APPEAL NO. 941679

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 28, 1994, in (city), Texas, (hearing officer), hearing officer, held a contested case hearing (CCH) (designated as the "Sequence No. 04" case) to consider the sole disputed issue in that case, namely, the respondent's (claimant) impairment rating (IR). The claimant failed to appear, the appellant (carrier) put on its evidence, and the hearing officer indicated she would attempt to contact the claimant and set another hearing to give him an opportunity to show good cause for his nonappearance and to offer evidence on the IR issue. On November 11, 1994, another hearing was held in the Sequence No. 04 case and claimant was allowed to present evidence on the IR issue as well as on the matters of whether he had good cause both for failing to appear on June 28th and failing to respond to the hearing officer's subsequent written inquiry. Immediately following that hearing, the hearing officer conducted another CCH with the same parties (designated as the "Sequence No. 05" case) to consider the disputed issues of whether the carrier waived its right to contest the compensability of claimant's psychiatric problems by not contesting such injury within 60 days of being notified of it, and whether claimant's psychiatric problems are a result of the compensable injury he sustained on (date of injury).

In a consolidated Decision and Order, the hearing officer stated that the evidence was insufficient to show that claimant had good cause for failing to appear on June 28, 1994. No appeal has been taken from this ruling. No ruling was made respecting claimant's having failed to respond to the hearing officer's written inquiry within two weeks. The hearing officer made certain factual findings and concluded that claimant sustained a compensable right hand and wrist injury on (date of injury), that his psychiatric condition/injury is compensable since it is causally related to his (date of injury), injury, that carrier waived its right to contest the compensability of claimant's psychiatric condition/injury since it failed to contest same on or before the 60th day after notification, and that the Texas Workers' Compensation Commission (Commission) cannot determine claimant's IR since the designated doctor's IR does not include an evaluation of the impairment, if any, resulting from claimant's psychiatric condition/injury. The hearing officer's order included a direction to the Commission to have claimant seen by a designated doctor to fully resolve the IR dispute.

Carrier's appeal raises four assertions of error. First, since claimant failed to show good cause for not appearing at the June 28, 1994, CCH, the hearing officer should have adopted the 14% IR reported by (Dr. T), the most recent designated doctor appointed by the Commission. Second, the hearing officer failed to "provide facts" in her Decision and Order to overcome the presumptive weight accorded Dr. T's report. Third, another designated doctor should not be appointed. Fourth, the carrier's July 15, 1994, contest of the compensability of claimant's psychiatric injury was timely in that it was based on newly discovered evidence, that is, the July 8, 1994, report of the carrier's doctor, (Dr. P); and claimant failed to prove his psychiatric problems resulted from the (date of injury), injury. Claimant's response, in essence, supports the hearing officer's decision.

DECISION

Affirmed.

To aid in understanding the history of the issues before us we first refer to a Decision and Order signed on February 11, 1994, by another hearing officer in an earlier case involving these parties (Docket No. HO-91-04348903-01-CC-HO41). The issue in that case was claimant's correct IR. The hearing officer's decision stated that claimant said he was injured at work on (date of injury), when a computer keyboard fell on his right wrist and injured it, that he treated with (Dr. J), that wrist surgery was performed on July 12, 1991, that he was later diagnosed with reflex sympathetic dystrophy (RSD) for which he was treated in 1992, that Dr. J assigned an IR of 59% which the carrier disputed, that the Commission selected (Dr. G) as the designated doctor to determine the IR, that Dr. G assigned an IR of 14%, that claimant complained to the Commission about Dr. G's examination and evaluation, and that the Commission then sent him to see another designated doctor,(Dr. C), who assigned claimant a 24% IR.

In his decision, the hearing officer made numerous factual findings which included the following: that on (date), claimant sustained an on-the-job injury to his right hand and that the carrier accepted liability for the hand injury; that Dr. J used the "Revised 3d Edition" rather than the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) to calculate claimant's IR; that on May 7, 1993, the Commission appointed Dr. G as the designated doctor to resolve the IR; that on May 17, 1993, Dr. G assigned an IR of 14% for loss of range of motion (ROM) in the right upper extremity, adopting the report of a rehabilitation center to whom he had referred claimant (the hearing officer's finding further stated that the rehabilitation center's 14% IR was "in accordance with the AMA Guides to the Evaluation of Permanent Impairment (3d edition revised)"); that Dr. G saw claimant again on August 6, 1993, examined additional reports and reaffirmed the 14% IR; that on October 29, 1993, without determining whether to adopt Dr. G's report or set it aside as being against the great weight of the other medical evidence, the Commission erroneously directed that claimant be examined by another Commission-selected designated doctor, Dr. C; that on November 8, 1993, Dr. C examined claimant and, "under the AMA Guides revised 3d Edition," assigned an IR of 24%; that Dr. G's IR was against the great weight of the other medical evidence; that neither Dr. J nor Dr. C used the version of the AMA Guides mandated by Section 408.124; and that the carrier was given neither a hearing on whether the Commission was rejecting Dr. G's IR or proper notice of the Commission's intention to appoint another designated doctor (Dr. C) if the parties could not agree on one.

Based on these findings the hearing officer concluded that Dr. G's report of a 14% IR was against the great weight of the other medical evidence; that Dr. C was not properly appointed as a designated doctor, did not become one, and therefore that his report was

not entitled to presumptive weight; that because neither Dr. J nor Dr. C used the mandated version of the AMA Guides, their reports could not be adopted; and that 14% is a reasonable assessment of claimant's IR for the carrier to use until the IR dispute could be resolved by another designated doctor. The Hearing officer's decision stated that the Commission was directed to order claimant to be examined by another designated doctor for the resolution of his IR dispute. The hearing officer also concluded that claimant reached maximum medical improvement (MMI) on December 29, 1992, because the parties agreed that Dr. J had so determined. (*See* Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993, where the MMI was certified to for the employee's back injury but not for his compensable psychological injuries.) Commission records show that neither party appealed from this Decision and Order which has therefore become final by operation of law. Section 410.169. Accordingly, insofar as they may be applicable, we must regard the findings and conclusions in that decision as *res adjudicata* and binding in the appeal we now consider. *See* Texas Workers' Compensation Commission Appeal No. 941411, decided December 7, 1994.

The evidence shows that following that decision the Commission appointed another designated doctor, (Dr. ST), who examined claimant on March 30, 1994, apparently while claimant was hospitalized in a psychiatric unit for depression, panic disorder, chronic pain syndrome, PTSD, and alcohol dependency, and in his report of that date assigned an IR of 14% for claimant's right wrist, elbow and upper extremity. Dr. ST's report made no mention of any psychiatric or psychological components of claimant's compensable injury.

With respect to the first appealed issue, we find it without merit. The carrier maintains that because claimant failed to show good cause for his nonappearance at the June 28, 1994, CCH, the 14% IR "should stand," reasoning that "[g]iven that the only evidence presented at the June 28, 1994, [CCH] consisted of the 14% [IRs] found by the two designated doctors, the only evidence that could be considered would be the 14% [IR.]" This assertion is apparently based on the premise that no evidence on the disputed issue adduced at the November 1, 1994, CCH should be considered. We note that at the November 1, 1994, CCH, the carrier did not object on that basis to the receipt of claimant's evidence and itself offered additional evidence on the IR issue. The Appeals Panel has stated that it does not generally consider issues raised for the first time on appeal. The carrier cites no authority in support of its contention. Neither the 1989 Act nor the Commission's rules require the ultimate sanction of barring a party's evidence at a subsequent hearing for failure to appear at a prior hearing, whether or not good cause was shown. Rather, Section 410.156(b) provides that the failure of a party to attend a CCH will constitute a Class C administrative violation, the penalty for which is found in Section 415.022(3). *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.11 (Rule 142.11). Under the circumstances of this case, we do not find the hearing officer to have abused her discretion in considering claimant's evidence on the disputed issue.

The carrier's second appealed issue asserts that "[t]he hearing officer nowhere provides facts nor states that the [IR] assigned by the first two designated doctors was against the great weight and preponderance of the other medical evidence" and that she committed reversible error in not adopting the 14% IR. Section 408.125(e) provides that if the designated doctor is selected by the Commission, his or her report shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary in which case the Commission shall adopt the IR of one of the other doctors. We find this appealed issue without merit because the hearing officer specifically found that while claimant has had several IR evaluations, none assessed his impairment, if any, resulting from his "psychiatric problems" and the carrier does not challenge this finding. Because the carrier's second appealed issue relates to that part of its fourth appealed issue which asserts that claimant failed to prove his psychiatric problems were caused by his compensable hand and wrist injury of (date of injury), the two points will be discussed together.

The hearing officer also made findings, not specifically challenged by the carrier, that on (date of injury), claimant sustained a compensable injury to his right hand and wrist, that this injury led to surgery in July 1991, that claimant was later diagnosed with RSD, that his RSD is a result of his (date of injury), injury, and that as a result of his RSD condition, claimant has experienced severe, incapacitating pain all over his body and this pain has caused or contributed to the psychiatric problems he has had since his injury. Based on these findings, the hearing officer concluded that claimant's psychiatric condition/injury is compensable since it is causally related to his compensable injury of (date of injury), and that the Commission cannot determine his IR at this time since the designated doctor's IR assignment does not include an evaluation of the impairment, if any, resulting from his compensable psychiatric condition.

In Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992, the Appeals Panel recognized that PTSD and depression may be a part of a compensable injury. *See also* Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992; Texas Workers' Compensation Commission Appeal No. 92432, decided October 5, 1992; and Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. We are satisfied the evidence sufficiently supports the hearing officer's findings and that they sufficiently support the conclusions. However, we caution that any future evaluation of claimant's IR for the inclusion of impairment from psychological or psychiatric injury, if any, should specifically describe the compensable injury, *e.g.*, PTSD, depression, etc. The hearing officer's description of "psychiatric condition/injury" and "psychiatric problems," while minimally sufficient for purposes of this appeal, may be too imprecise for the determination of the existence of permanent impairment, if any. *And see* Texas Workers' Compensation Commission Appeal No. 941643, decided January 13, 1995, where the Appeals Panel noted that the employee had

presented no medical evidence that he had permanent impairment from his psychological problems.

In evidence was a January 7, 1992, report from (Dr. B), a clinical psychologist, indicating he had provided psychotherapy to claimant in November and December 1991. An attached record indicated that Dr. B's impression included generalized anxiety disorder; major depression, severe; and psychological factors reflecting physical condition. This barely legible document made some reference to claimant's physical condition. Claimant testified that the Commission's medical review division required carrier to pay for this treatment and he extrapolated that this medical dispute gave carrier notice of his ensuing psychiatric injury.

On February 21, 1994, (Dr. IS), a psychiatrist, issued an Initial Medical Report which diagnosed claimant with post-traumatic stress disorder (PTSD), chronic pain syndrome, severe major depression, panic disorder with agoraphobia, and alcohol dependence. Another record of Dr. IS, undated but apparently generated in March 1994, stated that Dr. IS intended to hospitalize claimant immediately, that claimant was in severe pain secondary to his occupational injury of (date), and that his injury has caused severe depression and panic episodes. A hospital record showed that claimant was admitted by Dr. IS on March 14, 1994, with an admitting diagnosis of chronic pain syndrome and PTSD. The first name and telephone number of the carrier's adjuster was written on the form as was a precertification number. Another hospital record was an unsigned March 15, 1994, report of Dr. IS stating: "None of the patient's psychiatric symptomatology was present prior to the injury to his wrist. . . . I feel that all of the psychiatric symptomatology was caused by the injury to the wrist at [employer]." A Dr. IS record of April 6, 1994, contained notes about claimant's being discharged from the hospital on April 7, 1994, a day earlier than the "preauthorized date," and requesting outpatient psychotherapy and hypnotherapy as well as follow-up visits with Dr. IS. This record also bore the name and telephone number of carrier's adjuster.

The report of (Dr. ML), a clinical psychologist who at Dr. IS's request evaluated claimant during the March 26 through 28, 1994, period while he was hospitalized, indicated that he administered a battery of psychological tests all suggesting severe depression. Dr. ML diagnosed major depression, single episode, severe; panic disorder; alcohol dependence; cannabis abuse; post-traumatic stress disorder (PTSD); and chronic pain from wrist accident. Dr. ML also stated that claimant's symptoms were attributable to his being out of work for the past three years secondary to his wrist injury.

(Dr. VR), a pain management specialist, reported on March 28, 1994, that claimant's July 1991 wrist joint fusion surgery did not significantly improve his pain and that he was admitted to a pain center in 1992 where he was diagnosed with RSD. A November 21, 1991, record of (Dr. B), who apparently performed the wrist joint fusion surgery in July 1991, contained the diagnosis of "hand ligament or muscle torn ligament unspecified right wrist."

Dr. VR's physical examination of claimant's right upper extremity found marked atrophy of the muscles, hypersensitivity and allodynia, patchy numbness, decreased motor strength and skin discoloration. Dr. VR further reported during this hospitalization claimant was unsuccessfully treated with a ganglion block, and then had a brachial plexus catheter installed for three weeks of continuous infusion which helped. He also underwent a comprehensive physical therapy program. However, according to Dr. VR, the pain returned after the infusion was stopped and claimant began to drink heavily, became severely depressed, and his depression and panic disorder complicated his chronic pain history. In another March 28, 1994, report, Dr. VR characterized claimant's as "a very intractable RSD, treated with a multitude of interventional and noninterventional modalities without significant resolution of his organic pain syndrome," and stated that the only treatment left to try was the implantation of a spinal cord stimulator. Dr. VR reported on April 26, 1994, that a three week trial of the stimulator obtained excellent results with claimant being pain free, and that Dr. VR was seeking authorization to perform a permanent implantation.

A May 25, 1994, hospital consultation report by (Dr. SW) indicates that at the request of Dr. VR he consulted on claimant's right upper extremity RSD, that he examined claimant on that date, and that his assessment was that claimant be admitted with right upper extremity RSD "to perform the implantation of a dorsal column stimulator and generator."

In a June 3, 1994, report Dr. IS described claimant's RSD as a condition "in which the pain enters the nerves and the entire nervous system. Subsequently, all body parts become affected by the pain." Dr. IS further stated that "the depressive and anxiety symptoms which he currently experiences are a direct consequence of his initial injury and present disability."

Claimant introduced a February 23, 1994, letter from the carrier's adjuster to Dr. IS authorizing claimant's hospitalization for 21 days for treatment of depression. The carrier introduced the July 8, 1994, report of Dr. FP, a clinical psychologist, who examined claimant on July 6th. Dr. FP stated that claimant's vasodermal response was consistent with RSD and that he appeared to have RSD; however, he found claimant's psychological symptoms exaggerated and not related to RSD. Dr. FP further reported his disagreement with Dr. IS's diagnosis of PTSD and stated his opinion that claimant's psychological and psychiatric problems were longstanding and related to his dysfunctional family, history of erratic work, alcohol dependence, and personality dysfunction. In evidence was the carrier's Notice of Refused/Disputed Claim (TWCC-21), dated July 15, 1994, and bearing the name of its adjuster, stating that carrier "denies all psychological and psychiatric treatment since it is unrelated to injury."

The hearing officer obviously decided not to credit the report of Dr. FP and instead found the remainder of the medical evidence persuasive that claimant's (date of injury), right

hand and wrist injury led to surgery and to his RSD which caused him the severe and incapacitating pain which, as she found, caused and/or contributed to the psychiatric problems he has had since the (date of injury), injury. The hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). It is for the hearing officer, as the fact finder, to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

We find no merit in the carrier's third appealed issue that a third designated doctor should not be assigned because such action would disregard Commission Rules. The carrier cites no rules but does cite two Appeals Panel decisions for the proposition that appointment of a second designated doctor "is only appropriate where the first designated doctor is unable or unwilling to comply with the Act." Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993, and Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. Those decisions are readily distinguishable, however, in that they did not concern fact situations where the designated doctor's IR failed to account for the entirety of the compensable injury. The carrier has not contended that the IR assigned by Dr. ST, or for that matter by any other doctor to date, took into account an evaluation for impairment of the psychological or psychiatric component of claimant's injury. More on point is the decision in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, where the hearing officer considered issues concerning the employee's correct IR and whether her compensable knee injury was a producing cause of her psychological problems. The Appeals Panel affirmed the decision of the hearing officer which determined that the employee suffered depression as a result of her knee injury, rejected the designated doctor's report for not considering the psychological aspect of the employee's injury, and determined that an IR could not be established because there were no valid IRs in evidence which took into account the psychological injury. *See also* Texas Workers' Compensation Commission Appeal No. 93100, decided March 25, 1993, where the hearing officer determined that the report of the designated doctor, an orthopedic surgeon, which assigned the employee an IR of five percent for her back and did not allude to her diagnosed PTSD and depression was against the great weight of the other medical evidence. *And see* Texas Workers' Compensation Commission Appeal No. 93697, decided September 23,1993. *Compare* Texas Workers' Compensation Commission Appeal No. 93337, decided June 10, 1993, where the employee, who sustained a compensable back injury, contended she had not reached MMI and her psychological problems following her back injury were determined not to be compensable.

Carrier's fourth appealed issue is twofold. The carrier first contends that its July 15, 1994, contest of the compensability of claimant's psychiatric problems was timely and that

wavier should not apply because it exercised diligence in obtaining claimant's records and having him examined by Dr FP on July 8, 1994. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date the carrier is notified of the injury, the carrier waives its right to contest compensability. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6). Section 409.021(d) provides that a carrier may reopen the issue of compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. Carrier's second assertion is that claimant failed to prove that his psychiatric problems were caused by the (date of injury), injury. This second assertion has been addressed above.

The hearing officer made the following dispositive factual findings and conclusions on the timely contest of compensability issue:

FINDINGS OF FACT

6.On or before February 23, 1994, the Carrier was notified that the claimant was seeking benefits under the Act relative to his psychiatric problems. On February 23, 1994, the carrier, through its agent, preauthorized treatment/services in connection with an inpatient stay by the claimant for 21 days for depression.

7.The Carrier did not file a Notice of Refused or Disputed Claim with the [Commission] regarding the claimant's psychiatric problems until July 19, 1994.

CONCLUSIONS OF LAW

5.The Carrier has waived its right to contest the compensability of the claimant's psychiatric condition/injury, subject to newly discovered evidence, since it failed to contest the compensability thereof on or before the 60th day after notification.

The carrier did not contend at the CCH that Dr. FP's report constituted newly discovered evidence and that the carrier exercised diligence in obtaining it. Rather, the carrier's argument to the hearing officer was to the effect that the provisions of Rule 124.6 providing for notice of refused or disputed claims were not applicable to the facts in this case, an argument not advanced on appeal. We are satisfied the evidence sufficiently supports these findings and the conclusions. As stated above, the documentary evidence showed that the carrier on or about February 23, 1994, preauthorized claimant's admission on March 14th to a psychiatric unit for treatment of depression and other psychiatric problems and did not contest the compensability of claimant's psychiatric injuries until after

receiving Dr. FP's July 8, 1994, report. There was no showing as to when the carrier contacted Dr. FP. These facts do not import reasonable diligence on the part of the carrier in obtaining Dr. FP's report and are distinguishable from those in Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993, cited by the carrier. We do not find the hearing officer's determination of this issue to have violated a clear legal right nor to have been a manifest abuse of discretion. *See* Appeal No. 92640, *supra*.

Being satisfied that the hearing officer committed no reversible error and that the findings are not so against the great weight and preponderance of the evidence as to be manifestly unjust (In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951)), the decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge