APPEAL NO. 031679
FILED AUGUST 4, 2003

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 27, 2003, and closed on May 15, 2003. The hearing officer decided that the appellant/cross-respondent (claimant) did not sustain an occupational disease injury in the form of avascular necrosis on _____. The claimant essentially files a factual sufficiency appeal of this determination and submits new evidence attacking the credibility of the carriers' only witness as well as submitting a recent MRI of the claimant's brain. The claimant urges affirmance of the _____, date of injury. Respondent 2 (carrier 1) and respondent 3 (carrier 2) urge affirmance of the hearing officer's decision and argue that the new evidence should not be considered as it is not likely to produce a different result, is not material, and could have been submitted at the CCH with due diligence. Respondent 1/cross-appellant (carrier 3) urges affirmance of the hearings officer's decision regarding compensability but not the date of injury, _____, and joins the other two carriers in objecting to the consideration of the new evidence submitted with the claimant's request for appeal.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant's medical condition of avascular necrosis is not in dispute. Causation of his condition is in dispute. The claimant's employer contracted with (company A), a manufacturer of semiconductor computer chips, to do renovation sheet metal work at Buildings 3 and 4, between September and November of 2000. For a two-week period, the claimant cut into ductworks connecting Building 3 and 4 in order to install a tap, a new opening in the duct. The claimant did not wear any type of breathing mask, having been assured that the duct was clean of any harmful chemicals. The claimant and two other witnesses testified to the presence of a jelly like substance inside the duct. Mr. W, a professional engineer and employee of company A, testified that the ducts were clean and that no hydrofluoric acid lines were present in the ductworks in question, denying that any decontamination had taken place prior to the claimant working at the site. Shortly after finishing the job at company A, on November 8, 2000, the claimant began to get sick with various medical ailments. The claimant was eventually diagnosed with avascular necrosis and filed a workers' compensation claim. The claimant testified that he realized that his condition was work related after he read his latest MRI in preparation for filing a disability claim with the Social Security Administration. The claimant testified that he knew his injury was work related on _____.

The question of the date of an injury is a question of fact. The Appeals Panel has noted that the date of injury for an occupational disease is not necessarily the date of the first symptom and that the time period for notice begins to run when a reasonable

person would recognize the nature, seriousness, and the work-related nature of an injury. Texas Workers' Compensation Commission Appeal No. 982944, decided January 21, 1999. The hearing officer did not err in determining that the claimant's date of injury was _____. This date of injury is supported by the evidence and in accord with Section 408.007. We affirm this determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The question the claimant raises concerning Mr. W's credibility is within the province of the hearing officer under the standard of appellate review set out above and we would not reweigh his testimony. However, in the present case, we are faced with an additional point of error by the claimant, which requires us to reverse and remand this case. The claimant contends that he has newly discovered evidence directly bearing upon the credibility of the carriers' only witness, Mr. W. In response to a question posed by the hearing officer, this witness denied that decontamination procedures took place at the work site before the claimant worked at the site and denied the presence of hydrofluoric acid lines within the ductworks and crawl space between Building 3 and Building 4 at the work site. Specifically, the claimant contends that the documents attached to his appeal show that an independent contractor decontaminated the work site shortly before the claimant began working at the site and has pictures of hydrofluoric acid lines present in the work vicinity in question, as well as a Texas Natural Resources Conservation Commission report noting the presence of hydrofluoric acid at the work site. The claimant submits a recent MRI of the claimant's brain, taken after the CCH, which is cumulative since the claimant's poor medical condition resulting from avascular necrosis is mostly not in dispute.

We recognize that remanding a case to consider evidence not presented at a CCH is something not to be done lightly. Under the particular circumstances of this case, we feel that such a remand is justified. For one thing, determining whether or not the evidence the claimant seeks to introduce is actually newly discovered evidence--evidence which he could not have discovered earlier with the exercise of due diligence--in itself involves making factual determinations that are difficult to make on the appellate level. Also, what weight to give such evidence, if any, in weighing Mr. W's credibility is a factual determination that we are not in a position to make. However, to ignore the claimant's allegations that he has been precluded from presenting evidence, arguably critical to his case due to the fact that he had allegedly been deprived of this evidence due to false evidence given by the opposing party, would certainly not promote the interests of justice. Under these circumstances, we must remand to the hearing officer to determine whether the evidence in question is newly discovered evidence and, if so, what weight to give it.

The hearing officer's decision that the date of injury is _____, is affirmed. We reverse the hearing officer's decision regarding injury and remand this issue to the hearing officer. 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(a) and (d). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of insurance carrier 1 is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

The true corporate name of insurance carrier 2 is **EMPLOYER GENERAL INSURANCE** and the name and address of its registered agent for service of process is

ROBERT RAMSOWER
1601 ELM STREET, SUITE 1600
DALLAS, TEXAS 75201.

The true corporate name of insurance carrier 3 is **NORTH AMERICAN SPECIALTY INSURANCE** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Veronica Lopez-Ruberto
Appeals Judge