

APPEAL NO. 950113
FILED MARCH 8, 1995

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 December 14, 1994, to consider the following disputed issues reported from the benefit review conference (BRC) held on June 14, 1994: 1. Did the Claimant sustain a compensable injury on _____; 2. Was the Carrier's contest of compensability based on newly discoverable [sic] evidence that could not reasonable [sic] have been discovered at an earlier date, thus allowing the Carrier to reopen the issue of compensability; and 3. Did the Claimant have disability resulting from the injury sustained on _____. These issues were not changed or added to at the CCH. The hearing officer found that the respondent (claimant) was exposed to sodium bisulfite on _____, in the performance of his work; that such exposure temporarily aggravated claimant's preexisting chemical asthma but did not cause him to experience cerebral atrophy, memory loss, confusion, dizziness, or muscle spasms; that no later than June 14, 1994, [the date of the BRC] the appellant (carrier) received written notice that claimant was alleging the aforesaid conditions to be part of his compensable injury of _____; and that the carrier did not file a Notice of Refused/Disputed Claim (TWCC-21) contesting the compensability of those conditions before on or about August 13, 1994. The hearing officer concluded that claimant sustained a compensable injury on _____; that although the carrier's current dispute of the compensability of the aforesaid conditions was based on evidence not discoverable before May 19, 1994, (the date of (Dr. W) report describing them), that the carrier failed to timely file a controversion of the compensability of those conditions based on the newly discovered evidence. The hearing officer also determined that claimant has had disability from the aforesaid conditions since January 5, 1994.

Carrier's appeal asserts that the hearing officer's finding and conclusion regarding its having failed to timely contest the compensability of claimant's cerebral atrophy, memory loss, confusion, dizziness and muscle spasm was erroneous because, in effect, they added a disputed issue of timely controversion by the carrier, an issue not properly before the hearing officer pursuant to Section 410.151 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(a) (Rule 142.7(a)). Carrier requests the Appeals Panel to reform the hearing officer's decision by deleting such finding and conclusion. The carrier also requests deletion of the finding and conclusion on disability which are dependent upon the erroneous finding and conclusion. Carrier further asserts that in addition to the TWCC-21 of May 15, 1994, in evidence, which the hearing officer recognized to have been filed prior to the date the carrier likely received Dr. W's May 19, 1994, report, it had filed with the Texas Workers' Compensation Commission on July 19, 1994, another TWCC-21, dated July 13, 1994, which denied compensability and which it could have put into evidence had it known the hearing officer intended to add such issue. The claimant's response, while urging affirmance, also appears to take issue with the hearing officer's apparent determination that the May 19, 1994, report of Dr. W constituted newly discovered

evidence. While claimant's response was timely filed, as a response, it was not timely as an appeal (Section 410.202) and thus we will not consider it as such.

DECISION

Affirmed as reformed.

Claimant, the sole witness, testified that he had worked for 12 years without missing work for medical reasons; that on _____, after unloading sodium bisulfite, he was rinsing the truck in preparation for loading another type of chemical and was overcome with fumes; that he had a preexisting chemical asthma condition which was aggravated by the inhalation; that he went to a hospital where he was treated and released; and that returned to his job that same day working until approximately midnight. The hospital records show that claimant was admitted in the morning, treated and monitored for about three hours, and released. (Dr. EJ) diagnosed "asthma with acute chemical irritation and wheezing." Claimant, who was employed by an employee leasing company, further testified that around June 1, 1993, he began to experience confusion, memory lapses, dizziness, and difficulty with breathing. He also indicated that his assignment to the business entity involved in the _____, inhalation injury was terminated in July 1993. Other evidence indicates that claimant's assignment termination was associated with certain duty performance errors subsequent to _____ with serious safety implications, that he subsequently obtained other employment as a truck driver, and that he worked until January 4, 1994, when he began seeing Dr. W and was taken off work.

On cross-examination claimant denied much of the medical history relating to his severe breathing problems since January 1990 contained in the records of (Dr. TJ), a pulmonary disease specialist by whom he had been periodically treated since March 1990, and he maintained that his preexisting lung difficulties were "under control" at the time of his inhalation injury. Dr. TJ's impression on March 19, 1990, was chronic cough and shortness of breath most likely to due to COPD (chronic obstructive pulmonary disease) and history of cigarette smoking (recently quit). A March 4, 1991, record and subsequent treatment records of Dr. TJ stated that claimant had acute bronchitis, a history of chronic bronchitis, COPD and emphysema. After the inhalation accident claimant next saw Dr. TJ on July 23, 1993, and the record of that date stated the impression as "chemical inhalation with exacerbation of COPD" and noted that claimant had been able to continue working and that his breathing was "not too bad." Dr. TJ's record of July 30, 1994, stated that claimant ("with COPD") had come in for a follow-up after his recent chemical inhalation, that claimant was "doing much better," and that "based on two PFTs [pulmonary function tests] do not believe that he suffered any permanent damage."

According to the medical records in evidence, Dr. W began to care for claimant on January 4, 1994, stated that the date claimant could return to work was "unknown at this time," and that claimant's illness or injury was "COPD exacerbation; asthma." Dr. W's testing revealed an essentially normal EEG, a mild degree of cerebral atrophy and a

severe obstructive lung defect. Claimant testified that Dr. W explained to him that the chemical inhalation resulted in a lack of oxygen to his brain which resulted in his brain atrophy. Dr. W's report of May 19, 1994, concluded that claimant was exposed to bisulfite, a chemical "known to worsen air flow resistance and lung compliance in asthmatics and which has made his condition worse, . . ."

A detailed medical toxicology report by (Dr. C), who examined claimant on September 7, 1994, stated the following diagnosis: 1. [COPD] secondary to tobacco abuse. 2. Moderate bronchospastic component, reversible with bronchodilators. 3. Episode of sodium bisulfite fume inhalation with transient respiratory distress and recovery within a matter of hours to promorbid state. Dr. C went on to state that the sulfite fume inhalation episode was "acutely noxious but has resulted in no significant change in the patient's underlying [COPD] . . . The current pulmonary compromise, however, is unrelated to the workplace and, in particular, is unrelated to his exposure to sulfite fumes on March [sic] 20, 1993."

In his BRC report the benefit review officer (BRO) recommended that the carrier not be allowed to reopen the compensability issue based on Dr. W's May 19, 1994, report because the carrier had known of claimant's condition since June 1, 1993, when it received written notice of the injury. In its July 6, 1994, response to claimant's interrogatory asking whether the carrier agreed with the BRO's recommendations, the carrier stated: "No. The carrier is maintaining the position that the claimant did not sustain a compensable injury on _____. The carrier is further maintaining the position that they are entitled to reopen the issue of compensability based on [Dr. W's] 5/19/94 report. Lastly, the carrier is maintaining that the claimant did not sustain any disability as a result of the _____ injury."

The hearing officer made the following findings and conclusions.

FINDINGS OF FACT

1. On _____, Claimant was employed by Employer.
2. On _____, Employer subscribed to a policy of workers' compensation insurance issued by the City Insurance Company, Carrier.
3. On _____, Claimant's residence was located within seventy-five miles of the (City) Field Office of the Texas Workers' Compensation Commission.
4. On _____, Claimant was exposed to sodium bisulfite while he was engaged in the exercise of his regular job duties with Employer.
5. The chemical exposure referred to in the previous Finding of Fact resulted in a temporary aggravation of Claimant's preexisting chemical asthma, but did

not cause Claimant to experience cerebral atrophy, loss of memory, confusion, dizziness, or muscle spasms.

6. No later than June 14, 1994, Carrier received written notice that Claimant was alleging that his injury of _____, included cerebral atrophy, memory loss, confusion, dizziness, and muscle spasms.
7. Carrier did not file a TWCC-21 controverting the alleged compensability of the symptoms described in the previous Finding of Fact on or about August 13, 1994.
8. Since January 5, 1994, the symptoms which Claimant alleges to have resulted from his chemical exposure of _____, have prevented Claimant from obtaining and retaining employment at wages equivalent to the wages Claimant earned prior to _____.

CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office to the Texas Workers' Compensation Commission.
3. Claimant sustained a compensable injury on _____.
4. Although carrier's current dispute of the compensability of Claimant's cerebral atrophy, memory loss, muscle spasms, confusion, and dizziness was based on evidence which was not discoverable prior to May 19, 1994, Carrier has failed to timely file a controversion of the compensability of such symptoms based on such newly discoverable evidence.
5. Claimant has sustained disability since January 5, 1994.

Findings of Fact Nos. 1 - 6 and Conclusions of Law Nos. 1 - 3 have not been appealed and are affirmed. The carrier has timely challenged Findings of Fact Nos. 7 and 8 and Conclusions of Law Nos. 4 and 5.

From her discussion it appears that in reaching her findings and conclusions the hearing officer determined from the evidence that Dr. W's May 19, 1994, report did constitute newly discovered evidence permitting the carrier to reopen the issue of compensability, that she assumed the carrier received the report not later than June 14, 1994, the date of the BRC, and that she reasoned that the carrier's only TWCC-21 in evidence was completed on May 13th and thus could not have been in response to Dr. W's

May 19th report. Notwithstanding that the second disputed issue, as framed, presumed that compensability had already been contested, the hearing officer apparently saw no evidence of the carrier's having contested compensability after receiving Dr. W's May 19th report and thus went on to determine that the carrier had failed to timely contest the injuries. In so doing, we view the hearing officer as having gone beyond the framed issue which was restricted to the question of whether the carrier's contest was based on newly discovered evidence. Further, see the discussion in Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994, where the Appeals Panel discussed the inapplicability of a 60 day dispute period to the application of the newly discovered evidence provision.

With respect to the second issue, as framed, Section 409.021(d) provides that an insurance carrier may reopen the issue of compensability if there is a finding of evidence that could not reasonably have been discovered earlier. As the carrier points out, however, Section 410.151(b) provides that an issue not raised at a BRC may not be considered at the CCH unless the parties consent or the Texas Workers' Compensation Commission determines that good cause existed for not raising the issue at the BRC. *And* see Rule 142.7(b) providing for additional disputes by unanimous consent and upon presentation by a party if the hearing officer determines good cause exists.

We agree with the carrier that the hearing officer has erred in her treatment of the Section 409.021(d) and disability issues. The challenged findings and conclusions, read with the hearing officer's discussion, must be viewed as having either added an issue of the carrier's timely contest of compensability or of having converted or enlarged the newly discovered evidence issue to include an issue of timely controversion. While the two issues are obviously closely related, they are severable and we are unwilling, under the particular circumstances of this case, to view them as one and the same issue. *Compare* Texas Workers' Compensation Commission Appeal No. 93514, decided August 5, 1993, where the Appeals Panel did not find error in the hearing officer's admitting evidence of compliance with Rule 130.6 where the issue was whether a doctor's findings on maximum medical improvement and impairment rating were "binding," and held that under the circumstances of that case the Rule 130.6 compliance issue was subsumed in the issue of whether the doctor's findings were binding. In the case we here consider, had the hearing officer advised the parties at any time before the hearing closed as to how she was seeing the Section 409.021(d) issue develop, proposed restating the issue to enlarge it to include timely controversion, and obtained the consent of the parties, then the parties could have addressed the additional issue and adduced such additional evidence as they desired, including the TWCC-21 dated July 15, 1994, attached to the carrier's appeal.

As mentioned above, the carrier attached to its appeal a TWCC-21 dated July 15, 1994, stating that Dr. W's May 19th letter was received by the carrier on _____ and purporting to contest the compensability of the diagnosed aggravation of a non-occupational disease. The review of the Appeals Panel is generally limited to the record developed at the hearing. Section 410.203. In determining whether new evidence

submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. The TWCC-21 submitted with the carrier's appeal is clearly not cumulative. We are unwilling to say it was not offered at the hearing because of a lack of diligence given the framing of the timely controversion issue and the focus on whether there existed such newly discovered evidence as would permit the carrier to reopen the issue of compensability. Since it purports to contest the compensability of the condition stated in Dr. W's May 19, 1994, letter we cannot say the TWCC-21 lacks such materiality as to probably not affect the outcome. However, given our disposition of this case, we need not decide whether to remand for its consideration.

For the above reasons, the decision and order of the hearing officer are reformed by striking Findings of Fact Nos. 7 and 8, Conclusions of Law Nos. 4 and 5, and so much of the decision and order as requires the carrier to pay income and medical benefits based on the stricken findings and conclusions.

The hearing officer's decision and order, as reformed, are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge