

APPEAL NO. 991369

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 4, 1999, a contested case hearing (CCH) was held. The appellant/cross-respondent, who is the claimant, had sustained an undisputed compensable injury when involved in a major motor vehicle accident (MVA) on \_\_\_\_\_. Essentially, the claimant was arguing that at that time, his right knee was injured, although not detected for some time. He further argued that the hernias resulting from this accident had recurred, and thus were part of that same injury. Finally, the claimant argued that because the respondent/cross-appellant (carrier) failed to dispute the recurrent hernias within 60 days after being notified of this claimed injury, it waived the right to dispute. As part of its defense, the carrier argued that once an impairment rating (IR) was established, there was in effect a "waiver" of any right to assert after this date that the injury extended to other conditions or body parts (apparently even those developing after the date of maximum medical improvement (MMI), as in this case).

The hearing officer found that the claimant failed to prove that his recurrent hernias "are caused by or the result of the compensable injury" or that his right knee was injured either at that time or through an altered gait. She found that the carrier waived a dispute, however, because it was "aware" of the recurrent hernias on or before the date the claimant had surgery but did not dispute them earlier than the expiration of 60 days after this awareness.

The claimant has appealed the findings that the injury does not extend to his right knee or recurrent hernias. He recites facts that he believes support injury to these areas. The carrier argues that these conditions resulted from factors other than the injury and the hearing officer properly found that the relationship was not proven. The carrier appeals because it states the hearing officer failed to consider its waiver argument (that the extent of injury could not be opened after the date of MMI and IR), and further points out that the facts found by the hearing officer as to when it filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) are incorrect in that she assumed that the date of first filing this was the stamped date of evidentiary exchange. The carrier asserts that its dispute of compensability was timely and was filed on September 29, 1997, and attaches a date-stamped copy of the TWCC-21, which is not in the record of the CCH. It argues that the finding that it received notice of recurrent injury on January 12, 1998, is incorrect and that the findings of the hearing officer constitute an abuse of discretion. Other correspondence not in evidence is offered in support of the carrier's argument that the date of TWCC-21 filing found by the hearing officer is, in fact, the date of exchange. There is no response by the claimant to the carrier's appeal.

DECISION

Affirmed in part, reversed and rendered in part.

The hearing was extremely short, given the issues; claimant initially announced that he would not testify, but did so briefly in response to questions from the hearing officer, which were then followed up with questions from defense counsel and the ombudsman. The claimant had been involved in a serious rollover MVA on \_\_\_\_\_, while employed as a truck driver by (employer). He sustained a number of undisputed injuries, including back injury (lumbar fractures), left knee injury, fractured arm, and abdominal contusion and hernia. It was also undisputed that he was treated for depression in connection with this injury.

He had surgery for his hernia on April 19, 1996, that was paid for by the carrier; the pre-authorization approval is in the record. In mid-1997 it was determined that he had recurrent hernias. In issue at this CCH were whether his right knee was also injured in the accident and whether the "recurrent" hernias diagnosed in 1997, for which the claimant had surgery January 12, 1998, as well as a hernia that has since developed, were part of his compensable injury. The issue on this was framed poorly: did the claimant sustain a compensable recurrent abdominal hernia(s) in addition to the compensable injuries sustained on \_\_\_\_\_?

The claimant's surgeon is Dr. S. Sometime in January 1995, prior to the claimant's accident, he had abdominal surgery performed by Dr. S. This was a gastroplasty (stomach stapling) that claimant had for weight control purposes. Concerning the development of the hernia and its relationship to the accident, Dr. S wrote in April 1996 that he had seen claimant 10 days before his accident, he was well-healed, and he had no hernia, so believed that the development of hernia thereafter stemmed from the accident. The operative report of April 19, 1996, noted that claimant had sustained a hematoma in his abdominal wall as a result of his accident and it was after this resolved that he noticed the bulge ultimately diagnosed as a hernia; three hernias were actually found and repaired with a Gore-Tex mesh once incision was made. The hernia is described as post-traumatic. On June 12, 1997, the claimant was certified as having reached MMI, with an 18% IR by his treating doctor, Dr. W. Thereafter, on July 24, 1997, Dr. W wrote that claimant had a hernia for which he made a referral to Dr. S.

The January 12, 1998, operative report for the "recurrent" hernia stated that two hernias were found, above and below the Gore-Tex mesh, and were repaired. This surgery was paid through Medicare. Dr. S wrote on December 18, 1998, that he did not wait for pre-approval because he did not think it was prudent due to the claimant's pain. He characterized the 1998 repair as one for a "recurrence" of the previously repaired hernia, occurring at the upper end of the incision. On February 10, 1999, Dr. S wrote that the incidence of recurrent hernia following initial repair is about 10%, and that the risk of recurrence increases with subsequent recurrences.

When the claimant was asked for his lay testimony about what Dr. S told him was the cause of the recurrence, he said that he told him he did not know. There was no evidence, lay or medical, that the claimant had any accident or incident subsequent to his first hernia repair in April 1996 which could have resulted in the recurrence of his hernias.

Dr. S's February 10, 1999, letter expressly states that claimant's actions are no way responsible for the recurrence.

A report from Dr. W dated January 16, 1996, stated that claimant was developing right knee pain. There was a similar note in an August 1996 report. An MRI of the right knee was done on June 5, 1998, and reported an extensive degenerative and chronic tear in the posterior horn of the medial meniscus. There is no medical opinion expressly linking this condition to the 1995 injury.

On the timely dispute issue, the adjuster signed an affidavit in which she stated that the first notice of injury of the recurrent hernia was Dr. W's July 24, 1997, letter which she said was received by the carrier on August 22, 1997. (Dr. W's letter does not, however, expressly describe claimant's ailment as a "recurring" hernia.) The adjuster's affidavit is silent as to when any dispute by the carrier was filed. A TWCC-21 is in evidence and it is dated by the adjuster on September 26, 1997; however, the only copy in the record, as an exhibit of the carrier, is date-stamped by the Texas Workers' Compensation Commission (Commission) on November 9, 1998 (the same date a number of other documents are also stamped). The TWCC-21 simply "denies the causative relationship of hernia to the injury of 1995." No grounds are stated for this assertion. It is significant that four days earlier, on September 22, 1997, a consulting doctor for the carrier, Dr. F reviewed claimant's medical records and wrote a letter to the adjuster that opined that recurrent hernia following gastroplasty was common and that obesity was also a strong contributing factor. This letter also disputed the relationship of the first 1996 hernia to the accident. Dr. F concluded that claimant's hernia was not related to the MVA trauma. The gastroplasty had been the surgery performed by Dr. S prior to the accident and had been alluded to in records received by the carrier well before it filed its TWCC-21.

On the matter of injury, we can affirm the hearing officer's determination that the claimant's right knee was not part of the compensable injury; the evidence is not conclusive either way and the hearing officer's analysis of the weight is supported by the evidence.

By contrast, we are troubled by the analysis of the question of whether the recurrent hernias are related to the undisputed compensable hernia injury and repair that was done in April 1996. There was no initial dispute to the hernia which led to the 1996 operation; any argument that the carrier may have had about the causal relationship of the hernia to the accident, as opposed to claimant's obesity or stomach surgery, was therefore waived. The TWCC-21 filed by the carrier, purporting to dispute the "hernia," with no qualification that it is limited to the recurrent hernia, would plainly be untimely to dispute the initial injury and carrier recites no newly discovered evidence to justify a reopening of compensability. Compensability of the first hernia was thus accepted and the 1996 hernia repair was approved. The evidence in this case frankly indicates that the TWCC-21 dated September 26, 1997, was not responsive to any notice about a "recurrent" hernia, but rather triggered by the receipt of the report of carrier's consultant doctor which challenged the relationship of the hernia from inception to the MVA.

The hearing officer found as fact that stapling of claimant's stomach led to weakening of his abdominal wall. We regard this as essentially irrelevant in consideration of the "recurrence" issue. It is not clear to us why the hearing officer would implicate claimant's stomach stapling as a factor in the "recurrent" hernias, over and above the effect of the undisputed first compensable hernia and surgical repair. There is considerable medical evidence indicating that the area of the repaired hernias was contiguous to the previous repair site. Dr. S has characterized the hernias as a "recurrence" of the previous hernia. There was no evidence of any subsequent trauma.

The claimant did not contend that a separate mechanism of the injury set up a parallel course of "recurrence" (characterized by the hearing officer as a "propensity"), but that the need for further repair flowed as a natural result of the hernia and surgery that occurred from the accident. Presupposing that the carrier's TWCC-21 was intended as a dispute to only the recurrent hernia, the relationship of the 1997 recurrence was, at that point, required to be analyzed with reference to Section 401.011(26), that is, whether it naturally resulted from the initial damage or harm (the first hernia). Even if the weakened stomach muscles from the pre-injury surgery were a factor, this would have to be the "sole cause" of the hernias to constitute a bar to compensability in this case. The great weight and preponderance of the evidence is against the hearing officer's holding that the recurrent hernias did not result from the compensable injury, and we reverse and render an opinion that they did.

In arguing that the claimant may not raise the relationship of the recurrent hernias to his initial compensable hernia injury, after an IR is established, the carrier somewhat mischaracterizes the holdings of the Appeals Panel concerning the argued "waiver" of the extent of injury. In Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994, the Appeals Panel stated that a carrier must activate any disputes known at the time that an issue is raised over the IR, because a decision on IR is not an advisory opinion. Although Texas Workers' Compensation Commission Appeal No. 951494, decided October 20, 1995, made a somewhat broader statement applied to "parties," that case held that waiver would apply to a reopening of extent of injury, absent newly discovered evidence that could not have been discovered previously. It is clear that the context of the Appeals Panel opinion was a situation where the carrier sought to reopen and narrow the extent of an injury that had previously been accepted and thereby seek redetermination of the IR.

A different situation is presented, in our opinion, where the issue invokes entitlement to medical treatment for conditions that "naturally result" from the compensable injury. The right to lifetime medical treatment would mean little if a claimant were foreclosed, after an IR was rendered, from ever showing the development of conditions thereafter as a result of the compensable injury. While a finding of a new development may not compel a reopening of the issue of IR or MMI, the necessity for medical treatment and entitlement to those benefits for later aspects of the compensable injury present a distinct issue which we do not believe can be "waived" under Section 408.021.<sup>1</sup>

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<sup>1</sup>Of course, we would note that the proper forum for trying matters that relate only to medical benefits is through the Medical Review Division dispute resolution process as that process is set forth in Section 413.031. Because this case could

Regarding the hearing officer's findings against a timely dispute of compensability, the carrier may be in a predicament somewhat of its own making, because it failed to present a copy of the TWCC-21 which showed the date it was actually filed with the Texas Workers' Compensation Commission (Commission). Although it appears that the November 9, 1998, date is, as it argues, a date that the carrier's exchange of evidence was filed with the Commission, there was no alternative date offered to the hearing officer (nor was official notice of the date in the Commission's files requested) by any evidence (rather than argument). The hearing officer has erred, however, by not making a finding of fact as to the date that written notice of recurrent hernia was first received by the carrier. Although the hearing officer found that the carrier "was aware of the claimant's recurring hernias and his propensity to continue to develop hernias on or before January 12, 1998," the obligation to react with a TWCC-21 does not arise from "awareness" but from written notice of injury as defined by 28 TEX. ADMIN. CODE §124.1 (Rule 124.1). See Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997; Texas Workers' Compensation Commission Appeal No. 971340, decided August 28, 1997. In this case, because of our reversal of the hernia issue on the merits, we need not remand for a separate redetermination of the waiver issue because carrier is liable for benefits for the recurrent hernias regardless.

Our standard of review is not, as the carrier argues, whether the hearing officer abused his or her discretion, but whether there is sufficient support in the record for the evidentiary findings of the hearing officer. We affirm the determination that the right knee was not injured when the claimant had his accident. We reverse the determination that the recurrent hernias are not the result of his compensable injury and hold that they are. The carrier is ordered to pay reasonable and necessary medical benefits and other benefits which may be due in accordance with the 1989 Act.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Dorian E. Ramirez  
Appeals Judge

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potentially involve supplemental income benefits entitlement requirements pertaining to direct result and job search restrictions, we will not dismiss for want of jurisdiction.