APPEAL NO. 980198
FILED MARCH 13, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 30, 1997, a contested case hearing (CCH) was held with hearing officer. The issues heard at the CCH were whether the claimant, who is the respondent, sustained a compensable injury in the form of an occupational disease, on _____, and whether he had any disability from this disease.

The hearing officer determined that the claimant sustained injury, diagnosed at the time of the CCH as bilateral carpal tunnel syndrome (CTS), and that he had disability from his injury for the period from July 8, 1997, to the date of the CCH.

The carrier has appealed. It argues that the hearing officer erred by excluding its primary witness and that she failed to consider its argument on good cause. The carrier also argues that the claimant failed to bring forward sufficient evidence of repetitious, traumatic activities inherent in his type of employment versus employment in general. The carrier argues that the treating doctor's statements on causation are conclusory and there is otherwise no evidence to show why holding a steering wheel would result in CTS. While the findings of fact and conclusions of law concerning disability are appealed, there is no specific argument in the brief which identifies error and it would thus appear that the carrier's appeal of disability would be premised on the failure of the claimant to prove that he had a compensable injury. The claimant responds that the Appeals Panel should not disturb the findings of fact made by the hearing officer in resolving conflicting evidence. There is no response to the point of error that the hearing officer erred by excluding carrier's witness from testifying.

DECISION

Reversed and remanded.

The claimant had worked as a truck driver for seven years for a food company which was acquired in the last two years by (employer). He drove 18-wheel trucks, delivering chicken, and said that his average run would last three days, driving eight to 10 hours each day. The claimant said that the steering wheel was large, between 18 and 22 inches in diameter, and a firm grip was required. Claimant said that he gripped the steering wheel at the nine o'clock and three o'clock positions. He also had to shift through 10 gears, with the gearshift being located on his right. He estimated that about two hours of the driving time would involve using the gear shift, although not continuously for that time. Claimant said that while he was driving, he could feel a slight but constant vibration in the steering wheel.

Claimant testified that around June 30, 1997, after having been on the road for four or five days, he noticed pain and numbness in his hands. Claimant said he had been bothered with hand pain for about a year but it had not interfered with his ability to work.

The pain "kind of went away" on that day, but on the morning of _____, when he woke up his hands were numb again. He said that this was worse because the pain and numbness did not go away. Claimant said his right hand was worse and he reported this to his dispatcher, whose name he could not recall. Claimant said he went to an emergency room at a hospital in (state 1) on _____, where a doctor told him he had CTS and prescribed Ibuprofen, which did not alleviate his pain.

Claimant said his last day of driving was July 7, 1997, when he arrived back home. On this date, he went to see (Dr. L), his family doctor. He said Dr. L also told him he had CTS and it was from too much truck driving, specifically holding the steering wheel for long periods of time and feeling the road vibration. Dr. L referred him to another doctor, but he said his health insurance would not cover the referral nor would workers' compensation insurance, so he had not been evaluated by this doctor. Claimant then sought treatment at the veterans hospital, as he was a veteran, and he said he was diagnosed there with CTS, by (Dr. W) and (Dr. D). He was treated with medication and splints. Dr. D's September 8, 1997, report noted that claimant had normal range of motion, was in no apparent distress, had essentially normal strength in his upper extremities, had a positive Tinel's sign on the right hand but none on the left, and had objective testing results consistent with mild CTS on the right. Dr. D, noting that claimant had been off work at that point for two months, stated that "further rest" from work would be advisable because of early muscle membrane instability in the right hand.

Claimant said he had not worked because he was under a doctor's care (referring to Dr. L) and that Dr. L had taken him off work. He did not testify, one way or the other, about the impact of his injury on his abilities to work or function. He said that Dr. D, who was a neurologist, told him he might need surgery in the future. Claimant was taking anti-inflammatory medication at the time of the CCH. Claimant said his wrists had gotten about 40% better since he had been off work.

Claimant said he was mistaken when he told the adjuster in his recorded statement that he had absolutely no symptoms until June 30th. He clarified that his left hand never went completely numb as did his right hand.

The medical evidence produced by the claimant in support of the causal connection of his CTS to work (or its existence as a condition) consisted primarily of Dr. L's August 19, 1997, letter stating that his CTS was in reasonable medical probability due to repetitive use of his hands from driving long distance for prolonged periods of time. Dr. L also took claimant off work beginning July 7th for two weeks. Dr. W took claimant off work for two weeks beginning July 28th and for another 30 days beginning in mid-August.

On September 8, 1997, (Dr. F) wrote to the carrier in response to its request for him to review the claimant's medical records and venture an opinion as to the work relatedness of his CTS. Dr. F stated that he could find no objective evidence of a significant, credible etiology associated with the claimant's employment which would be responsible for the claimant's CTS. Dr. F cited studies which in general questioned the causal connection

between CTS and any work place activity. It is possible to read Dr. F's report and conclude that he has come to believe that CTS in general is not caused by work-related activities, but in any case he does not agree that claimant's work as a truck driver is of the nature of work that would have caused CTS.

An objection was made at the CCH to calling Dr. F to testify by telephone on the basis that he had not been disclosed as a witness having knowledge of relevant facts. Although a report from Dr. F had been exchanged at the benefit review conference (BRC), he was not, according to claimant, included on a list of persons having knowledge of the relevant facts that was tendered 15 days after the BRC, and was not disclosed until December 9th. The carrier explained that when it received additional medical evidence from the claimant on November 18, 1997 (some of which appears to be included in this record without objection by the carrier), the adjuster wrote to Dr. F on December 4, 1997, to see if he would be available to testify live and that Dr. F confirmed on December 9th that he could, whereupon prompt disclosure was made to claimant. The objection to Dr. F's testimony was sustained. By contrast, when the claimant also objected to the December 4th letter from the adjuster on the basis that it also was not exchanged, the hearing officer found good cause for its admission. The basis cited by the hearing officer for excluding Dr. F was as follows:

> I think that the decision was made in December. Although carrier did the right thing upon making the decision to exchange that name, I believe that this was within the control of the carrier to make the determination to find out from [Dr. F] earlier if there was any chance of him testifying, and . . . I don't think that there is good cause for that late exchange.

The BRC report which is in evidence indicated that the CCH was originally scheduled for December 22, 1997. The BRC was held on October 2, 1997. It appears that the CCH was reset on October 15th to December 30th.

We review evidentiary good cause determinations of hearing officers on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992. The test for good cause is that degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 971243, decided August 16, 1997.

We hold that the hearing officer in this case abused her discretion by excluding the live testimony of Dr. F and that such exclusion cannot be said to be harmless error because she has expressly discounted Dr. F's written report because it lacked sufficient explanation for statements made therein, which presumably would have been supplied through live testimony and cross-examination. The hearing officer's acknowledgment that the carrier promptly disclosed that Dr. F would be actually available to testify live, once this was known, constitutes the basis for good cause to allow his testimony, and the basis recited by the hearing officer, that carrier could have ascertained his witness status and availability at an earlier date, does not constitute a reasonable basis under the statute and rules for

exclusion under the facts of this case. Moreover, we observe that Dr. F's status as an expert witness was timely disclosed to the claimant through the timely exchange of his report.

Section 410.160 requires that the parties shall exchange, within the time prescribed by Texas Workers' Compensation Commission (Commission) rule, the following:

(1) all medical reports and reports of expert witnesses who will be called to testify at the hearing;

(2) all medical records;

(3) any witness statements;

(4) the identity and location of any witness known to the parties to have knowledge of relevant facts; and

(5) all photographs or other documents that a party intends to offer into evidence at the hearing.

Section 410.161 makes clear that the obligation to disclose information or documents extends to that which is "known to" the party or in that party's "possession, custody, or control" at the time disclosure is required under Section 410.160 or provisions relating to interrogatories and depositions.

There was no dispute that Dr. F's written report was made available under this statute. His report appears to qualify as a document under Section 410.160(a), because Dr. F did not personally examine or treat the claimant but was being asked for his expert conclusions based upon review of claimant's medical records. Therefore, disclosure of his report would, in this case, necessarily disclose his status as "an expert witness who will be called to testify at the hearing."

28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 142.13(c)(1)) provides that the evidence described in Section 410.160 shall be exchanged not later than 15 days after the BRC. However, Rule 142.13(c)(2) goes on to state that parties shall exchange additional documentary evidence thereafter "as it becomes available." Thus, the rule contemplates and provides for disclosure of additional information that is generated after the 15-day deadline. This was additionally done for Dr. F.

While we have cautioned that a party who belatedly investigates the facts and then does not disclose known information, in order to make further investigation and development, runs the risk of having evidence excluded for failure to exchange, Texas Workers' Compensation Commission Appeal No. 960513, decided April 26, 1996, we have also held that a party is not required to create evidence within 15 days of the BRC in order to exchange it. Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993; also Appeal No. 960513, *supra.* Additional records were exchanged to the carrier by the claimant which Dr. F had not previously reviewed. In this case, the trier of fact acknowledged that the carrier's determination and ascertainment of his availability to call Dr. F as a live witness (his report having already been timely disclosed to the claimant) was not actually made until early December and his availability was not known to the carrier until that time. The hearing officer agreed that the carrier acted correctly by making a prompt disclosure at that time, three weeks in advance of the CCH and not on its eve. Under these circumstances, it was an abuse of discretion to exclude Dr. F's testimony for the reasons stated by a hearing officer. We cannot agree that diligence in this case would have required the carrier to confirm Dr. F as a live witness two and a half months prior to the CCH, his expert witness status having been arguably already communicated by timely disclosure of his written report.

In order to allow for the excluded testimony of Dr. F, we reverse and remand and will not, at this point and prior to the development and consideration of such additional evidence, comment on or evaluate the appeal of the decision that claimant sustained a work-related CTS and had disability therefrom.

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.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur but write separately to state that in my opinion claimant sufficiently complied with the "discovery" statutes and rules when she timely disclosed and exchanged the report of her expert witness, Dr. F. In these circumstances, I do not view claimant as being required to further identify Dr. F as a person having knowledge of relevant facts nor do I believe a good cause for late exchange inquiry was required.

Philip F. O'Neill
Appeals Judge