APPEAL NO. 980006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 12, 1997, a hearing was held. Hearing officer determined that the compensable injury of the appellant (claimant) did not extend to cubital tunnel syndrome and/or an ulnar nerve injury and that claimant did not have disability after June 26, 1997, the date he found she was released to return to work. The hearing officer also determined that respondent (carrier) timely contested the compensability of claimant's cubital tunnel/ulnar nerve injury. On appeal**,** claimant asserts that the extent of injury determination is incorrect because she did have cubital tunnel syndrome and that the disability and carrier contest determinations are also against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision should be affirmed.

DECISION

We affirm in part, reverse and render in part, and reverse and remand in part.

Claimant first contends the hearing officer erred in determining that her injury did not extend to cubital tunnel syndrome. She points to evidence that claimant was experiencing cubital tunnel/ulnar nerve symptoms soon after she began working for (employer) in 1994, that (Dr. EL) diagnosed work-related cubital tunnel syndrome, that claimant's treating doctor was more credible than (Dr. PE), who examined claimant for carrier, and that the hearing officer should discount Dr. PE's opinion because Dr. PE was biased and did not review all of claimant's medical records. Under the 1989 Act, the claimant has the burden of proving that he or she sustained a compensable injury and the extent of the injury. Texas Workers' Compensation Commission Appeal No. 952208, decided February 12, 1996; Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Extent of injury is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 960407, decided April 10, 1996.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that she was working for employer on _____, doing repetitive work in the manufacturing division. She said that, shortly after she began

working there, her wrists, hands, and fingers began to feel sore and that they began to feel numb in the Spring of 1995. The problems did not get better and she finally saw a doctor. Her treating doctor eventually diagnosed bilateral carpal tunnel syndrome (CTS), she had release surgery in both hands, and she was taken off work on March 1, 1996. Claimant said she had a baby on April 28, 1996, while she was off work.

It was undisputed that carrier accepted claimant's CTS claim. Some medical records dated in 1996 indicate that claimant was complaining of pain and numbness in all fingers in 1996. The designated doctor selected in the case certified that claimant reached maximum medical improvement (MMI) on September 1, 1997, with an impairment rating (IR) of 17%.

In a March 20, 1997, report, Dr. EL indicated that claimant is having some "different symptoms," that her hands are starting to "go numb again" but that the numbness is "more on the fifth and fourth fingers of both hands," that she had "bilateral tenderness in both cubital tunnels," that she had had these symptoms for "many months" but that the symptoms had not been severe enough to mention "until now," and that he would "redo the EMG" to see if she has cubital tunnel syndrome. This March 20, 1997, report indicates that it was faxed to carrier on April 9, 1997. In a June 26, 1997, letter, Dr. PE, who examined claimant for carrier, stated that claimant had bilateral CTS, that she could return to work without restrictions, that there are no objective findings to support a diagnosis of ulnar neuropathy, but that if claimant does have ulnar neuritis, the symptoms may be directly related to her care for her baby. In an August 15, 1997, letter, Dr. PE said that claimant had a minimal Tinel's sign with regard to ulnar neuropathy, that previous electrodiagnostic studies were reported to be normal, that there was a latent onset of ulnar nerve symptoms, and that it was Dr. PE's strong opinion that the ulnar nerve symptoms were not tied to claimant's work-related injury. In an August 20, 1997, letter, Dr. EL said claimant's ulnar condition was work related. In a September 10, 1997, letter, Dr. EL said that claimant has cubital tunnel syndrome and that this "has been documented multiple times since April of '96." In a November 5, 1997, letter, Dr. EL said that "the mechanism of injury for cubital tunnel syndrome is identical to that of [CTS]" and that they are both caused by "chronic repetitive motion." The hearing officer determined that claimant has not demonstrated that the ulnar nerve and cubital tunnel conditions were part of her original compensable injury.

From the medical evidence, particularly the evidence from Dr. PE, the hearing officer could and did find that claimant's injury did not extend to include the claimed cubital tunnel syndrome/ulnar nerve condition. The hearing officer heard the evidence, judged its credibility, and determined what weight to give the evidence. We will not substitute our judgment for that of the hearing officer because this extent of injury determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Claimant contends the hearing officer erred in determining that carrier timely contested the compensability of her cubital tunnel/ulnar nerve claim. She asserts that

carrier did not need an independent medical examination by Dr. PE in order to contest the claim, that it had a duty to investigate all along, and that it was not diligent in its actions. Claimant asserts that carrier's August 26, 1997, Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) was not a timely dispute of compensability.

Section 409.021(c) provides in part that "[i]f an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." Rule 124.6(d) provides that:

> Payment, or denial of payment, of a medical bill shall be made in accordance with the Act, Sec. 4.68, and not under this section. However, a carrier that contends that no medical benefits are due because an injury is not compensable under the Act shall file a notice of refused or disputed claim set forth in this section no later than the 60th day after receipt of written notice of injury.

Notices that claim injury to additional parts of the body not previously claimed will, generally, start a new 60-day time period for contesting compensability for those particular parts of the body. 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. Rule 124.6(c).

In Texas Workers' Compensation Commission Appeal No. 962596, decided March 27, 1997, we quoted Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994, in which the Appeals Panel wrote:

> [I]n 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.
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> 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.

In this case, the hearing officer said in his decision and order, and carrier stated in its brief, that carrier received written notice of the cubital tunnel/ulnar nerve claim (Dr. EL's March 20, 1997, report) on April 9, 1997. Carrier asserts that it sent a letter to claimant asking that she submit to an independent medical exam and, when she did not respond, it filed for an order requiring an exam. The record reflects that carrier filed a Request for Medical Examination Order (TWCC-22) on April 23, 1997, which was approximately 14 days after the date that carrier had written notice of the cubital tunnel/ulnar nerve claim. Carrier received approval for an independent medical examination on May 23, 1997, and then obtained an appointment for claimant with Dr. PE for June 26, 1997, which was more than a month after carrier received approval for the exam. The record does not reflect why claimant could not be seen by Dr. PE sooner. Carrier asserts in its brief that this was the first available appointment with Dr. PE. In her June 26, 1997, report, Dr. PE stated that there was no objective evidence that claimant had ulnar problems and that the alleged ulnar problems, if any, may be related to care for claimant's child. Even though the hearing officer found that this report was received by carrier on "July 23, 1997," carrier asserted at the CCH that it received Dr. PE's report on July 9, 1997.[1] Carrier did not file a TWCC-21 immediately after receiving Dr. PE's report, but continued to investigate the claim. It sent Dr. PE's report to Dr. EL for comment, sent Dr. EL's response back to Dr. PE and, after Dr. PE reviewed Dr. EL's response to Dr. PE's report, it then filed its dispute of the cubital tunnel/ulnar nerve claim on August 26, 1997.

The hearing officer determined that: (1) carrier's first knowledge of possible involvement of the cubital tunnel and ulnar nerve was in April 1997; (2) carrier had reasonable grounds to dispute involvement of the ulnar nerve/cubital tunnel condition when it received Dr. PE's report on "July 23, 1997"; (3) carrier disputed involvement of these body parts on August 26, 1997; and (4) carrier's contest of compensability of these body parts is based on evidence that could not have been reasonably discovered at an earlier date.[2]

This is not a case where the carrier disputed the cubital tunnel/ulnar nerve claim within 60 days of the April 9, 1997, receipt of written notice (Dr. EL's report), or by June 9, 1997. Therefore, we must consider, under the totality of the circumstances, whether the case should have been reopened. Regarding whether Dr. PE's report was newly discovered evidence that could not reasonably have been discovered earlier, we note that carrier did not offer evidence regarding why it did not obtain an earlier independent medical exam for claimant after it received Commission approval for an exam. An order for an exam was given within the 60-day period, on May 16, 1997, and received by carrier on May 23, 1997, which left approximately 17 days of the 60-day period for carrier to obtain a report from its own expert. For the purposes of this analysis, we will ignore this and assume that

[1] In its reply brief on appeal, carrier asserted that the date stamp shows it received Dr. PE's report on "July 3, 1997." The date stamp actually shows receipt on July 9, 1997.

[2] In the decision and order, the hearing officer stated that carrier had written notice of the ulnar nerve condition on April 9, 1997.

carrier could not have obtained an earlier appointment with Dr. PE. We will now address evidence regarding carrier's diligence in disputing the claim once the alleged newly discovered evidence from Dr. PE became known.

We first conclude that the hearing officer's determination that carrier received Dr. PE's report on July 23, 1997, is against the great weight and preponderance of the evidence.[3] Carrier said at the CCH and the date stamp shows that carrier received the report on July 9, 1997, and we render a determination that carrier received Dr. PE's report on July 9, 1997. In the report, Dr. PE said there is nothing to suggest that claimant's ulnar neuritic complaints were work related. As of its July 9, 1997, receipt of this report, carrier had grounds to dispute the cubital tunnel/ulnar nerve-related claim. However, carrier did not dispute until almost seven weeks after July 9, 1997. We conclude that carrier did not exercise reasonable diligence in filing its TWCC-21 on August 26, 1997, after it learned of Dr. PE's report on July 9, 1997. Carrier could have filed its dispute shortly after receiving Dr. PE's report on July 9, 1997, and then later, after more investigation, it could have withdrawn the dispute if necessary. We reverse the hearing officer's determination that carrier timely disputed the cubital tunnel/ulnar nerve claim and render that carrier waived the right to dispute the cubital tunnel/ulnar nerve claim. Appeal No. 962596, *supra.*

Claimant asserts that the hearing officer erred in determining that she did not have disability after June 26, 1997. Claimant contends that she proved disability extending until the date of MMI, September 1, 1997, through off-work slips, medical reports, and claimant's testimony. Claimant asserts that even though Dr. PE, the doctor who examined her for carrier, said she could return to work as of June 26, 1997, her treating doctor, (Dr. ST), had not released her to go back to work, so the hearing officer's determination is against the great weight and preponderance of the evidence. The hearing officer determined that claimant was released to return to work on June 26, 1997, and that her disability ended on that day. However, in considering this issue, the hearing officer considered only the CTS injury and whether claimant had disability regarding that injury. Because we have reversed the carrier waiver issue, we must remand the issue of disability to the hearing officer. The hearing officer apparently relied on Dr. PE's opinion regarding disability and Dr. PE's opinion in that regard was based on her view that the compensable injury did not include a cubital tunnel/ulnar nerve condition. On remand, the hearing officer should reconsider the disability issue considering the fact that carrier waived the right to contest compensability of the cubital tunnel syndrome/ulnar nerve condition.

We affirm that part of the hearing officer's decision and order that determined that claimant's injury did not extend to cubital tunnel syndrome/ulnar nerve problems. We reverse the hearing officer's determination that carrier did not waive the right to contest compensability of the cubital tunnel syndrome/ulnar nerve problems and render a decision that carrier waived the right to contest the compensability of that claimed injury. We

[3] In its TWCC-21, carrier stated that it received Dr. PE's report on July 23, 1997. This is apparently why the hearing officer determined that carrier received it on that date.

reverse the hearing officer's disability determination and remand that issue to the hearing officer for reconsideration consistent with this decision.

We affirm in part, reverse and render in part, and reverse and remand in part. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy Stephens
Appeals Judge

CONCUR:

Gary Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge