APPEAL NO. 970713
FILED JUNE 4, 1997

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 3, 1997, a contested case hearing (CCH) was held. The issues at the CCH were whether the appellant, who is the claimant, sustained a compensable injury to his neck in the course and scope of employment with employer at the same time that he sustained undisputed compensable injuries on _____ (such issued phrased in terms of whether the injury "extended" to his neck); whether the carrier disputed the compensability of the neck injury within 60 days after receipt of notice of the neck injury; whether the carrier was relieved from liability for the claim in its entirety because the claimant failed to file a claim for compensation within a year after he was injured; whether the claimant had the inability to obtain and retain employment at wages equivalent to the pre-injury wage (disability); whether he had reached maximum medical improvement (MMI) and, if so the date; and the claimant's impairment rating (IR). The hearing officer declined to add an issue over whether the claimant had timely disputed his first IR.

The hearing officer determined that the claimant's injury did not extend to his cervical area. He found that the claimant's injury caused disability from October 27, 1993, through October 29, 1995, the date of "statutory" MMI. Factual findings were made on two reports of the designated doctor, one of which assessed only the lumbar spine, and the second of which combined this with an IR for cervical impairment as well. In each case, the hearing officer agreed that the reports were not against the great weight of other medical evidence. However, because the hearing officer determined against the claimant on the issue of the cervical injury, he accorded presumptive weight to the first report only, and found that claimant reached MMI on October 11, 1994, with an eight percent IR. On the claims filing issue relating to the lumbar spine, he determined that because the carrier had accepted liability for that injury, that an exception to the claims filing requirement was therefore applicable "even if" the claimant had failed to file a claim; there was, however, no determination made that the claimant, or someone on his behalf, failed to timely file a claim. Finally, as to the dispute of the cervical injury, the hearing officer determined that the first written notice of such injury was received by the carrier on September 25, 1995, and that the carrier timely disputed on October 26, 1995.

Both parties have appealed. The claimant has appealed the determinations that his injury did not extend to his cervical area, pointing out that his early and continuing complaints were thought to be carpal tunnel syndrome (CTS), and that conclusive diagnosis was deferred through carrier refusal to approve an EMG, but the condition was eventually diagnosed as cervical radiculopathy. The claimant argues that the

hearing officer's decision is contrary to the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. The claimant also argues, on this point and on the point of error relating to timely dispute of the neck injury, that the carrier withdrew its dispute to the cervical injury through its previous attorney in November 1995, and consequently waived any dispute to this. The claimant argues that the proper MMI date and IR are those reflected in the third report of the designated doctor, which certified MMI on the statutory date with a 23% IR. The claimant further points out that even if the Appeals Panel agrees that the injury is confined to the lumbar spine, the designated doctor, in a second report, amended the MMI date for that injury to ____. The carrier responds by arguing the evidence it believes to be in favor of the hearing officer's determination that there was no cervical injury. It argues that the alleged withdrawal of a dispute is not relevant to whether the claimant's cervical area was injured, but that, in any case, its letter of withdrawal did not constitute an "agreement" as to disposition of the claim. The carrier further responds that the only effect of the letter was to withdraw a dispute made on newly discovered evidence. The carrier responds that the determination on MMI and IR are correct.

The carrier has appealed the determination that it is not released from liability because of the claimant's failure to file a claim for his _____, injury within a year. The carrier argues that it did not discover that the claimant failed to file a claim until the June 18, 1996, benefit review conference (BRC), and that Section 409.004(2) does not apply to the case here. The carrier argues, on this later point, that the provision applies only when a carrier or employer choose not to dispute a claim. The claimant responds that the decision of the hearing officer is consistent with earlier Appeals Panel decisions and further responds that the claimant timely filed a claim for compensation. Along this line, he argues both that an Employee's Notice of Injury or Occupational Disease And Claim for Compensation (TWCC-41) was filed within a year, and that other forms constituting a "claim" were also filed within that time, and that the carrier's appeal should be rejected for all these reasons.

## DECISION

We affirm the hearing officer's determination that the carrier cannot be released from liability for the alleged failure of the claimant to file a claim. We reverse and render on points of error relating to the dispute by the carrier of the cervical injury, MMI, and IR, and order payment of benefits consistent with this decision.

The claimant was employed by an alarm system company and stated that he was tugging on a jet line, pulling electrical wires through a conduit in a building, when he fell backwards and caught himself, on _____. He said that he took it easy the rest of the day, and by the next morning was unable to get up right away due to pain in his

arm, lower back, and right leg. Claimant said he was four hours late for work, and when he arrived, he reported his injury and pain to his supervisor, but was told that there was one week remaining on the job before another job was undertaken. Claimant said he was told if he went to see a doctor at this point, he would have "zero" chance of performing the upcoming job. Claimant also indicated that his private health insurance was not effective until some later date so he deferred medical treatment while trying to get clarification of his medical insurance status. However, he said he could not take the pain anymore after five weeks and went to see Dr. A, who took him off work on October 25, 1993. Claimant said he had not worked since that date due to his injuries. Dr. A referred claimant to Dr. H, who became claimant's treating doctor.

The employer reported on an Employer's First Report of Injury or Illness (TWCC-1) that claimant sustained a back injury, and the carrier reacted to this by filing a TWCC-21 in which compensability of the back injury was disputed primarily for failure to report to the employer within 30 days. Within a week, however, the carrier filed a second TWCC-21 initiating payment of temporary income benefits (TIBS) and stating that the carrier did not dispute the claim.

It is fair to state that claimant's primary early treatment for his injury focused on his lumbar spine. However, on January 4, 1994, Dr. E, a neurologist to whom claimant was referred by Dr. H, sent a report to the adjuster for the carrier in which he recommended an EMG to "rule out" CTS on the right side. When the adjuster questioned how CTS related to the _____, injury, Dr. E wrote back on February 3, 1994, that, since his injury, the claimant had been bothered with "intermittent tingling and numbness throughout the right upper extremity without associated neck pain or right arm weakness." Dr. E said he suspected that the claimant could have a right median nerve injury, or CTS, and advised further upper extremity EMG testing. This was not approved at that time.

The carrier was represented by attorney Attorney B, who appeared at earlier BRCs through 1995 on behalf of the carrier and had fees approved for representation. For the time period prior to the CCH, the claimant was assisted primarily by an ombudsman. A doctor for the carrier, Dr. RH, certified MMI and a seven percent IR for the claimant, with which the treating doctor did not agree, so, because of a timely request for dispute resolution filed by the carrier, the Texas Workers' Compensation Commission (Commission) appointed a designated doctor, Dr. O, who examined claimant for his lumbar injury on March 10, 1995, and certified MMI in accordance with Dr. RH's report (with a date of October 11, 1994), with an eight percent for the lumbar spine. In June 1995, Dr. H wrote to the adjuster to report that claimant continued to complain of numbness in the upper right extremity. He again requested an EMG. The

Commission appointed Dr. F to examine claimant in order to evaluate the medical necessity of the treatment, and Dr. F concurred in the EMG to evaluate the source of persistent pain in that area "apparently stemming from that original injury." Dr. F opined that he doubted claimant had a serious condition but deferred to the treating doctor. The EMG was then approved, and Dr. H reported to the adjuster on September 25, 1995, that it showed abnormalities at C5-6 consistent with moderately severe radiculopathy and suggestion of injury at C7. He recommended an MRI.

The carrier, on October 26, 1995, filed a TWCC-21 to dispute the cervical injury, in the following words:

Per investigation carrier disputes any medical treatment or disability to the cervical area. Treatment to the cervical area is not related to the original incident of [ _____ ], medical investigation continues. Carrier reserves the right to amend.

On November 8, 1995, claimant had a cervical myelogram showing mild spur formation and some swelling of the nerve root at C5-6; a post myelogram CT scan was reported as showing no significant abnormality except mild spurring. On November 30, 1995, Attorney B wrote to the ombudsman, with a copy to the adjuster:

Please allow this to confirm our conversation of November 29, 1995 wherein the carrier has agreed to withdraw its October 26, 1995 dispute on the basis of newly discovered evidence. I understand that the benefit review conference scheduled for November 30, 1995 will no longer be held, and the claimant will be seeing [Dr. B] for evaluation of his cervical problems. Your assistance is appreciated.

Dr. O examined claimant twice more, including the cervical area. On January 26, 1996, Dr. O certified eight percent IR for the lumbar spine, but said that claimant had not reached MMI for his cervical injury. On April 12, 1996, Dr. O examined claimant and certified MMI on the statutory date with a 23% IR for lumbar and cervical impairment.

Sometime in early 1996, the carrier changed its attorney to its representative at the CCH under appeal. On March 26, and May 28, 1996, carrier reasserted a dispute to the cervical injury.

**FILING OF A TIMELY CLAIM AND EXCEPTIONS THERETO**

At the CCH, the claimant asked the hearing officer to take official notice of the Dispute Resolution Information System (DRIS) file. The hearing officer indicated he would take notice of a specific entry only and was then asked to note DRIS entry of August 12, 1994, showing that claimant filed a claim with the field office of the Commission. It does not appear from the decision that the hearing officer did this. The

date in question is, however, recited on the two 1996 BRC reports as the date the claim was filed. Claimant testified that the DRIS entry was shown to the carrier's attorney at both BRCs. There is no TWCC-41 hard copy in the certified claims file in evidence.

As the claimant points out, a TWCC-41 is not the only type of document that may be considered "a claim." Texas Workers' Compensation Commission Appeal No. 952101, decided January 24, 1996. The Appeals Panel has incorporated the standards articulated in Cadengo v. Compass Insurance Co., 721 S.W.2d 415 (Tex. App.-Corpus Christi 1986, no writ) in stating that "other" writings filed on behalf of a claimant may satisfy the requirements of the "claim." *See* Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 1994 (holding that no claim was filed because there was no writing of any nature within one year). Leaving aside that it appears that claimant may have timely filed a TWCC-41, whether or not a copy was put in the claims file, there appears to be numerous doctor's reports in the claim file within the one-year period that could satisfy the requirements of a "claim."

Further, where parties conduct themselves as if a claim was filed, the Appeals Panel has held that the exception set out in Section 409.004(2) applies. Texas Workers' Compensation Commission Appeal No. 94557, decided June 21, 1994. We do not agree that this exception is limited in the manner suggested by the carrier, and note that up until early 1996, the carrier treated the _____, injury as one for which a "claim" was made. In any case, even if no "claim" were filed, this defense should have been ascertainable within 60 days following August 20, 1994, whether or not first discovered by carrier's second attorney at a 1996 BRC. *See* Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994. The hearing officer's determination that the assertion of a late claim was not a defense in this case can be affirmed.

**WHETHER THERE WAS A TIMELY DISPUTE REGARDING THE CERVICAL INJURY OR WHETHER A DISPUTE WAS WAIVED**

We hold that the hearing officer erred in this case by finding that the dispute over the cervical injury was viable and not waived because carrier timely filed a TWCC-21 on October 26, 1995. This finding wholly disregards Attorney B's withdrawal of that dispute.

It is worth emphasizing that Rule 124.6(a)(9), promulgated to implement Section 409.022(a), requires that disputes to the compensability of an injury must state the grounds therefore, and that conclusory statements that liability is disputed or that an

injury is under investigation are insufficient. The failure to contest compensability of an injury within 60 days after the date of written notice of injury waives the right to do so. Section 409.021(c). The fact that the claimant's arm pain was not identified to a neck injury until September 1995 would allow the carrier another 60-day period to dispute the asserted extent of injury. Texas Workers' Compensation Commission Appeal No. 94611, decided June 24, 1994. However, it is clear that the carrier withdrew this dispute from further adjudication as confirmed by the letter from Attorney B on November 30th, which also cancelled a BRC. While the carrier argues that this would not be effective without a BRC agreement, we do not agree. In Texas Workers' Compensation Commission Appeal No. 941609, decided January 17, 1995, the Appeals Panel held, in the context of a Rule 130.5(e) 90-day dispute, that a dispute voluntarily withdrawn was no longer a dispute. The hearing officer applied such a rationale in this case by holding that the 1993 dispute to the lumbar injury was withdrawn by the carrier; the fact that the 1995 cervical dispute was withdrawn by a letter rather than a TWCC-21 appears to us a distinction without a difference.

In this case, there was no evidence that Attorney B was not authorized and empowered to act on behalf of the carrier, nor do we agree with the carrier's urged interpretation of the letter that he intended only to withdraw one component of his TWCC-21 dispute. Attorney B plainly states that "newly discovered evidence" is the basis for withdrawing the dispute, and he cancelled the BRC that would otherwise have been held. Because there was no "dispute" to be resolved at a BRC, we do not agree that Sections 410.029 and 410.030 applied. Whether it could seek at some later date to reopen compensability in accordance with Section 409.022(b) was neither urged nor argued.

Accordingly, we reverse the hearing officer's determination that a timely dispute was raised to the cervical injury, and render a decision that the carrier voluntarily withdrew its dispute to the compensability of the cervical injury and thus waived the right to dispute it.

**EXISTENCE OF A CERVICAL INJURY, MMI, AND DISABILITY, AND THE PERCENTAGE OF IMPAIRMENT**

Although we note that there is evidence in this case that the cervical injury occurred on _____, albeit belatedly diagnosed when recommended testing was not approved, whether such evidence amounts to a great weight and preponderance against the hearing officer's decision need not be discussed because dispute to the injury was waived and it thus became compensable. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993.

The factual findings that Dr. O's IR reports were not against the great weight of other medical evidence are not appealed, and we therefore will take those findings as rendered. Because the cervical injury is part of the compensable injury, and Dr. O's April 18, 1996, report is the only one which assigns an IR for the entire injury, based upon statutory MMI, it is entitled to presumptive weight. Accordingly, we render a decision that claimant reached MMI on October 29, 1995, with a 23% IR, and order benefits paid in accordance with this decision and the unappealed finding relating to the period of inability to obtain and retain employment.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge