

APPEAL NO. 040203  
FILED MARCH 19, 2004

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 November 20, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable repetitive trauma injury to her cervical spine on \_\_\_\_\_, and had disability beginning March 21, 2003, and continuing through the date of the CCH. In its appeal, the appellant (carrier) argues that the hearing officer erred in admitting Hearing Officer's Exhibit No. 3, a Texas Workers' Compensation Commission (Commission)-selected required medical examination (RME) report by Dr. H dated August 20, 2003. The carrier additionally argues that the hearing officer abused his discretion by failing to rule on its objection; not timely filing his decision; and not fully developing the record and preserving the rights of the parties. The carrier also contends that the disputed determinations of the hearing officer are so against the great weight and preponderance of the credible evidence as to be manifestly unjust. The claimant responded, urging affirmance. The claimant contends that the carrier had a copy of Dr. H's report since the benefit review conference, that the report was an official Commission document, and that the report was not initially included in her offer of evidence at the CCH because of an oversight by the ombudsman. The claimant also notes that once the hearing officer gave notice that he was going to take notice of the report, the carrier had a chance to present arguments disputing the report. We note that the carrier additionally filed a reply to the claimant's response.

DECISION

Affirmed.

As noted above, after the record had closed, the hearing officer reopened the record at the claimant's request to admit Hearing Officer's Exhibit No. 3, a Commission-selected RME report from Dr. H dated August 20, 2003. A copy of Dr. H's report was provided to the parties and an opportunity was presented to the parties to provide any comments or response to Dr. H's report. The record was closed on December 29, 2003, and a decision was written. The hearing officer found good cause to add Dr. H's report to the record as Hearing Officer's Exhibit No. 3 and noted the carrier's objection. The hearing officer's evidentiary rulings are reviewed using an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the admission 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. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Although the hearing officer specifically found that the claimant was evaluated by Dr. H on August 20, 2003, and he concluded that the claimant sustained a repetitive trauma injury to her cervical spine, a review of the record also reflects that another doctor who examined the

claimant concluded in a record dated April 3, 2003, that the claimant's neck problem was caused by repetitive type neck movement at work. After reviewing the record, we cannot conclude that admission of Dr. H's report was reasonably calculated to cause and probably did cause the rendition of an improper judgment. See Hernandez, supra. Nor do we find merit in the carrier's contention that it was denied due process by the admission of Dr. H's report. The parties were given an opportunity to provide comments or responses to Dr. H's report before a decision was rendered.

Regarding the carrier's appeal of the hearing officer's failure to file his decision with the Division of Hearings within 10 days, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 142.16(c) (Rule 142.16(c)), the Appeals Panel early on addressed that situation in Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, citing the Texas Supreme Court case of Lewis v. Jacksonville Building and Loan Association, 540 S.W.2d 307 (Tex. 1976), which held that the hearing officer's time limits do not go to the essence of the merits and thus are not mandatory. We hold the carrier's appeal on this ground to be without merit.

Nor do we find merit in the carrier's contention that the admission of Dr. H's report violates Section 410.164. The request of the claimant to reopen the record, the objections of the carrier, and the report as well as the decision to admit the report were all documentary pieces of evidence and were made a part of the record. Contrary to the carrier's contention, the hearing officer included the letters between the close of the record on November 20, 2003, and its reopening on December 29, 2003.

An occupational disease includes a repetitive trauma injury. Section 401.011(34). The claimant contended that she sustained a repetitive trauma injury from performing her work activities for the employer. The claimant had the burden to prove that she sustained a repetitive trauma injury as defined by Section 401.011(36). Conflicting evidence was presented on the disputed issues of whether the claimant sustained a compensable injury in the form of an occupational disease, the date of injury, and disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations on the disputed issues are supported by sufficient evidence and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer.

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

**LEO F. MALO  
12222 MERIT DRIVE, SUITE 700  
DALLAS, TEXAS 75251.**

---

Margaret L. Turner  
Appeals Judge

CONCUR:

---

Gary L. Kilgore  
Appeals Judge

---

Robert W. Potts  
Appeals Judge