APPEAL NUMBER 94943
FILED AUGUST 31, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (City), Texas, on June 21, 1994, before hearing officer. The issues involved the claim of (IE), claimant, who was injured on _____, in the course and scope of her employment with (employer).

There were many stipulations at the hearing, among them that claimant had reached statutory maximum medical improvement (MMI) on December 12, 1993; that the designated doctor determined claimant's impairment rating to be five percent; that the claimant filed an amended claim on February 11, 1992, asserting that, along with her back and neck, she injured her hands and wrists; and that the carrier on October 15, 1993, contested the compensability of bilateral carpal tunnel syndrome as being unrelated to the injury of _____.

The hearing officer determined that claimant was diagnosed with "hyperextensive-related" bilateral carpal tunnel syndrome on September 8, 1993; that claimant's hands were not injured on _____; that the carrier did not timely contest compensability of claimant's hand condition on or before the 60th day of receipt of notification of the condition; and that its contest of compensability was not based upon newly discovered evidence that could not reasonably have been discovered at an earlier date.

The carrier appeals this decision. The carrier argues that, to the extent the hearing officer appears to count the 60 days from a report of its own doctor, this report expressly stated that carpal tunnel syndrome was not related or did not originate with the compensable injury. The carrier further argues that the 1989 Act allows the carrier to reopen the issue of compensability with new evidence, and it did so within two days of notice of a compensable bilateral carpal tunnel syndrome. The claimant has not responded, nor was an appeal made of the hearing officer's determination that claimant's hands were not injured in the course and scope of employment.

DECISION

We affirm the decision of the hearing officer, based upon the conclusions that the carrier did not timely dispute injury to the hands and did not show that, at the time of filing its dispute on October 15, 1993, it had newly discovered evidence which could not have been reasonably discovered earlier, which are factually supported by sufficient evidence in the record.

The claimant had been employed by the employer for 12 years at the time of the injury. On _____, she tripped over and fell against a pallet, impacting both hands on the edge of the pallet, and hurting her back. Claimant contended that since the date of

her accident, her hands have hurt her with tingling and burning sensations. She contended that she consistently reported this to her doctors, but was told that her back was the most important thing and they would attend to her hands at a later time. Although claimant at first went to a company doctor, her treating doctor became Dr. G.

The record indicated that claimant, who was represented by her attorney at the time, filed an amended claim for compensation on February 11, 1992. This notice contended injury to "back, hands, right leg, wrists, neck." The claim that the hands and wrists were injured in addition to the back was a new claim for these regions of the body.

The adjuster, Ms. D, testified that she had been involved with claimant's case from the beginning, and stated that she had reviewed the medical records in this case and agreed that the carrier had received copies of these documents. Ms. D stated that claimant's early medical treatment related solely to her back. Pertinent medical documents for 1992 are as follows:

-January 13, 1992: Computerized medical statement of Dr. G lists diagnosis of lumbosacral sprain, herniated lumbar disc; no mention of hand or wrist injuries.

-January 27, 1992: Computerized medical statement of Dr. G shows "sprain left wrist" in addition to lumbar injuries. This same diagnosis for the wrist appears along with the back condition in monthly statements from February through June 1992.

-January 27, 1992: Letter to carrier from Dr. Z, a neurosurgeon referred by Dr. G, states that claimant complained of numbness in her hands at time of the accident. However, his diagnosis at this time was lumbosacral radiculopathy, and primary testing and treatment was for claimant's back. Claimant taken off work because of her back.

-March 5, 1992: TWCC-64 medical report by Dr. Z, relates only to back.

-May 6, 1992: Letter from Dr. G to Ms. D sets out the history of his consultations with claimant; discusses lumbar problems and belief that claimant has a lumbar disc injury. The letter is silent on any claimed or treated injuries to the hands and wrists. Notes that _____ CT scan showed bulging discs at three levels, with underlying herniation at one level that "might" be present.

-September 10, 1992: TWCC-64 by Dr. Z with a diagnosis of nerve root irritation syndrome, notes claimant has pain in left wrist.

Claimant said that she was referred one time for her hands to a doctor who refused to examine her; she testified that she did not believe the carrier had ever received reports or bills from this doctor.

In July 1993, claimant was referred by her treating doctor to Dr. P for assessment of her hands and wrists. On July 12, 1993, Ms. D wrote to Dr. P asking if claimant's current hand condition was related to her _____ fall. (Ms. D testified that she knew that Dr. P was a doctor who customarily treated carpal tunnel syndrome.) On August 16, 1993, Dr. P answered in a short letter and was nonresponsive, stating merely that his assistant reviewed her records and most of claimant's previous treatment was for her back, not her hands. A July 19, 1993, medical report written by Dr. P stated that claimant had signs and symptoms of "possibly" associated carpal tunnel syndrome. Dr. P recommended EMG testing to determine whether carpal tunnel was related to her _____ injury or an "ongoing abnormality." Ms. D testified she received this report shortly after it was written but it did not, in her mind, answer the question of whether the carpal tunnel syndrome was related to claimant's accident.

On August 3, 1993, Dr. L examined claimant for an independent medical examination for the carrier. Dr. L in his report detailed claimant's history of back injuries and his examination related to that; he also noted, however, that she appeared with wrists braces, and that she had recently seen Dr. P for numbness and pain in her hands. Dr. L pointed out that claimant's previous medical records did not document this problem, and stated that based upon her failure to seek treatment for carpal tunnel, he found it "probably" unrelated to her _____ incident. Dr. L completed a TWCC-69 on August 8, 1993 which stated that claimant had not reached MMI.

On September 8, 1993, Dr. P wrote a letter to Ms. D recommending an EMG, and stating that claimant "probably" had a hyperextension-related carpal tunnel syndrome as distinct from repetitive motion. Ms. D testified that she did not receive this letter until October 13, 1993. Two days later, the carrier filed a TWCC-21 form disputing the causal relationship of bilateral carpal tunnel syndrome to the _____ injury.

On December 15, 1993, a letter from Dr. G to Ms. D stated that his review of his notes indicated that claimant mentioned hands injuries on her first trip to his office, and he conceded that his reports omitted this. Dr. G stated that the x-rays taken in January 1992 were negative for fractures. Dr. G stated that his x-ray of December 1992 showed "minimal degenerative changes" which "could possibly" be a complication of the impact. On a December 20, 1993, TWCC-64, Dr. G noted claimant complained of constant pain and stiffness in both wrists. Diagnosis shown was lumbosacral strains, sprains, thoracic/lumbosacral neuritis and radiculopathy, "unsp."

The designated doctor, (Dr. DV), an orthopedic surgeon, assessed a five percent impairment rating, and his narrative states that this is the same rating whether or not the

hands are considered. He found no evidence of carpal tunnel syndrome in her hands or loss of function.

A carrier is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). However, a carrier may reopen inquiry into compensability if there is a finding of evidence that could not reasonably have been discovered earlier. Section 409.021(d). In summary, in those cases where compensability is conceded, or the right to dispute is waived, the carrier may nevertheless seek a reopening of the claim if the Commission finds that there is new evidence meeting the standard of Section 409.021(d). This provision appears intended to cover those situations where pertinent facts come forward after 60 days where it cannot fairly be said that the carrier "waived" defenses that could not reasonably have been known before the 61st day. We believe that the proper way to analyze the decision here is by applying Section 409.021 as a whole.

While the right to dispute within 60 days is triggered by filing of a dispute within a prescribed time period, the process of reopening a claim is dependent, we believe, upon the Commission's finding of new evidence, which involves analysis of whether the carrier has acted with reasonable diligence to dispute the claim once the new evidence became known. A defense under the "reopening" provision in Section 409.021(d) is not allowed simply because it is filed within a prescribed period. The trier of fact must determine, from the totality of circumstances, if the case should be reopened.

Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) makes clear that the carrier that has begun payment of benefits must file its dispute on or before the 60th days after it receives written notice of injury.

Rule 124.1 defines written notice of injury:

(a)Written notice of injury . . . consists of <u>the insurance carrier's earliest receipt of</u>:

(1)the employer's first report of injury;

(2)the notification provided by the commission under subsection (c) of this section; or

(3)any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability. [Emphasis added.]

Subsection (c) states that the Commission shall notify the carrier whenever it receives notice from a source other than the carrier of an injury which may cause eight or more days of disability, a death, or an occupational disease.

A "written notice of injury" according to Rule 124.1 is not every writing, but it is the one that is received the earliest that starts the 60-day time period. The Appeals Panel has held that notices which claim injury to additional parts of the body not previously claimed will start a new 60-day time period for contesting compensability for those particular parts of the body. Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. Where the carrier has accepted that a certain body part was injured, or waived its dispute, and medical evidence is developed at a later date indicating the presence of additional physical damage to the same part of the body, it would appear that it is the reopening/new evidence provision, not a new computation of 60 days, that applies.

The hearing officer in this case made no express findings of fact as to what constituted the written notice of injury under Rule 124.1 which first triggered the carrier's obligation to dispute a hand and wrist injury within 60 days. Because she appears to count carrier's 60 days from the report of Dr. L, however, we conclude that she impliedly found that Dr. L's report was a "written notice of injury" with respect to injuries to claimant's hands and wrists. This implied finding is against the great weight and preponderance of the evidence in this case, because Dr. L's report expressly stated that he believed any carpal tunnel syndrome not to be related to the incident in question. Carrier's point that a written notice of injury cannot be attributed to a communication disclaiming a relationship is well taken.

However, her determination that there was a waiver of a dispute of compensability for the hands is not reversible error because there was an earlier-received writing containing all requisites of Rule 124.1. This was the amended claim for compensation which the hearing officer found was received by the carrier on February 17, 1992. As the hearing officer found, it plainly claimed injury for claimant's hands and wrists. This was enough to trigger the carrier's duty to investigate the nature of the injury that resulted from claimant's fall, and a concrete diagnosis was not necessary. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. We can uphold the hearing officer's finding that carrier waived a dispute of compensability of injury to the hands and wrists based upon the lack of a dispute within 60 days of this notice.

That is, however, only half of the inquiry as to whether the carrier could raise an issue as to carpal tunnel syndrome. The medical evidence in the file makes clear that reasonable investigation by the carrier into the hand and wrist injuries within 60 days of February 17, 1992 (and for some time beyond), would have yielded a diagnosis only of sprained left wrist, complaints of numbness, and x-rays that showed no fracture of her left hand. Also present were diagnoses of thoracic and lumbar radiculopathy. Therefore, an investigation would have yielded at that time a condition consistent with a fall forward and a

blow to the hands, or thoracic back injury. Carpal tunnel syndrome was not mentioned as a possibility until mid-1993, according to this record.

We believe that the proper analysis was whether, at the time the carrier disputed the compensability of carpal tunnel syndrome on October 15, 1993, it could reopen the issue on the basis of newly discovered medical evidence that could not have been discovered earlier, as provided for in Section 409.021(d). We believe that such a determination must be made by the trier of fact, not on the basis of a count of days, but upon the complete facts surrounding the disputed condition and the efforts of investigation that were made. Although the hearing officer finds (incorrectly according to the calendar) that the adjuster received Dr. P's letter within 60 days of Dr. L's report, and although reasonable minds could dispute as to whether Dr. P's letter constitutes a "confirmation" of carpal tunnel syndrome, there is sufficient evidence in this record to support the conclusion of law that the carrier's contest of compensability was not based upon newly discovered evidence that could not reasonably be discovered well before October 15, 1993. Dr. P's July 19, 1993, report says carpal tunnel is "possibly" associated with claimant's fall. Dr. P's letter of August 16, 1993, was clearly unresponsive to the adjuster's direct inquiry, and ambiguous as to whether claimant's condition was related, and a trier of fact could conclude that greater diligence could have been exercised prior to October 13th to "pin down" Dr. P to clarify his report. Moreover, the inquiry that triggered Dr. P's letter could be taken as evidence that the adjuster had begun to formulate the impression that claimant's carpal tunnel syndrome could be work related, sometime in July 1993.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The record as a whole sufficiently supports the hearing officer's decision and order, which we affirm for the reasons stated herein.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge