harm to the physical structure of the body. See Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992; *and compare National Union Fire Insurance Company of Pittsburgh v. Janes*, 687 S.W.2d 822 (Tex. App.-El Paso 1985, writ ref'd n.r.e.) (where court held that pain accompanied by swelling and medical evidence of aggravation would support a finding of injury under the statute); Texas Workers' Compensation Commission Appeal No. 021403, decided July 16, 2002, following *Janes, supra*. The medical evidence, in this case, indicates spasms in the cervical and lumbar spine, tingling and numbness into the left hand, and positive impingement signs in the left shoulder. In view of this evidence, we reverse and remand the hearing officer's determination for further consideration. On remand, the hearing officer should state the basis of her determination and make corresponding findings of fact and conclusions of law.

In her appeal, the claimant requests an opportunity to present additional witnesses on remand. The claimant asserts that she failed to call the witnesses at the prior hearing on advice from her ombudsman. In Texas Workers' Compensation Commission Appeal No. 001766, decided September 29, 2000, the Appeals Panel noted that an ombudsman is not a legal representative, that the ombudsman is at the CCH to assist the claimant, and that the decision to present evidence or not present evidence remains the responsibility of the claimant. The claimant, in this case, was given ample opportunity to meet her burden of proof on the disputed issues.

Accordingly, the hearing officer should not take additional evidence from the claimant's witnesses, on remand.

DISABILITY

The hearing officer erred in determining that the claimant did not have disability. Given our reversal of the injury determination, we likewise reverse and remand the hearing officer's disability determination for further consideration of the evidence.

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 Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Edward Vilano
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge