APPEAL NO. 033316
FILED FEBRUARY 2, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A consolidated contested case hearing was held on November 3, 2003. In (Docket No. 1), the hearing officer determined that: (1) the appellant (claimant) did not sustain a compensable injury in the course and scope of employment on (date of injury for Docket No. 1); (2) the respondent (carrier) is relieved from liability under Section 409.002, because the claimant failed to timely notify her employer of an injury pursuant to Section 409.001; and (3) because the claimant did not sustain a compensable injury on (date of injury for Docket No. 1), she did not have disability. In (Docket No. 2), the hearing officer determined that: (1) the claimant did not sustain a compensable injury in the course and scope of her employment on (date of injury for Docket 2); (2) even though the carrier did not timely contest the claimed injury, it did not waive the right to contest compensability because the claimant did not sustain a compensable injury; (3) the carrier is relieved from liability under Section 409.002, because the claimant failed to timely notify her employer of an injury pursuant to Section 409.001; and (4) because the claimant did not sustain a compensable injury on (date of injury for Docket 2), she did not have disability. The claimant appeals these determinations and asserts that the hearing officer erred by not admitting Claimant's Exhibit Nos. 3, 6, 7, 8, and 9. The carrier urges affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

We first address the claimant's assertion that the hearing officer erred by not admitting Claimant's Exhibit Nos. 3, 6, 7, 8, and 9. In order to obtain a reversal, the claimant must show that the alleged error was reasonably calculated to cause and probably did cause rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (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.). Applying this standard, we find no reversible error.

(DOCKET NO. 1)

The hearing officer did not err in making the complained-of determinations. The injury and notice determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing

officer's injury and notice determinations are 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). Because the claimant did not sustain a compensable injury on (date of injury for Docket No. 1), the hearing officer properly concluded that the claimant did not have resultant disability. Section 401.011(16).

(DOCKET NO. 2)

In her appeal, the claimant specifically challenges the hearing officer's findings of fact and conclusions of law with regard to injury, notice, and disability. The claimant also argues, "My ombudsman informed me that if [the carrier] didn't deny [the claim] in 7 days, they were responsible for the claim." In the absence of a specific challenge of the hearing officer's conclusion of law with regard to waiver, the carrier contends that the issue was not appealed. Section 410.202(c) provides that a request for appeal or a response must clearly and concisely rebut or support the decision of the hearing officer on each issue on which review is sought. The Appeals Panel has read this requirement broadly, particularly in cases involving an unrepresented claimant where it is relatively evident what issues the claimant is appealing. Texas Workers' Compensation Commission Appeal No. 971637, decided September 26, 1997. In view of the above quoted language, the claimant clearly appeals the hearing officer's waiver determination. Accordingly, the issue is addressed below.

The hearing officer found that the carrier first received written notice of the claimed injury on September 13, 2003, and did not begin to pay benefits or notify the Texas Workers' Compensation Commission (Commission) and the clamant of its refusal to pay benefits, within seven days of September 13, 2003. The carrier does not assert that it submitted a "Cert-21," within the required period. Notwithstanding, the hearing officer concluded that the carrier did not waive its right to contest the claimed injury under Section 409.021, because the claimant did not sustain an injury in the course and scope of her employment on (date of injury for Docket 2).

The hearing officer erred in determining that the carrier did not waive its right to contest the claimed injury and that the claimant did not sustain a compensable injury on (date of injury for Docket 2). Although not cited in the decision and order, the hearing officer appears to apply Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). In Williamson, 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, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has recognized that Williamson is limited to situations where there is a determination that the claimant had no injury, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. We read the hearing officer's decision, in this case, as stating only that the claimed injury is not causally related to the claimant's employment. Indeed, medical reports, dated July 18, 2003, show that the claimant has cervical/brachial syndrome, a shoulder sprain/strain, an elbow injury, and a

wrist sprain/strain. Because the evidence shows that the claimant has some injuries and the carrier failed to dispute these injuries within seven days after receipt of written notice, we reverse the hearing officer's decision and render a new decision that the carrier waived its right to dispute the claimed injuries pursuant to Section 409.021, and the claimant sustained compensable injuries on (date of injury for Docket 2), as a matter of law.

The hearing officer erred in determining that the carrier is relieved from liability under Section 409.002, because the claimant failed to timely notify her employer of an injury pursuant to Section 409.001. In Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002, we held that a carrier, which waives its right to contest compensability by failing to comply with Section 409.021, also loses its right to assert a defense under Section 409.002. Accordingly, we reverse the hearing officer's notice determination and render a new decision that the carrier is not relieved from liability under Section 409.002.

The hearing officer erred in determining that the claimant did not have disability. The hearing officer found that the claimant was unable to obtain and retain employment at her preinjury wages due, in part, to the claimed injury of (date of injury for Docket 2), for the period beginning on June 6, 2003, and continuing through the date of the hearing. This finding was not appealed by either party. In view of our decision that the claimant sustained a compensable injury on (date of injury for Docket 2), we reverse the hearing officer's decision that the claimant did not have disability and render a new decision that the claimant had disability for the period beginning on June 6, 2003, and continuing through the date of the hearing.

The hearing officer's decision and order in (Docket No. 1) is affirmed. The hearing officer's decision and order in (Docket No. 2) is reversed and rendered, consistent with our decision above.

The true corporate name of the insurance carrier is **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES H. MOODY II
901 MAIN STREET
DALLAS, TEXAS 75202.

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Edward Vilano
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Margaret L. Turner
Appeals Judge