

APPEAL NO. 041463
FILED AUGUST 12, 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 May 25, 2004. The hearing officer determined that: (1) the date of injury (DOI) is on or about _____; (2) the appellant (claimant) did not sustain a compensable repetitive trauma injury; (3) the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure, without good cause, to timely notify her employer pursuant to Section 409.001; (4) since there is no compensable injury, there can be no disability; and (5) the election of remedies doctrine is not a bar to this claim. The claimant appealed the adverse determinations based on sufficiency of the evidence grounds. The carrier responded, urging affirmance.

DECISION

Affirmed.

We first address the claimant's evidentiary objection. The claimant asserts that the hearing officer erred in failing to consider Claimant's Exhibit No. 15, a medical report by Dr. H, which she offered into evidence. Parties must exchange documentary evidence with each other not later than 15 days after the benefit review conference and thereafter, as it becomes available. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The hearing officer determined that the medical report was not timely exchanged, and that no good cause existed for the untimely exchange. To obtain a reversal on the basis of admission or exclusion of evidence, it must be shown that the ruling admitting or excluding the evidence was error and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been stated 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 Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We conclude that the hearing officer properly excluded the complained-of medical report on the grounds of no timely exchange and no good cause shown.

The claimant also complains that Dr. H's testimony was excluded (the hearing officer allowed the testimony on a bill of exception and said that she would not consider it). The hearing officer determined that the claimant did not timely exchange the doctor's name as a witness pursuant to Rule 142.13(c). We perceive no error by the hearing officer in refusing the doctor's testimony on the grounds of no timely exchange and no good cause shown.

The claimant had the burden to prove the DOI, that she sustained a compensable injury, that she gave timely notice of injury to the employer, and that she

has had disability. The claimant claimed that she sustained a repetitive trauma injury as a result of performing her work activities for the employer. Section 408.007 provides that the DOI for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, which is defined in Section 401.011(36). Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The parties stipulated that the claimant first reported her injury to her employer on _____. Conflicting evidence was presented at the CCH. 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 from the evidence presented. We conclude that the hearing officer's determinations on the disputed issues are supported by sufficient evidence and 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).

The 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because we have affirmed the hearing officer's determination that the claimant did not sustain a compensable repetitive trauma injury, we likewise affirm the determination that she did not have disability.

In her appeal, the claimant appears to complain of ineffective assistance from the Texas Workers' Compensation Commission's ombudsman in the presentation of evidence. The claimant specifically complains that she was not allowed to directly cross-examine the carrier's witness. The record reflects that, with the assistance of the ombudsman, the claimant presented her case through her testimony, documentary evidence, and cross-examination of the carrier's witness. Accordingly, we decline to reverse the hearing officer's decision on this basis.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN ZURICH 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge