APPEAL NO. 950189

This appeal is brought 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 November 18, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. She determined that the respondent (claimant herein) sustained compensable injuries in the nature of cellulitis in the right arm, dyschythmias, and gastroenteritis on (date of injury); that he had disability as a result of these injuries from (date), through the date of the hearing; and that the claimant's average weekly wage (AWW) is $1,384.75. Finding good cause, the hearing officer also added as an issue and determined that the appellant (carrier herein) did not timely controvert the compensability of the claimant's injuries. The carrier appeals these determinations and associated findings of fact arguing that the hearing officer erred in allowing the issue of timely controversion to be added as a disputed issue and that the findings and conclusions of the hearing officer are not supported by sufficient evidence. In addition, the carrier alleges prejudicial error in the admission of medical evidence about the condition of a co-worker who purportedly sustained a compensable injury under circumstances identical or similar to the circumstances under which the claimant sustained his claimed injuries. The claimant replies that the hearing officer properly admitted the evidence, or, alternatively, any error in its admission was not prejudicial and that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed. All dates are in 1994.

DECISION

We affirm in part, reverse and remand in part and reverse and render in part.

The claimant testified that he began working for the employer as a boilermaker a few days before his claimed injuries. He said he was hired as a temporary employee to help disassemble a refinery. The project was expected to last approximately a month, at the conclusion of which he would be let go. He stated he was scheduled to work seven days a week and was paid $14.50 per hour plus overtime. His particular job was in the "benzene unit" of the refinery. He said that he had been working without protective equipment for about three days when he and his co-workers were directed to submit a blood sample to determine a baseline benzene presence in the blood. Medical records indicate the blood was drawn on (date). The claimant said that after he returned to work he developed a bruise on his arm where the blood was drawn. According to the claimant, the bruise grew larger and by the third day his arm had swollen. He reported to a hospital emergency room (ER) at about 9:30 p.m. on (date) complaining of pain in his right arm. He was admitted to the hospital on (date) for an infection of his right antecubital fossa. He also complained of breathing problems, chest discomfort, nausea, diarrhea and abdominal pain. According to the history given on admission, the claimant reported a two year history of peptic ulcer disease. He was diagnosed with cellulitis. His symptoms, with the exception of gastrointestinal problems, had largely resolved by the time he was released from the hospital on March 10th. The claimant has not returned to work since he went to the ER.

The carrier appeals the decision of the hearing officer to consider the issue of timely contest of compensability arguing that under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)), a party desiring to add an issue at a CCH must meet not only the good cause test, but also send the request to add the issue no later than 15 days before the hearing. By failing to meet the 15 day time limit, the claimant, according to the carrier, has waived this issue.

Section 410.151(b) provides, in pertinent part, that an issue not raised at a benefit review conference (BRC) may not be considered at a CCH unless the parties consent or "the commission determines that good cause existed for not raising the issue." Rule 142.7 implements this statutory provision and provides, in subsection (e), in pertinent part:

(e)Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the [BRC's] report. The hearing officer will allow the amendment only on a determination of good cause.

(1)If the party is represented, the request shall:

(A)be made in writing;

(B)identify and describe the dispute or disputes;

(C)state the reason for the request;

(D)be sent to the commission no later than 15 days before the hearing; and

(E)be delivered to all other parties . . . .

The Appeals Panel in the past has observed that to add an issue under this subsection, the party must establish both good cause and request the addition of an issue at least 15 days before the hearing. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 94416, decided May 24, 1994, and Texas Workers' Compensation Commission Appeal No. 94109, decided March 8, 1994. In these, and similar cases, there was clearly available sufficient time for a prudent party seeking to add an issue to meet the 15 day standard. In the case now appealed, however, the evidence shows that the BRC was conducted on October 18th. The report of the BRC was signed by the BRO on October 25th and received by the Chief Clerk of Proceedings on October 31st. Rule 141.7 requires the report to be submitted no later than the fifth day after close of the BRC. The report was sent to the parties by the Senior BRO in (city) by letter of November 8th, consistent with Rule 141.7(d), and date stamped as received in the Lufkin field office on

November 15th. The claimant's attorney stated he received a copy of the report of the BRC on November 12th and facsimiled his request to add the issue of timely contest of compensability on November 15th. In this communication he also agreed to a continuance if the carrier deemed it necessary to prepare its defense on the added issue. Evidence of why the CCH was set so soon after the BRC was not developed, see Rule 142.6(a), but it is apparent that given the date the report of the BRC was sent out, neither party could have met the 15 day rule for adding a disputed issue. We are unwilling to insist on the application of the 15 day rule when, as here, it was through no fault of the parties impossible to meet and there is no evidence of lack of diligence in responding to the report after it was finally received. For this reason, we find that the hearing officer did not abuse her discretion in adding the issue of timely contest of compensability. *See* Texas Workers' Compensation Commission Appeal No. 94253, decided April 18, 1994. *See also* Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, for a discussion of the directory and mandatory nature of Commission rules.

The carrier also complains on appeal that there was insufficient evidence to support the determination of the hearing officer that the carrier did not timely contest compensability of the claimed injuries. Sections 409.021(c) and (d) provide that a carrier which does not contest compensability of an injury by the 60th day after being notified of the injury waives its right to contest compensability absent a finding of new evidence that "could not reasonably have been discovered earlier." Rule 124.6 further provides that if the carrier has begun payment of benefits, it must dispute the claim on or before the 60th day "after the carrier receives written notice of the injury . . . ." This written notice can consist of the employer's first report of injury, notification by the Commission, or "any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." Rule 124.1(a)(3). Whether a written notice "fairly" informs the carrier as described above is a question of fact for the hearing officer to decided. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

The hearing officer concluded that the carrier had written notice of the claim on March 14th but did not contest compensability until September 30th. The TWCC-1 received by the carrier on March 14th refers only to a right arm infection. No mention whatsoever is made of gastroenteritis or dyschythmias. Similarly, the other documentation in evidence, particularly the medical records of the hospitalization and the report of Dr. C, do not purport to make any connection between the dyschythmias and gastroenteritis and the work of the claimant or to provide any more than a current diagnosis. *See* Texas Workers' Compensation Commission Appeal No. 941655, decided January 26, 1995; Texas Workers' Compensation Commission Appeal No. 941464 January 9, 1995; Texas Workers' Compensation Commission Appeal No. 94904, decided August 25, 1994; Texas Workers' Compensation Commission Appeal No. 94851, decided August 15, 1994. *Compare* Texas Workers' Compensation Commission Appeal No.

93967, decided December 9, 1993, in which, unlike this case, the medical reports refer to a truck accident as the source of the claimant's condition. We are thus compelled to conclude, contrary to the hearing officer, that the TWCC-1 did not provide fair notice of any condition other than the cellulitis and that only this condition became compensable by virtue of the carrier's failure to timely contest compensability. Appeal No. 93967, *supra*.

The carrier next appeals the following findings of fact and conclusions of law of the hearing officer:

FINDINGS OF FACT

4.Claimant sustained cellulitis of right arm, dyschythmias and gastroenteritis in the course and scope of his employment while working in the benzene unit without proper respiratory equipment.

6.Toxicology report provides a causal link to Claimant's condition and his work on (date of injury) and the resulting hospitalization.

CONCLUSIONS OF LAW

3.Claimant sustained an injury in the course and scope of employment on (date of injury).

In her Statement of the Case, the hearing officer reports the carrier's position as being the claimant's condition "was solely caused by intervening injuries or illnesses unrelated to the workers' compensation claim." (Emphasis added.)

In its appeal, carrier contends that the hearing officer mischaracterized its position as being one of sole cause and that there was insufficient evidence to establish a causal connection between the claimant's work and the claimed injuries. We agree that the carrier never presented a sole cause defense either at the BRC or at the CCH and that the hearing officer's use of this phrase in her decision and order was unfortunate. Having reviewed the record, we nonetheless conclude that the case was not decided against the carrier based on a failure of a sole cause defense and find no prejudicial error in this choice of words. With regard to carrier's sufficiency of the evidence challenge, we observe that the claimant had the burden to prove by a preponderance of the evidence that he sustained the claimed compensable injuries in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A compensable injury may generally be proved by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the ability from common knowledge to find a causal basis. *See* Texas Workers' Compensation Commission

Appeal No. 92083, decided on April 16, 1992. In Finding of Fact No. 4, the hearing officer characterized the claimed injuries as the result of inhalation of benzene. Although it is not altogether clear from a reading of the record that this was the theory of the claimant's case as regards his cellulitis, we conclude that the claimant contended his injuries occurred as a result of contact with the chemical environment in which he worked. To this extent, we believe expert evidence was required to establish causation. *See* Texas Workers' Compensation Commission Appeal No. 94082, decided March 4, 1994 and cases cited therein.

Our review of the medical evidence discloses that no one attributed the dyschythmias or gastroenteritis to the claimant's work activities. Hospital records refer to nausea and diarrhea (resolved by the next morning) on the date of admission and longstanding peptic ulcer disease. No edema of the upper extremities was noted after triage. Chest pain was considered "most likely related to his respiratory treatment [not further identified]." Angina and a cardiac condition were ruled out as unlikely. The word dyschythmias does not appear in any medical report. Dr. C's report, which he styles a "Medical Toxicology Consultation" and which we assume is what the hearing officer refers to in Finding of Fact No. 6 as a "toxicology report," also offers no connection between the claimed injuries and the claimant's work other that to say that if the cellulitis was secondary to an infection from the blood drawing, then it reasonably could be work related. Having reviewed the evidence presented, we conclude that the findings and conclusions of the hearing officer that the claimed dyschythmias and gastroenteritis injuries are compensable to be so contrary to the great weight and preponderance of the evidence as to be clearly erroneous and unjust. We therefore reverse and render a decision that the claimant's only compensable injury in the course and scope of his employment on (date of injury), was cellulitis.

The carrier also appeals the determination of the hearing officer that the claimant had disability from (date) through the date of the hearing "and continuing." Because we have rendered a decision that the dyschythmias and gastroenteritis are not compensable injuries, we reverse the decision of the hearing officer which found disability and remand this issue to the hearing officer to make findings of fact and conclusions of law as to whether the cellulitis has caused any disability.

The carrier next contends that hearing officer erred in admitting certain medical records of a fellow employee who allegedly sustained compensable injuries under somewhat similar circumstances as the claimant. In addressing an evidentiary point of error, we will reverse a decision and order of the hearing officer if the complaining party can show not only error in fact, but also that the:

> error was reasonably calculated to cause and probably did cause the rendition of an improper decision . . . . Reversible error is not ordinarily shown in

> connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. (Citations omitted.)

Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. The subject of this co-worker's medical condition was discussed at length in a transcript of a telephone conversation between an adjuster and a supervisor. Both sides offered this transcript into evidence without objection. Thus, the information was otherwise in evidence and we cannot conclude that the exhibit objected to was reasonably calculated to cause or that it probably did cause the rendition of an improper decision.

Finally, the carrier appeals the decision of the hearing officer that the claimant's AWW was $1384.75 calculated on 11-hour work days, seven days a week at a rate of $14.50 per hour with additional wages for overtime work. The uncontradicted evidence was that the claimant was a temporary employee only for the duration of this job and that he had only worked about three days before his injury. The carrier argues on appeal that "it is not fair and reasonable for his [AWW] to be calculated based on that one week of earnings." It submits that a fairer method would be to determine AWW on a "standard" 40-hour week. Section 408.041 defines average week wage and provides that where an employee has not worked for 13 consecutive weeks immediately preceding the date of injury or where the wage at the time of injury has not been fixed or cannot be determined, the wages of a similar employee working for the employer or working in the same or similar services should be the basis for the AWW. Failing any of these methods of determining AWW, the Commission is to select a "fair, just, and reasonable" AWW. At the hearing, the carrier presented no evidence about the wages of similar employees and offers the $560 figure for the first time on appeal. We have noted in the past that the determination of a fair, just and reasonable method to determine AWW is up to the sound discretion of the hearing officer and is not a matter of precise mathematical computation. Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. Having reviewed the record in this case, we are unwilling to conclude that the determination of the this issue by the hearing officer was not based on sufficient evidence or amounted to an abuse of discretion. In any case, both the figure found by the hearing officer and the figure suggested by the carrier exceed 100 percent of the state average weekly wage on the date of the injury, which is the figure on which income benefits are calculated pursuant to Section 408.061.

Those parts of the decision and order of the hearing officer which determined the claimant's AWW, which found good cause for adding the issue of timely contest of compensability and which found the carrier did not timely contest compensability of the cellulitis injury only are affirmed. Those parts of the decision and order which determined that the carrier did not timely contest compensability of the dyschythmias and gastroenteritis, and which found that the claimant sustained these injuries (date of injury), are reversed and a new decision rendered that the claimant did not establish that he sustained dyschythmias and gastroenteritis due to his employment and that the carrier

timely contested compensability of these injuries. That part of the decision and order which found disability is reversed and this issue remanded to determine if the claimant had disability because of the cellulitis injury.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge