APPEAL NO. 950263

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq.* (1989 Act). On January 18, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues were:

1.Whether Claimant's compensable injury of (date of injury) constituted a producing cause of Claimant's hypertension, diabetes, anxiety, sexual dysfunction, and psychological condition, and

2.Whether carrier had waived its right to dispute the compensability of such conditions.

The hearing officer determined that claimant's sexual dysfunction was the result of claimant's 1991 compensable injury, but that the other conditions of hypertension, diabetes, anxiety and a psychological condition had not been caused by the compensable injury. The hearing officer further determined that carrier had waived its right to dispute compensability for these conditions because carrier "failed to controvert the compensability" of claimant's conditions "more than sixty days" after receiving the first written notice that claimant was alleging compensability of those conditions.

Appellant, carrier, disagreed with the hearing officer's decision, and appeals contending that newly discovered evidence, namely a "peer review" of claimant's medical evidence allowed it to "reopen the issue of compensability of an injury." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the respondent, claimant.

DECISION

Claimant testified, and it is undisputed, that claimant had been employed as a truck driver for the employer on (date of injury). On that date claimant sustained a compensable injury when he fell off a truck injuring his back, leg, foot and hip. Claimant testified, and the records support, that he saw a number of doctors in the ensuing years (at least eight of whom are referenced and have reports in the record.) Claimant testified that he had not suffered from hypertension, diabetes, anxiety, sexual dysfunction, and psychological problems (also referred to collectively as "conditions" in this opinion) prior to his injury but those conditions eventually arose out of the initial injury. To support his contention that he had not suffered from these conditions previously claimant testified that he had taken, and passed, a Department of Transportation (DOT) physical examination in order to get his driver's license, and that he has no family history of any of those conditions.

What we consider particularly significant is that claimant testified that he received 104 weeks of temporary income benefits (TIBS), carrier had filed 19 Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms and did not dispute claimant's conditions until a TWCC-21 dated September 30, 1994, was filed with the

Commission on October 4, 1994. In fact the TWCC-21s indicated at least two quarters of supplemental income benefits (SIBS) had been paid. The record of this case further reflects that a benefit CCH was conducted in (city) on November 30, 1993, on the issue of an impairment rating, claimant having already reached statutory maximum medical improvement. In the hearing officer's statement of evidence in the November 30, 1993, CCH it is clear claimant was alleging sexual dysfunction and other conditions as the result of his 1991 compensable injury. The hearing officer, in that case, commented:

> Claimant stated that his current physical condition includes communicational difficulties, stomach ulcers, high blood pressure, and diabetes, which his treating and referral doctors have indicated were precipitated by the pain of claimant's underlying compensable back injury.

Some 11 TWCC-21 forms filed after the November 1993 CCH indicated impairment income benefits (IIBS) were paid and SIBS were begun with no dispute regarding the extent of claimant's condition.

The hearing officer, in the present case, refers to various medical reports, makes inferences and factual determinations in concluding that none of claimant's conditions, other than sexual dysfunction, were caused by the compensable 1991 injury. The hearing officer recites reasons why "Claimant's sexual dysfunction was caused by his compensable injury of (date of injury)." In that the determinations regarding whether or not certain of the conditions had or had not been caused by the compensable injury have not been appealed we will not consider or address them further.

In (Dr. T) report, dated August 17, 1992, the hearing officer notes, with regard to claimant's anxiety, and psychological condition, that claimant "has been seeing a psychiatrist" and that claimant's injury has "interfered with his psychological well being. . . " The hearing officer stated:

> Carrier is presumed to have received this report within five days after it was mailed. Therefore, on or before August 22, 1992, Carrier had written notice of the fact that it was being alleged that Claimant's psychological condition, including his anxiety, was traceable to his compensable orthopedic injury of (date of injury). Since Carrier failed to dispute the alleged compensability of Claimant's psychological condition within sixty days of August 22, 1992, Carrier has waived its right to do so, unless it can demonstrate that its dispute, filed in 1994, was based on newly discoverable evidence.

While we do not necessarily agree with the concept that a medical report "is presumed" to have been received within five days after it was mailed (the deemed receipt provision of Rule 102.5(h) only applies to written communications to and from the Commission), carrier clearly at some time in 1992 received this report. The hearing officer further comments that other reports regarding claimant's diabetes and hypertension indicated that carrier was

paying for services, treatment and medication for these conditions in 1992 and 1993. The hearing officer further stated:

> It is utterly inconceivable that Carrier would have paid for professional services without being fully apprised of the nature of such services. Therefore, it will also be found that Carrier had written notice of the alleged compensability of Claimant's diabetes and hypertension no later than November of 1993, when it made its first payment for [Dr. Z] services, and Carrier will be found to have waived its right to dispute the compensability of Claimant's diabetes and high blood pressure, unless its late controversion, filed in October of 1994, was based on newly discoverable evidence.

Although not mentioned by the hearing officer, we would further note that the CCH of November 30, 1993, and the hearing officer's decision resulting from that proceeding, clearly make reference to the fact that claimant was then alleging his other ailments and conditions were related to the compensable (month year) injury.

At some time, not made clear on the record, apparently in 1994, carrier requested a "peer review" of claimant's medical records. Carrier, at the CCH in this case, alleged it did not receive the peer review until September 21, 1994, and that it promptly disputed claimant's conditions on the TWCC-21 dated September 30, 1994, which stated: "diabetes and hypertension does not appear to be related to on-the-job injury. Carrier disputes their coverage and cover back injury only." Although that TWCC-21 makes reference that a "peer review report will be sent to TWCC, claimant . . . ," no peer review report was offered or admitted into evidence at the CCH in January 1995. Carrier in its appeal alleges that the peer review report constitutes "newly discovered evidence" and for the first time (apparently) attaches a copy of the report to its appeal. As our review of the evidence is limited to the record developed at the hearing and clearly the "peer review" report was in existence and referenced at the hearing, we decline to now consider it on appeal. Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992. Even were we to consider it, which we do not, its probative value is questionable, in that it consists of a nurses's summarization of what she thought a doctor said.

Carrier alleges that "[s]ince the time of his accident on (date of injury), claimant began suffering from [the cited conditions]. Due to the severity of these conditions, [carrier] requested a peer review of claimant's medical records." Carrier fails to mention that its request for a peer review was over three years after the injury, after it had paid 104 weeks of TIBS, after numerous medical reports had referenced these conditions, after a CCH decision had referenced these conditions in November 1993, and after it had paid more than one quarter of SIBS. Carrier cites Section 409.021(c) for the proposition that payments by the carrier do not affect "the right of the [carrier] to continue to investigate or deny the compensability of an injury during the 60-day period." Carrier further relies on Section 409.021(d) that "An insurance carrier may reopen the issue of the compensability of an injury

it there is a finding of evidence that could not reasonably have been discovered earlier." Carrier relies on its "peer review" report dated September 21, 1994, as such evidence. We disagree for the reasons stated below.

Carrier acknowledges that it is incumbent on the party that seeks a new trial based on newly discovered evidence to establish: (1) the evidence has come to the knowledge of the party since the hearing; (2) it was not owing to want of due diligence that it did not come sooner; (3) the evidence is not just cumulative; and (4) the evidence is so material it would probably produce a different result if a new hearing were granted. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983). Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992. Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992. The "peer review" report, even if it had been admitted would, under these circumstance, not have constituted "newly discovered evidence" because waiting to this late date, after having been appraised of claimant's allegations no later than the CCH of November 1993 shows clearly an almost utter disregard of the due diligence requirement.

Carrier cites Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994, a case distinguishing additional claimed injures to the same part of the body as the original injury, from a situation where the additional claimed injury is to a different part of the body than the original injury. Carrier argues that in this case, since the additional injuries were to different parts of the body, it ". . . is entitled to an additional 60 days to dispute compensability of the injury" and it did so within two weeks of receiving the peer review report. The fallacy with this reasoning is that is presupposes that carrier had no reason to believe claimant's conditions were allegedly related to his compensable injury until it received the peer review report on September 21, 1994. That was simply not the case as we have previously pointed out. The hearing officer noted:

> It is also noted that Carrier received its first written notice of the alleged compensability of some of Claimant's medical conditions as far back as 1992, yet there is no indication the Carrier acted promptly to request a peer review report, upon receiving written notice of the alleged compensability of such conditions.

The hearing officer's factual determination that "no later than November 1993, Carrier received written notice that claimant's [at least two conditions] were allegedly due to the claimant's compensable back injury, of (date of injury)" is supported by the evidence. If nothing else, the hearing officer's decision of the November 30, 1993, CCH, recited that claimant was claiming those conditions were related to the compensable injury. For carrier to have exercised due diligence it should have requested the peer review report promptly after receiving written notice of claimant's allegations, which the hearing officer determined to have been November 1993.

Upon review of the record submitted, we finding no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge