

APPEAL NO. 032713
FILED DECEMBER 9, 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 August 18, 2003. The hearing officer determined that appellant/cross-respondent (claimant) sustained a compensable injury on _____; that she had disability from February 27 through May 2, 2002, and from March 3, 2003, through the date of the hearing; that claimant timely reported the claimed injury; and that respondent/cross-appellant (carrier) waived the right to contest the compensability of the claimed injury. Claimant appealed the disability determinations, contending that she had disability continuously from February 27, 2002, through the date of the hearing. Carrier responded that the hearing officer should have found that claimant did not have disability at all. Carrier appealed the determinations that claimant sustained a compensable injury, that she had disability, and that she timely reported the injury. Carrier asserted that the hearing officer abused his discretion in failing to allow Dr. S to testify by telephone. Carrier also appealed the determination regarding carrier waiver, asserting that because claimant did not sustain damage or harm to her body, there could be no carrier waiver. Claimant responded that the Appeals Panel should affirm the hearing officer's determinations, except for the disability determination that she appealed.

DECISION

We affirm as reformed in part and reverse and render in part.

We first correct a clerical error in the decision and order. Conclusion of law No. 4 contains an error in that the hearing officer states that disability recurred on May 3, 2003, when it is apparent that he means March 3, 2003, and the decision is hereby corrected.

Carrier contends that the hearing officer abused his discretion in failing to allow Dr. S to testify by telephone. Carrier said Dr. S would have testified regarding the nature of the shoulder disorder and that he would counter the evidence from Dr. D regarding whether there is a rotator cuff tear. Carrier stated that Dr. R also stated that there is no rotator cuff tear. The March 12, 2002, report of Dr. R says there is no rotator cuff tear, though Dr. R said there may be bursitis and rotator cuff tendonitis.

To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or 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 decision. 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). After reviewing the evidence in this case, we conclude that any

possible error in excluding evidence in this case was not reasonably calculated to cause, nor did it probably cause, the rendition of an improper decision. We perceive no reversible error.

Carrier contends the hearing officer erred in determining that it waived the right to contest the compensability of the claimed injury. Carrier asserted that there can be no waiver because there was no damage or harm to the physical structure of claimant's body. However, the hearing officer determined that claimant did sustain an injury to her shoulder at work and there is MRI evidence of a condition showing damage to claimant's shoulder, so carrier's argument fails. Texas Workers' Compensation Commission Appeal No. 022608, decided November 25, 2003; Texas Workers' Compensation Commission Appeal No. 030430, decided April 7, 2003.

Carrier contends that the hearing officer erred in determining that claimant sustained a right shoulder injury in the course and scope of employment and that she timely reported her injury. We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Additionally, as noted above, the carrier waived the right to contest the compensability of the claimed injury and it was compensable as a matter of law. Carrier lost its right to assert a defense under Section 409.002 regarding timely notice. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

Carrier contends that the hearing officer erred in determining that claimant had disability from February 27 through May 2, 2002, and from March 3, 2003, through the date of the hearing. We have reviewed the complained-of determination and conclude that the issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Claimant contends the hearing officer erred in determining that she did not have disability from May 3, 2002, through March 2, 2003. We agree. Claimant testified that she was working at a lighter-duty position after her shoulder injury when she was moved to a heavier waitress position in February 2002. She said she could not do the heavier waitressing work, and that Dr. D took her off work on February 27, 2002. Claimant said that she found out in April 2002 that she had cancer and began cancer treatments. She said she did not begin treating for the shoulder injury again until March 3, 2003. The hearing officer determined that claimant had disability from February 27, 2002, through May 2, 2002. The hearing officer apparently ended disability for a period beginning May 2, 2002, because that was the last date mentioned in one of her medical records and there was a gap in treatment until Dr. D resumed treatment on March 3, 2003. Dr. D

said claimant's "white count" was down and that she did not have treatment for her shoulder while she was being treated for cancer. The hearing officer determined that: (1) claimant's treatment for the shoulder ended on May 2, 2002, because of other serious health problems; (2) claimant's other health problems resolved to the point that she can return for treatment of the shoulder on March 3, 2003; (3) claimant sought treatment from Dr. D on March 3, 2003; and (4) claimant failed to establish that her right shoulder was a cause of her inability to work from May 3, 2002, to March 2, 2003.

The hearing officer erred in limiting disability in this case. It is apparent that the hearing officer determined that the claimant's disability stopped for a while beginning on May 2, 2002, and that the cancer was the sole cause of the disability between that date and March 3, 2003, when she resumed treatment for her shoulder. The hearing officer applied the wrong legal standard. The fact that claimant was undergoing cancer treatment did not preclude the injury to her shoulder from remaining at least a producing cause of her disability. There was no evidence that claimant's shoulder injury resolved from May 2, 2002, to March 3, 2003, so that she was able to earn her preinjury wage. The hearing officer did not find that the claimant's shoulder condition changed during that period. To say that claimant did indeed have disability for a period, then to end disability while she was undergoing cancer treatments, and then to start disability again with no evidence of a change in the condition of the shoulder does not make sense under the facts of this case.

There may be more than one producing cause of disability. To establish that a noncompensable intervening injury or condition ends disability, it must be proved that the intervening injury or condition is the sole cause of the claimant's disability. Texas Workers' Compensation Commission Appeal No. 992587, decided December 30, 1999. There was no such evidence. We reverse the hearing officer's determination that claimant did not have disability from May 3, 2002, through March 2, 2003, and render a decision that claimant had disability from May 3, 2002, through March 2, 2003. In total, claimant had disability from February 27, 2002, through the date of the hearing.

We affirm that part of the hearing officer's decision that states that claimant sustained a compensable injury, that she timely reported the injury, and that carrier waived the right to contest the compensability of the injury. We affirm that part of the hearing officer's decision that states that claimant had disability from February 27 through May 2, 2002, and from March 3, 2003, through the date of the hearing. We reverse that part of the hearing officer's decision that determined that claimant did not have disability from May 3, 2002, to March 2, 2003, and render a decision that claimant had disability from May 3, 2002, to March 2, 2003.

According to information provided by carrier, the true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Margaret L. Turner
Appeals Judge