APPEAL NO. 950354

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On December 6, 1994, after a continuance, a contested case hearing was convened in (city), Texas, with (hearing officer) presiding. The claimant, who is the respondent, is (claimant), and the appellant (carrier) announced at the hearing that it did not dispute that he had sustained a compensable injury to his arm on (date of injury). The issues for consideration were those reported from the benefit review conference (BRC) as unresolved, together with an issue added on motion of the claimant upon a finding of good cause (and without objection from the carrier). These issues were: whether the claimant's cellulitis, bursitis, and ganglion cyst condition were part of his injury; the claimant's average weekly wage (AWW); whether he had disability as a result of his injury; and whether the carrier waived its right to dispute compensability of the additional conditions because it did not dispute them within 60 days after receiving notice of same. The AWW issue was resolved by agreement during a recess at the beginning of the hearing. The claimant's attorney argued that the sufficiency of the dispute filed by the carrier was also called into question as part of the "waiver" issue, but no express issue on this alternative argument was agreed to or directly raise.

The hearing officer determined that the claimant's right arm was injured in the course and scope of his employment, and that this led to claimant's bursitis, cellulitis, and ganglion cyst. She further found that, except for a three week period in April 1994 when claimant worked briefly in a light duty job, he had disability from his injury beginning on March 8, 1994, to the date of the hearing. The hearing officer further determined that on March 8, 1994, the carrier first received notice of injury and did not file a notice of refused or disputed claim with the Texas Workers' Compensation Commission (Commission) until June 27, 1994. As this was more than 60 days, the hearing officer further held that the evidence upon which the carrier based its June 27th dispute was not newly discovered evidence that could not reasonably have been discovered at an earlier time.

The carrier has appealed the hearing officer's finding on waiver. Although carrier asserts that the June 27, 1994, dispute was "timely", carrier argues that its adjuster did not have medical expertise and reacted as a prudent lay person would. Carrier further argues that development of the case was delayed and that the opinion of its consultant doctor, upon which its dispute was based, could not have been obtained earlier. The carrier further states that a finding that claimant's injury extended to cellulitis, bursitis, and a ganglion cyst is against the great weight and preponderance of the evidence, because the evidence in favor of the claimant does not rise to the level of reasonable medical probability. The disability portions of the decision were not appealed. The claimant responds by reciting evidence in favor of the hearing officer's decision.

DECISION

We affirm the hearing officer's decision that claimant's cellulitis, bursitis, and wrist ganglion were related to and a part of his compensable injury. We affirm the decision that

the carrier filed an untimely dispute concerning the cellulitis and bursitis and waived the right to dispute these conditions. We affirm the finding that carrier did not show a basis to reopen compensability for newly discovered evidence. We reverse her decision that carrier's dispute was untimely concerning claimant's wrist condition, and render a decision that as written notice of the wrist condition was apparently received by the carrier on or about May 19, 1994, its dispute filed June 24, 1994, was timely. However, because the hearing officer also determined all conditions were compensable, we affirm the hearing officer's order that carrier is liable for income and medical benefits.

Claimant stated that he was a boilermaker for (employer) and he was working in (state) at the time of his injury. Claimant said that he had an abrasion on his right elbow, and on (date of injury), a flange on the benzene tank on which he worked broke and river water spilled over his arm. By March 7th, he said, his arm was swollen and sore, he was feverish, and he had diarrhea. At the referral of the employer, he was hospitalized at (hospital) in (state), for seven days, and had surgery on his elbow. To summarize several hospital records, claimant's condition was diagnosed as cellulitis and abscessed olecranon bursitis of the elbow, with a probable "staph" aureus or a river water borne bacterium as the causative agent. (The reference to river water appears to contradict the earlier entry in the history stating that claimant denied exposure to brackish water, and which claimant testified he did not say). The diagrams in the hospital records make clear that the situs of the abrasion and infection was the right elbow. The hospital records show carrier as the payor and workers' compensation carrier. In the history, and in his testimony, claimant denied that he was involved with intravenous drug use. Claimant sought treatment after his discharge from (Dr. K), whose records in evidence also include copies of the hospital records. Dr. K's initial medical report (TWCC-61) was filed March 16, 1994, and lists right olecranon bursitis of the right elbow as the condition he was treating.

Some evidence was admitted that a coworker of claimant, (Mr. M), also developed cellulitis from exposure at work to the river water, with the point of entry being a work-related blood test puncture, and that Mr. M also became ill on or about (date of injury). A transcribed statement of (Mr. G), the project manager where claimant and Mr. M worked, confirmed that another worker was infected.

Claimant was treated in April for some swelling in the armpit and breast area, but it was determined by Dr. K and consulting doctors that there was no relationship of this condition to claimant's injury, and claimant did not so assert.

Included in Dr. K's records is a copy of a letter from Crawford & Co. in (city), Texas, to (SL), the original adjuster on the file, dated April 21, 1994, which sets out their conversation with claimant of a few days previously. The letter makes clear that a work-related infection to claimant's elbow was asserted. The letter informed the adjuster of the name and phone number of Dr. K and his city of practice.

Claimant was referred by the carrier to (Dr. J), who examined him on June 15th. While Dr. J opined that the granuloma body in the wrist was not related to either a benzene exposure or claimant's olecranon bursitis, Dr. J stated it could be related to a recent history of injection or "IV" sites in the area. Claimant testified the IV for antibiotics at the hospital had been put into his left arm.

Although not clearly developed through testimony, the claimant subsequently developed a mass in the right wrist area, for which Dr. K performed an excision operation on May 20, 1994, for an "olecranon bursa adhesion." Dr. K's written opinion was that this resulted from claimant's cellulitis. His records indicated that this surgery was pre-authorized by (Ms. C), the carrier's adjuster, on May 19th. Dr. K's records contain a release that claimant signed, on May 19th, for all of his medical records.

Ms. C, the adjuster, identified herself as the carrier's litigation specialist for workers' compensation, and said she had adjusted workers' compensation claims for ten years. She stated that this case was more medically "bizarre" than usual, and that as the project was shut down, it was hard to locate witnesses from the job site. Ms. C also said delay resulted because the hospital wanted a release for records, which claimant initially refused to sign. Ms. C stated her understanding that a carrier had 60 days to dispute a claim from the point at which it had both a reason to dispute and all information necessary to dispute. Ms. C confirmed that an "800" telephone number listed as a billing number on the hospital record from (city) was the carrier's number. She testified that the carrier's usual practice would have been to request hospital records immediately; however, there is no evidence of when, or if, requests for records were made to the hospital. From what Ms. C said, she did not personally become the manager of the claims file from the other adjuster until sometime after the first week in April 1994. Ms. C testified about the following dates:

-March 14th - Carrier receives the claim.

-March 17th - claim assigned to a case manager for carrier. The claim was described as an "unknown" infection to the right arm.

-March 23rd - Claimant called in to the previous adjuster to talk about his claim. As of this date, Ms. C testified that the involvement of Dr. K as treating doctor was known.

-An independent adjuster, Crawford & Co., was hired sometime after this.

-April 28th - Mr. G, the supervisor, was contacted about the claim.

-A rehabilitation nurse was hired by carrier to obtain a medical release from claimant for records. Release sent in late May to hospital.

-May 17th - Ms. C set up appointment for examination with (Dr. E), but claimant did not attend.

-June 3rd - Records received from (state) Hospital, and forwarded to Dr. E.

-June 20, 1994 - Report from Dr. E, a toxicologist, was received which opined that, in reasonable medical probability, the "ongoing clinical dysfunction" of claimant was unrelated to the workplace. Dr. E opined that cellulitis and olecranon bursitis were not the result of exposure to wastewater. Dr. E stated that the "possibility of parenteral drug abuse certainly deserves consideration".

Ms. C said that she was unable to form an opinion, without a doctor's opinion, as to whether claimant's claim should be disputed. After receiving Dr. E's report, she filed TWCC-21 forms with the Commission dated June 20 and June 24, 1994. Both forms state that the carrier received first notice of injury on March 8th, although Ms. C stated she did not know where that date came from. The June 20th form states the substance of the dispute as follows:

Based on the medical report from [Dr. E], in his opinion, in reasonable medical probability that the ongoing clinical dysfunction sustained by the claimant is unrelated to the workplace. Therefore any and all treatment other than the initial treatment are denied.

The June 24th TWCC-21 is substantially the same except that it states also that the dispute is based on Dr. J's report as well. The hearing officer took official notice that the disputed TWCC-21 was filed June 27, 1994, with the Commission.

WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT CLAIMANT'S ANCILLARY MEDICAL CONDITIONS WERE RELATED TO AND PART OF HIS COMPENSABLE INJURY

The carrier conceded that claimant's arm injury was compensable, and the only injury discussed other than the conditions in issue was claimant's elbow abrasion. Section 401.011 (26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." It appears to us that the evidence in this case strongly supports the determination of the hearing officer that the infectious condition, bursitis, and wrist ganglion were causally connected and part of the injury under this definition. In a claim involving a disease connected to the workplace, evidence concerning similarly afflicted coworkers is relevant and probative, and such evidence existed in the statements of Mr. M and Mr. G. We do not regard Dr. E's opinion, and his speculation about intravenous drug use, which is not otherwise supported, as a great weight and preponderance of evidence against the other evidence in the case, which sufficiently supports the hearing officer's decision.

WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT THE CARRIER WAIVED ITS DISPUTE TO THE COMPENSABILITY OF CLAIMANT'S CELLULITIS, BURSITIS, AND GANGLION CYST

We must comment at the outset that carrier's arguments, to the extent they are premised on Ms. C's knowledge or lack thereof, are wholly without merit. Leaving aside that Ms. C was only one of several persons employed by the carrier to adjust this claim, it is clear that the duties and responsibilities that are incumbent upon carriers in the 1989 Act apply regardless of the expertise and skill of a carrier's individual employees who may be assigned to a case, or the efficiency of the carrier's office procedures. The case cited by carrier in support of its "reasonably prudent adjuster" standard is factually and legally inapplicable to the case here. Even if the hearing officer considered the argument that Ms. C lacked the expertise to file a dispute at an earlier date without a doctor's opinion, she could not be faulted if she found the assertion incredible in light of Ms. C's ten year experience adjusting claims and Ms. C's current status as "litigation specialist for workers' compensation" for the carrier. The evidence in the record frankly indicated gaps of unexplained delay of approximately a month after March 17, 1994, in investigating the claim and seeking necessary medical records. Although Ms. C maintained that delay occurred because claimant would not give a release for medical records from the hospital, we note that carrier was identified as the payor on hospital records. As such, it had access to these records under Rules 133.301 and 133.302. Hospital records were also available through Dr. K. We note that the Medical Practice Act, TEX. REV. CIV. STAT. ANN. Art. 4495b, § 5.08(h) provides for exceptions to confidentiality of patient records for individuals or corporations involved in payment of fees for services rendered. *See* Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992. There was no evidence that Dr. K refused any request for applicable records.

Ms. C indicated that she understood the 60-day time period to run from not only notice of injury, but from when a carrier had all the information "necessary" to perfect a denial of the claim. The Appeals Panel has affirmatively rejected the argument that the 60-day period begins when there is enough evidence to suggest a defense. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. We also stated in that decision that "medical evidence belatedly obtained through want of due diligence and failure to follow up on obtaining information from a doctor whose identity is disclosed from the outset is not newly discovered evidence." In this case, Dr. K's involvement was known both from his initial medical report and the independent adjuster's report. While a carrier may seek to reopen the issue of compensability upon a finding of evidence that could not have reasonably been discovered earlier, Section 409.021(d), we cannot agree that the hearing officer erred when she found this standard was not met.

We note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6), requires the carrier to react to a written notice of injury. While there is sufficient evidence indicating that the carrier had written notice of injury of claimant's cellulitis and olecranon bursitis at least around March 14th, the day Ms. C testified she thought the case was assigned to the carrier, the earliest documentation of claimant's wrist injury appears to have

been generated around May 19th, when Dr. K sought pre-authorization for the wrist excision surgery. Medical records earlier than this date give notice only of the infected elbow and bursitis. Therefore, as to the wrist infection, we reverse the hearing officer's determination that the carrier did not timely file a dispute to that injury, and render a decision that a TWCC-21 was filed for the wrist within 60 days. However, because the hearing officer found that the wrist condition was compensable, the outcome of the case is the same.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Except as to the limited portion of the decision relating to waiver of dispute of compensability of the wrist injury, which we reversed as stated above, the record in this case does not lead us to the conclusion that the hearing officer's determination has been clearly wrong, and the decision and order of the hearing officer are otherwise affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge