APPEAL NO. 93604

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On December 9, 1992, April 28, 1993, and May 21, 1993, a contested case hearing was held at (city) and (city), Texas, with (hearing officer) presiding. She reopened the record on June 14, 1993, to add one hearing officer's exhibit and thereafter determined that respondent (claimant) timely filed his claim, has not reached maximum medical improvement (MMI), and does not have an injury that was solely caused by a pre-existent condition. Appellant asserts that the claim was not timely filed and that the sole cause of claimant's problem was his (year) injury and surgery therefor. Claimant did not reply.

DECISION

We affirm.

The issues at the hearing, either from the benefit review conference or upon good cause added by the hearing officer, were (1) whether the claim was timely, (2) whether MMI was reached and if so, the impairment rating, (3) contribution (but this issue was not litigated), and (4) whether claimant's condition prior to (date of injury), was the sole cause of his problem.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

The carrier asserted on appeal that the hearing officer erred in finding (1) a timely filing of a claim (a) because the evidence was insufficient to support a filing based on the evidence of a mailing in February 1992, (b) because the hearing officer abused her discretion in reviewing Texas Workers' Compensation Commission (Commission) computer data to find reference to a claim timely filed, and (c) because the computer information did not provide a copy of a claim form filed; and (2) that claimant's pre-existing condition was not the sole cause of his problem.

The Appeals Panel determines:

That the hearing officer did not err in finding that a claim was filed within one year of the injury under the standards set forth in Section 409.003 of the 1989 Act.

That the record contains sufficient evidence to support the determination of the hearing officer that claimant's condition prior to (date of injury), was not the sole cause of his problem.

Claimant testified that he noticed groin pain on (date of injury), while lifting 100 pound sacks of cement. In 1990, he had bilateral inguinal hernias diagnosed and had surgery for that condition. In both 1990 and the present time, claimant worked for (employer). His

treating doctor after the (year), injury was (Dr. G) who eventually operated on him in January 1993 for a hernia.

Prior to the latest surgery, Dr. G on April 1, 1992, stated on a TWCC-69 that claimant reached MMI with a 60% impairment. In a response to a letter dated March 31, 1993, from employer, Dr. G also indicated that claimant's January 1993 surgery was because of the 1990 surgery, not a new injury. The claimant also saw (Dr. D) on August 5, 1992, who found no abnormality. He added, "I do not advise any attempts at surgical relief of his symptoms." Other than the reference to no abnormality, Dr. D did not state a basis for dismissing surgery as a possible remedy. Dr. D found MMI on August 5, 1992, with zero percent impairment. In a letter dated May 10, 1993, to carrier's lawyer, Dr. D said that he agreed with (Dr. S), the designated doctor, conclusions reached in a letter he wrote and also said that claimant's problems are "most likely to be related to complications of the original surgery."

Dr. S examined claimant in November 1992. He stated at that time that claimant had not reached MMI and suggested that herniography could determine whether claimant has a hernia. In correspondence initiated by carrier's lawyer, Dr. S stated on January 7, 1993, "[i]n my opinion it is certainly possible that his complaints are related to the injury in (year) and subsequent aggravation. I cannot, however, state with reasonable medical probability that this is the case." (Emphasis added.) In another letter of reply to carrier's lawyer, Dr. S on March 29, 1993, discussed two nerves and their possible impact on the claimant's condition. He points out that the removal of a mesh placed in the abdomen of claimant at a previous surgery can create a defect, and a waiting period of 12 months may be necessary to determine the outcome of the January 1993 surgery. He opined that the injury of (Year) would not have caused the scarring around a nerve and the removal of the mesh "could" have produced the hernia that was found. Then a letter of the carrier's lawyer to Dr. S dated April 7, 1993, contains handwriting across the bottom that is unsigned; it says, "[s]ince I was not present at his recent surgery, I cannot agree or disagree with the statement made by [Dr. G]." This letter had asked Dr. S if he agreed with Dr. G that there was no new injury. While there is a great deal of opinion that claimant's previous surgery was a cause of his more recent problems, Dr. S provides sufficient evidence on which the hearing officer could base her determination that claimant's condition prior to (date of injury), was not the sole cause of his present condition. Dr. S's opinion as to causation is not clearly stated, but appears to include an aggravation after the previous surgery; Dr. S does not indicate that the previous surgery was the sole cause. The hearing officer correctly stated on the record that the burden of proof to show sole cause was on the carrier and the carrier did not dispute this point. After considering all of Dr. S's statements, the hearing officer could reasonably conclude that he did not rule out the (date of injury), incident as a causative factor in the current condition of claimant. *See* Gregory v. TEIA, 530 S.W.2d 105 (Tex. 1975), which said that an expert's opinions as to deductions are not binding on the trier of fact even when not contradicted by another expert.

Claimant's fiancee testified that she prepared the TWCC-41, Notice of Claim, for claimant and he signed it. She then mailed it near Valentine's Day in February 1992, after claimant had received a form in January 1992. She sent it by regular mail to the Commission in (city), Texas.

Claimant testified that he did not know that the claim had not been received until brought up at the benefit review conference in October 1992; he then filed a claim that day in which he referred to a claim previously sent in February 1992. While the hearing officer did not approach the issue of timely filing of a claim upon the basis of good cause for late filing as set forth in Section 409.004 of the 1989 Act, Pan American Fire & Casualty Co. v. Hill, 586 S.W.2d 187 (Tex. Civ. App.-El Paso 1979, writ ref'd n.r.e.) affirmed a jury determination of good cause for late filing based on Hill's belief that his claim had been filed. While that case pointed to an insurance adjuster's assurance that "everything would be taken care of" and such representations were not involved in this case, the Hill case also talked of payments that were made to Mr. Hill that would indicate the carrier was treating the matter as a claim and that Mr. Hill filed a claim as soon as he received a form from the "Board." These points are comparable to the case before us on appeal. A factor in the Hill case that was not present in this case was that a wage agreement was signed; however, the sequence of events in that case indicates that the wage agreement was not signed until after the time for filing had elapsed. In the case before us, there is testimony that claimant actually did more to see that a claim was timely filed than did Mr. Hill in the Hill case; claimant signed a claim form and his fiancee testified that it was mailed; Mr. Hill signed no claim for two years after his injury.

Carrier also asserts that the hearing officer abused her discretion in examining Commission computer data to determine that a claim had been timely filed. The record indicates that the hearing officer upon reviewing Commission records then ordered that the record be reopened and upon reopening on June 14, 1993, noted that carrier objected to the computer data, Hearing Officer Exhibit No. 5, as not timely exchanged. Hearing Officer's Exhibit No. 5 provides in part:

TEXAS COMPASS
CLAIMS FORMS LIST

(DWC #)-060892 TC (SS)

SEQ	FORM	RECEIVED DATE	DATE ENTERED	TIME ENTERED	TYPE OF BENEFIT -- FORM 21 --
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1	*01	09/13/1991			
2	21	10-02-1991			1
3	21	11-20-1992			2
4	21	12/02/1992			2
5	21	12/02/1992	12/17/92	08:13 AM	
6	21	12/23/1992	12/29/92	11:54 AM	
7	21	05/08/1993	05/14/93	11:39 AM	1
8	41	09/13/1991			
9	69	09/23/1992			
10	69	11/16/1992			

*** END OF DATE ***
SEQ: _____`*' Denotes form that created CLAIM

In overruling this objection the hearing officer pointed out that no one brought this to her attention, but that she had discovered it herself. On appeal, the carrier did not assert that overruling the objection, made on the basis of untimely exchange, was error. While not necessary to this decision since not appealed, reference is made to Texas Workers' Compensation Commission Appeal No. 92410, decided September 25, 1992, which stated that the exchange requirements in the 1989 Act only apply to parties. Since the carrier's basis for appeal, abuse of discretion, was not asserted in the objection to admission of the computer data raised at the hearing, this review does not have to consider that theory when first raised on appeal (*see* Texas Workers' Compensation Commission Appeal No. 91104, decided January 21, 1992, which cited Marsh v. State, 276 S.W.2d 852 (Tex. Civ. App.-San Antonio 1955, no writ).

While the question of abuse of discretion may not need to be reviewed, it would not cause us to reverse the decision of the hearing officer in this case. Texas Workers' Compensation Commission Appeal No. 91033, decided October 31, 1991, found that a hearing officer acted properly in admitting documents in a claimant's possession as hearing officer exhibits after the claimant's case in chief had been presented. That opinion pointed out that the claimant was not represented; the claimant in the case before us on appeal also was not represented although he was assisted by an ombudsman. Such opinion cited Article 8308-6.34(b) (now § 410.162(b) of the 1989 Act) which calls for "preservation of the rights of the parties and the full development of facts required for the determinations to be made." *See also* Texas Workers' Compensation Commission Appeal No. 92029, decided March 11, 1992, that states a hearing officer has implied authority to reopen a hearing, citing again, Article 8308-6.34(b) (now § Section 410.162(b)) of the 1989 Act calling for full development of the facts.

The notice of claim in question is required to be filed with the Commission. The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92595, decided

December 21, 1992, examined the position of designated doctors and observed that they serve at the request of the Commission. It concluded that the Commission therefore has a responsibility to assure that such a doctor's report is fully developed. Hearing officers, on their own motion, have reopened the record to seek another report from the designated doctor; in Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, the Appeals Panel affirmed this action based again on Article 8308-6.34(b) (now § 410.162(b) of the 1989 Act) and the fact that the hearing officer "sought evidence relative to issues that were before the hearing he was conducting."

The action of the hearing officer in this case did not involve a designated doctor, but it did occur consistent with the hearing officer's duty to develop facts in order to make determinations for which she is responsible and her involvement in developing facts took her no further than a review of Commission computer data, which we observe the Commission has a responsibility to maintain. Under the provisions of § 410.162(b) of the 1989 Act, the hearing officer did not abuse her discretion in reviewing the Commission computer data.

Finally, carrier objects to the hearing officer's determination that the claim was timely filed because the hearing officer did not produce an actual claim form in her review of computer data. Section 410.165(a) of the 1989 Act provides that conformity to the legal rules of evidence is not necessary; the information found provides sufficient evidence upon which the hearing officer could determine that a claim had been timely filed.

The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge