APPEAL NO. 992526

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 September 27, 1999. The issues at the CCH involved whether the appellant, who is the claimant, sustained a compensable injury on _____, and whether the respondent (self-insured) could be allowed to reopen the issue of compensability on the grounds of newly discovered evidence.

The hearing officer found that the self-insured had newly discovered evidence which could not reasonably have been discovered earlier and therefore could reopen the issue of compensability. He further found that the claimant had sarcoidosis which was an ordinary disease of life and which was not aggravated by "unknown" chemicals to which the claimant might have been exposed on _____. He found no compensable injury had been sustained on _____.

The claimant has appealed; she attached a copy of the hearing decision on which she has circled various findings of fact and conclusions of law on both stated issues and indicated that she disagrees. Documents are attached--some in the record, some not--on which she has written arguments in favor of a finding that she sustained a compensable injury. The self-insured responds that the claimant's appeal is not adequate to assert error by the hearing officer. The self-insured generally asserts that there is sufficient evidence to support all of the hearing officer's findings and conclusions.

DECISION

Reversed and remanded.

At the outset, we disagree that the claimant's appeal is inadequate to raise error; she has attached a copy of the hearing officer's decision, circled some of the findings of fact and conclusions of law relating to the two issues and stated "disagree." We find this a sufficient assertion of error by the hearing officer with respect to those findings and conclusions. We will not consider, however, any attached documents which were not part of the record of the case as developed at the CCH.

This is a case that presented some complexities not dealt with fully in the decision and, in part, are the basis for remanding the case. First of all, it was clear that although the claimant identified as her date of injury _____, her testimony during the CCH alluded to her belief that she had developed an occupational disease that was aggravated through exposure to chemicals at her work over time. Second, while the evidence developed during the CCH focused on a condition of sarcoidosis, as did the hearing officer's decision, the record suggests numerous other conditions present in, or claimed by, the claimant which were not addressed in the decision. The claimant was apparently represented by an attorney until about six weeks prior to the CCH and this may have resulted in imprecision in presentation of the case.

The claimant worked as a hairstylist for (a certified self- insured that shall be referred to herein as the carrier or the employer, depending upon the context of the reference). She had worked there for eight years.

The claimant said that in 1996, she was having some breathing problems and was treated by Dr. F, who referred her to Dr. H. Dr. H diagnosed her with a condition called sarcoidosis, the cause of which he told her was unknown. However, according to the claimant, Dr. H and Dr. F both told her that this condition could be aggravated by exposure to chemicals and fumes at the salon where she worked. In October and November 1996, and again in September 1997, she was taken off work. She was required to present medical documentation to her employer to substantiate this amount of time off and her sarcoidosis is disclosed on these forms. The doctor's portions of the forms completed by Dr. H show that in October 1996, he described her condition as sarcoidosis and interstitial lung disease that was not work related. However, this same form stated that the claimant had a lung condition "aggravated by odors and fumes." The form he completed in September 1997 stated that she had sarcoidosis and pulmonary fibrosis, again not work related.

The claimant vividly described an incident that happened sometime before _____, in which a hair coloring agent caused a client's head to begin smoking. The claimant was able to calm the client and lead her to the sink area to neutralize the colorant. The claimant said that the client had burns on her scalp and that fumes and smoke were rising from her head as the claimant was bent over her. The claimant could not recall exactly when this occurred. However, the claimant said that it was after this that she developed lesions on her skin.

She also noted that some stylists would frequently dip hot curling irons into containers of sodium hydroxide, which sent fumes into the air causing stylists and clients alike to cough. According to the claimant, the day before the date of injury (which was also her last day of work), the manager had cleaned out the vents at the salon. The claimant said that when she came into work the next day, she was already feeling nauseated and the problem became worse at the salon; so she called her manager, reported this and her inability to continue working, and went to the doctor. The claimant said that a manager named "S" urged her to file an injury claim and she did so. She had also filed a claim for social security disability, which was pending.

On _____, Dr. H wrote a brief "To Whom It May Concern" letter stating that the claimant had a diagnosis of sarcoidosis ‘with exacerbation.‘ He recommended that she stay away from "inhalation irritants" for two weeks and remain at home. He invited the reader to contact his office for further information.

The claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) contending she had injury to her lungs, forehead, chest, and throat due to inhaling irritants and chemicals at work. She recited the _____, date of injury, but put "n/a" in the portion of the form asking her to complete further information for

an occupational disease.

The claimant's accident report filed with the employer recited that on _____, she felt a sharp pain and shortness of breath while working on a client. However, the answer to the query "When did it happen?" also included an August 1995 date. The claimant also listed lost time periods earlier than _____, on this form. She identified her doctor as Dr. F.

Dr. H's treatment records are in evidence. It appears his reports were copied to Dr. F. His records prior to August 1998 include diagnoses of sarcoidosis, pulmonary fibrosis, and forehead skin lesions. Prednisone was prescribed. (The claimant was still taking prednisone at the time of the CCH.) Dr. H's _____, report concluded that the claimant had sarcoidosis with "further irritation due to inhalation of irritants in this patient who works as a hairdresser in addition to pulmonary fibrosis." The report also noted dyspnea on exertion and in the history that "specifically yesterday" the claimant had further exposure at work to cleaning chemicals and developed shortness of breath. A chest x-ray showed some "worsening of right biapical infiltrates."

In evidence is the first Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the carrier. It was filed on September 10, 1998, and states:

> Carrier accepts the exacerbation to the claimant's sarcoidosis. Carrier denies extent of injury to the claimant pulmonary fibrosis, dyspnea, and para-aortic mass. These conditions are ordinary diseases of life to which the general public is exposed to outside of employment. Carrier denies these conditions arose out of the course and scope of employment. And denies indemnity and medical benefits.

The recited date of the first written notice of injury is August 14, 1998. The dispute of sarcoidosis was first made on a January 8, 1999, TWCC-21. This stated:

> Based on new medical evidence received, the carrier denies indemnity and medical benefits for the following: carrier denied the claimant suffers from an occupational disease that arosed [sic] out of the course and scope of employment. There is insufficient medical evidence that supports claimant's condition deteriorated or was aggravated by an injury on the job. The claimant's condition of pulmonary sarcoidosis is an ordinary disease of life to which the general public is exposed to outside of employment.

The "new evidence" that the carrier contended gave rise to this TWCC-21 was the report of a required medical examination (RME) doctor, which it received in hard copy on January 6, 1999. However, this report was the culmination of a series of events that did not begin until over a month after the carrier had received notice of exacerbation of the sarcoidosis and a week after filing the first TWCC-21. On September 17, 1998, the adjuster completed a request for an RME doctor and sent it to the claimant the next day in

order to obtain agreement. The claimant was asked to respond within 14 days. There was no evidence presented one way or the other on whether the claimant responded, but the Texas Workers' Compensation Commission (Commission) approved the request for an RME on October 12, 1998. The examination was actually conducted on November 18, 1998. Two weeks before, the adjuster wrote to the RME doctor, Dr. JR, to tell him the purpose of the examination:

1) Whether the injured employee has or has not reached maximum medical improvement [MMI] and, if so, the percentage of impairment, if any.

2) Claimant's ability to return to work in full duty or light duty capacity. If so, at what time, if not an anticipated date.

3) What would be the proper treatment plan.

4) Is further treatment medically necessary? Is any further diagnostic testing medically necessary? If so, what treatment would be proper?

5) However, if treatment is declined, what would be the impairment rating [IR] and date of [MMI] at the time of the examination.

The adjuster further informed Dr. JR that she "looked forward to receiving your TWCC-69 [Report of Medical Evaluation] report." Dr. JR was not asked to opine on causation. The claimant was not sent a copy of this letter but was generally informed that the purpose of the examination was to "make sure you are being properly treated and to determine the extent of your injury."

On December 14, 1998, Dr. JR completed a report in which he not only confirmed the diagnosis of sarcoidosis but ventured the further opinion that this was an ordinary disease of life and not work related. He further stated that he saw no evidence of deterioration in the claimant's condition related to her work environment. He indicated that he had been asked to review, among other things, "causation." This report was apparently received by the carrier on January 6, 1999.

The claimant said she had not worked since _____, and that her sarcoidosis had gotten worse, although she agreed she had not been around hairdressing chemicals since she left the employer.

The hearing officer correctly stated that the carrier bore the burden of proof on newly discovered evidence as the basis for reopening compensability. The carrier presented no evidence other than documents and although it argued about the nature of the bad faith dilemma that adjusters face in accepting or disputing a claim, no ***evidence*** was presented that this was a factor in the carrier's behavior in this case with respect to the one condition it accepted, even as it rejected others.

WHETHER THE CARRIER PRESENTED SUFFICIENT EVIDENCE THAT IT COULD REOPEN COMPENSABILITY OF SARCOIDOSIS BASED UPON NEWLY DISCOVERED EVIDENCE THAT COULD NOT REASONABLY HAVE BEEN DISCOVERED EARLIER.

The hearing officer's determination that the carrier had newly discovered evidence upon which to reopen the issue of compensability of the sarcoidosis is focused soley on the request for an RME and the ultimate report. The hearing officer determined that the carrier acted in a reasonably prudent manner in seeking and obtaining the report and reacting to it. We do not agree, however, that the sequence of events relating to the RME support the hearing officer's legal conclusion that the carrier "timely contested compensability based on newly discovered evidence that could not reasonably have been discovered at an earlier date, thus allowing the self-insured to reopen the issue of compensability."

A carrier is given 60 days under Section 409.021(c) to contest compensability of a claim, or it waives this right. The first stated issue in this case, whether the carrier could reopen compensability, is premised upon an implied finding that the carrier failed to timely controvert the sarcoidosis within 60 days after written notice of injury; "timely contest" was no longer in issue. Sections 409.021(d) and 409.022(b) allow for reopening compensability or expanding the grounds for dispute upon a finding of evidence that is newly discovered. Section 409.021(d) says:

> An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Section 409.022(b) says:

> The grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

Plainly, there are two components to being allowed to reopen compensability or present additional grounds: the information must not only be "newly discovered" but further proven to have been unavailable or unaccessible through the carrier's reasonable exercise of its duty to investigate the claim (in other words, not discoverable at an earlier time). Thus, while Dr. JR's report was ultimately received in January 1999, this is not the ending point of inquiry. The hearing officer was also required to analyze whether the critical information contained therein was information that could not have been discovered earlier by the carrier. As we see it, the critical information contained in Dr. JR's report that was alleged to have triggered the dispute was not a new diagnosis but his opinions that sarcoidosis was an ordinary disease of life and that there were no medical records showing aggravation. The medical records upon which he based this assessment would be the records supplied by the carrier and the claimant.

We made clear in Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993, that the carrier's duty to investigate is proactive and involves more than serving as a passive repository of records and filed information. That decision also discussed at length the basis for the legislatively-mandated 60-day investigation (or waiver) provisions of the 1989 Act. It made clear that the 60 days does not run from the receipt of information upon which the carrier determines to mount a defense of the claim, but runs from written notice of injury.

It is obvious that the first TWCC-21 filed by the carrier, mischaracterized somewhat during the CCH as an "acceptance of the claim," plainly disputed as ordinary diseases of life some conditions whose existence was only stated in Dr. H's reports (pulmonary fibrosis, dyspnea) or the earlier disability statements filed with the carrier's insured. This indicates to us (and should have indicated to the hearing officer) that some investigation by the carrier had in fact gone on during the weeks between notice of injury and the date the first TWCC-21 was filed to ascertain the inherent nature of claimed disease from information readily available at that point. The carrier apparently did not require a doctor's assessment that pulmonary fibrosis was an ordinary disease of life prior to filing its first TWCC-21 and there is no evidence that the carrier was in fear of "bad faith" by making this dispute. Furthermore, as the carrier expressly accepted "exacerbation of sarcoidosis," it plainly had (or should have had) records available from which it could determine if evidence of aggravation was, in fact, present or absent.

Although the carrier argued that the carrier "immediately" sought an RME, we are hard-pressed to agree that initiation of the request over a month after notice of injury qualifies as urgency. On the contrary, given that the carrier was already halfway through its 60-day investigation period, this request and the subsequent events indicate a somewhat leisurely pace of investigation of a possible defense. The request for an RME followed a belated affirmative acceptance of exacerbation of sarcoidosis. The letter from the adjuster informed Dr. JR that his mission was essentially to assess MMI, IR, return to work, and medical treatment. The RME does not appear to have been initiated by the adjuster to seek an opinion on causation from Dr. JR; however, he may have interpreted his mission. Even if it were, we cannot agree that, given the record here, an RME was the only means by which the carrier could have ascertained either the inadequacy of medical evidence on aggravation or the inherent nature of sarcoidosis as an ordinary disease of life. Either ground of defense could, in our opinion, have been readily obtained well within the 60-day period.

We find the evidence legally insufficient on the matter of reopening compensability of sarcoidosis**.** Because the burden of proof was on the carrier to show that this information was that which could not reasonably have been discovered at an earlier time, and essentially the only evidence shows that such information would have been readily available within the 60-day period, we reverse the hearing officer's determination that the carrier could reopen the compensability of an _____, exacerbation of sarcoidosis and render a decision that its acceptance of compensability of the exacerbation of sarcoidosis

must stand, dispute thereto being waived.

WHETHER THE CLAIMANT SUSTAINED A COMPENSABLE INJURY ON _____.

We are unable to render a decision on the compensable injury issue, however, because a waiver on the matter of an episodic aggravation of sarcoidosis does not appear to wholly resolve the global issue of whether the claimant sustained "a compensable injury" on _____. The benefit review conference report is frankly unenlightening on the nature of the "injury" that was in dispute. The timely disputed conditions of pulmonary fibrosis, dyspnea, and para-aortic mass have not been resolved by the hearing officer, nor have other claimed conditions, such as "forehead, chest, and throat" been either clarified by the claimant, disputed by the carrier, or addressed by the hearing officer. Therefore, we remand for further consideration and development of the evidence, which should include a statement from the claimant as to the conditions that she asserts arose from an exposure on _____ (or _____, since the testimony and Dr. H's examination report from _____ allude to the injurious incident as having occurred then).

However, if there was at one point a claim that the claimant might have made for repetitive, continuous exposure to chemicals as a cause of her lung diseases in general, we cannot agree that this case was before the hearing officer. Also, we cannot agree with the hearing officer that the claimant's case under all the facts here rises or falls solely on an identification of specific chemicals present in the air on the date of the specific injury asserted, although we observe that the claimant did specify at least one chemical, sodium hydroxide, in conjunction with a hot iron, as one source of irritating fumes. *See* Texas Workers' Compensation Commission Appeal No. 981178, decided July 13, 1998.

Accordingly, we reverse and remand the issue of whether the claimant sustained a compensable injury on (or about) _____, which must be rendered also in accordance with our determination of the reopening issue on exacerbation of sarcoidosis.

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 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:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy L. Lueders
Appeals Judge