

APPEAL NO. 990895

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 March 30, 1999. The issues at the CCH, as reported out of the benefit review conference, were whether the respondent's (claimant) compensable injury sustained on _____, of tendonitis of the right arm and wrist includes or extends to include an injury to her right knee, and whether the carrier waived the right to contest the compensability of the claimed injury to the right knee by not contesting compensability within sixty days of being notified of the injury. The hearing officer determined that the claimant's compensable injury sustained on _____, includes a right knee sprain, but does not include or extend to include chondromalacia of her right knee, and the carrier waived the right to contest the compensability of the chondromalacia of the right knee. The appellant (carrier) appeals, urging that the hearing officer's determination that the carrier waived the right to contest the compensability of the chondromalacia is not supported by the evidence and the decision should be reversed. The claimant responds that sufficient evidence supports the hearing officer's decision regarding waiver and it should be affirmed. Not appealed is the determination of the hearing officer that the compensable injury includes a right knee sprain, but does not include or extend to include chondromalacia of her right knee, and it has become final.

DECISION

Reversed and rendered.

The only issue on appeal is the issue of waiver. The issue at the CCH was phrased as follows:

Did the carrier waive the right to contest the compensability of the claimed injury to the right knee by not contesting compensability within sixty days of being notified of the injury.

The hearing officer made the following determinations regarding this issue:

FINDINGS OF FACT

2. On September 18, 1998 designated doctor, Dr. R, diagnosed Claimant with chondromalacia of the right knee.

* * * *

4. Carrier was notified of Claimant's current condition of chondromalacia of the right knee on September 18, 1998.

5. Carrier filed a TWCC-21 on December 7, 1998.

CONCLUSION OF LAW

4. The carrier waived the right to contest the compensability of the chondromalacia of the right knee by not contesting compensability within sixty days of being notified of the injury.

The carrier appeals only Finding of Fact No. 4 and Conclusion of Law No. 4. The carrier argues that there is no evidence that the carrier received the designated doctor's report which references chondromalacia on the date it was written, September 18, 1998. The carrier asserts that the only evidence indicating the carrier's receipt of information concerning the right knee was the affidavit of LA which indicates the carrier received notice in a letter from Dr. A dated November 3, 1998, on December 1, 1998. In support of its position, the carrier's appeal includes a "File Activities Report," not previously exchanged and not introduced at the CCH. In response, the claimant argues that there is nothing in the record which indicates that the designated doctor did not mail a copy of the report to the carrier; that the claimant received her copy of the report on or about September 28, 1998; and that the new information attached to the carrier's appeal could have been readily obtained prior to the CCH.

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the document carrier attached to its appeal, but not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the document attached to the appeal which was not offered at the hearing does not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The carrier, in its closing argument, stated it is denying that the claimant's current right knee problem, chondromalacia, is related to the _____, injury and is not contesting that the claimant fell on her right knee and sustained a bruise. The claimant, in her closing argument, asserted that the designated doctor's report gave notice to the carrier of the right knee condition, chondromalacia, in September 1998 and the Carrier did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until three months later.

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). The Appeals Panel has held that where the issue involves whether a more severe condition has evolved

from an injury whose compensability was conceded or waived, the "reopening" statute applies. Texas Workers' Compensation Commission Appeal No. 962415, decided January 9, 1997; Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994. An employee who argues that a document is written notice of the compensability of a particular injury and that receipt of the document makes the carrier's contest of compensability untimely, has the burden of proving when the notice was received. Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994; Texas Workers' Compensation Commission Appeal No. 990307, decided March 24, 1999.

In this case, regardless of whether Section 409.021(c) or (d) applies, the claimant had the burden to prove when the carrier received written notice of the chondromalacia. Although the hearing officer found that the carrier was notified of the claimant's chondromalacia on September 18, 1998, there is no evidence to support such a finding. The report dated September 18, 1998, does not reflect a carrier date stamp and the mere allegation the document was received by the carrier is insufficient to meet the claimant's burden of proof. The hearing officer's determination is against the great weight and preponderance of the evidence. We reverse the hearing officer's decision that the carrier waived the right to contest the compensability of the chondromalacia of the right knee by not contesting compensability within sixty days of being notified of the injury, and render a decision that the claimant did not establish that the carrier waived its right to contest the compensability of the chondromalacia of the right knee. The carrier is not liable for benefits for a right knee chondromalacia injury.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge