APPEAL NO. 960018

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 26, 1995, in [city], Texas, with the record closing on October 3, 1995, after the hearing officer, [hearing officer], reopened the record to seek additional information from one of the doctors. Although this case involved five issues, only one has been appealed by the appellant (hereinafter carrier): whether the carrier timely contested the compensability of claimant's right knee injury. The hearing officer held that the carrier should have been fully informed of this medical problem on or before March 30, 1994, but that it did not file a TWCC-21 (Notice of Refused/Disputed Claim) within 60 days of that date, and, in fact, had not filed a TWCC-21 disputing compensability of the problem as of the date the CCH was convened. In its appeal the carrier argues that, contrary to the hearing officer's findings, the record contains copies of numerous TWCC-21s, including one dated March 30, 1994. It also argues that claimant's torn medial meniscus was not a part of the compensable injury (as the hearing officer also found), and that it should not be ordered to pay medical and income benefits for this injury. The appeals file does not contain a response by the respondent (hereinafter claimant).

DECISION

Affirmed.

The case before us has had a long and complex history, as summarized by the hearing officer in her decision, and has been the subject of prior CCHs and Appeals Panel decisions. For purposes of this appeal, we will only address the single issue that has been raised by the carrier; the hearing officer's findings as to the other issues, unappealed, have become final. Texas Workers' Compensation Commission Appeal No. 93714, decided September 28, 1993.

Pursuant to an August 14, 1992, decision and order (affirmed in Texas Workers' Compensation Commission Appeal No. 92531, decided November 23, 1992), the claimant was found to have suffered a compensable injury to his right knee, right hand, and lower back on [date of injury].

The claimant had an MRI of the right knee, performed on May 27, 1992, which contained findings suggestive of a horizontal tear involving the posterior aspect of the medial meniscus. After initial treatment by other doctors, claimant was referred to an orthopedist, [Dr. D], in May 1993. On May 6th Dr. D wrote that because claimant's knee problems had continued for almost a year, he needed an arthroscopic evaluation and probably medial meniscus surgery. Surgery performed on May 18th showed a torn lateral meniscus but showed no evidence of any tear of the medial meniscus. On October 21, 1993, Dr. D wrote that claimant reported some continuing problems, including knee

weakness and pain in bad weather, but he believed the claimant had reached maximum medical improvement (MMI) of the knee and could return to work.

According to the medical reports, the claimant returned to Dr. D in February 1994, complaining of right knee pain and weakness. On March 10th Dr. D examined the claimant and found "severe tenderness" on the medial side and "marked reduced range of movements." An MRI performed on March 3rd showed abnormal signal in the posterior horn of the lateral meniscus which, the report said, "could represent post operative changes." In his March 10th report Dr. D said he had reviewed this MRI "which reveals postoperative changes on the lateral side, for which he had a lateral meniscectomy done before, but there is obviously a tear on the medial side." Dr. D reviewed his operative report, confirming that it had not shown any tear of the medial meniscus. Dr. D went on to state:

> [Claimant] says this happened while he was doing exercise at the doctor's office for an impairment evaluation I believe. I told him that I was not there and I can not tell this happened at that time or not. I asked him whether he had any injury or a fall and he says no. It is hard for me to say whether it happened at the time or not . . . . But when the arthroscopy was done the medial meniscus was examined with a hook and there was no evidence of any meniscus tear at that time. I can only say that this meniscus tear probably could have happened after the surgery. I can not say when, where, and how.

On March 14th, Dr. D wrote that he rechecked the claimant and reviewed the first MRI, stating:

> It looks like this patient probably had some findings suggestive of what appeared to be a horizontal tear in the medial meniscus, but unfortunately this meniscus was found to be normal when we did the arthroscopy on him. We were able to find only a tear in the lateral meniscus rather than on the medial side. Now also it looks like there seemed to be a tear in the medial meniscus, but this looks a little different than before because it seemed to be communicating with the joint suggesting a tear.

On April 11th, carrier's consultant wrote Dr. D to inquire about several things, including claimant's current clinical status which, Dr. D replied, was "positive for medial meniscal tear." An unsigned, April 27th note, apparently from the same individual (since it refers to Dr. D's "reply to my letter of 4-11-94") states that "[Dr. D] interprets the recent MRI as revealing a tear in the medial meniscus, whereas the radiologist indicates a suggestion of same." The consultant's recommendations included, "There is no medical

evidence which implicates, clearly, the medial meniscus. Recommend denial on present evidence."

An October 27, 1995, letter to the hearing officer from the designated doctor, [Dr. H], also refers to Dr. D's records concerning the medial meniscus tear, and goes on to state that he (Dr. H) had a police report stating that claimant had been accosted and had to run a considerable distance and that "it is very likely from this examiner's opinion that if this patient had another injury to his knee it is as a result of his confrontation with the police and not involved in the original injury that he had." Dr. H went on to state that his original, four percent impairment rating (IR) for claimant's knee remained unchanged. A police report, stating that on July 21, 1993, claimant had been apprehended after fleeing from police, was also in evidence.

In evidence, too, was a TWCC-21 dated March 30, 1994, which denied liability for the following reason: "Carrier denies any further indemnity or medical treatment as it relates to the right knee. Old MRI film and scope does not show a meniscus tear. New MRI film does show this tear on the right knee. It appears that this is a new injury." No Texas Workers' Compensation Commission (Commission) date stamp appeared on the form.

As noted above, the hearing officer found that the claimant's medial meniscus tear was not the result of his fall on [date of injury]; this determination has not been appealed. As to timely dispute of compensability, the hearing officer made findings of fact that the medial meniscus tear was diagnosed on March 14, 1994, by Dr. D; that the carrier should have been fully informed of this medical problem on or before March 30, 1994; and that the carrier did not file a TWCC-21 disputing the torn meniscus within the 60 days following March 30, 1994, and had not filed a TWCC-21 disputing compensability of this problem when the CCH was convened on September 26, 1995.

In her discussion of the evidence, the hearing officer expounded on her decision as follows:

> The carrier initially did not timely file its contest of compensability [for the original injury] in 1992. The carrier did not timely file its contest of compensability of the hernia in 1994. During the third [CCH] and in the decision of the Appeals Panel affirming the decision and order of the hearing officer, the need to timely file a TWCC-21 was emphasized. The same situation has again arisen with regard to the knee injury. The benefit review officer [BRO] commented that a TWCC-21 was in the file disputing the knee injury, but he stated that this TWCC-21 was not file-stamped. The carrier did not offer a TWCC-21 which reflected the date that it was filed with the

Commission into evidence. The carrier has again been dilatory and has accepted yet another, unrelated injury which will be subsumed into the compensable claim.

By way of background, the first decision and order in this case held that the carrier did not timely contest compensability of the original injury and Appeal No. 92531, *supra*, affirmed, noting that the TWCC-21s filed by the carrier concerned cessation of benefits after April 9, 1992, due to an intervening injury, and not to the noncompensability of the original injury. The second decision and order, dated July 7, 1993, concerned only disability and was affirmed by Texas Workers' Compensation Commission Appeal No. 93663, decided September 15, 1993. The third decision, issued September 15, 1994, included as an issue whether the carrier timely contested compensability of a hernia, which the hearing officer decided against the carrier. In affirming in Texas Workers' Compensation Commission Appeal No. 941397, decided November 28, 1994, the Appeals Panel noted carrier's adjuster's testimony that she received notice of the hernia on May 11, 1994, and on the same day prepared a TWCC-21 disputing compensability, but that the Commission's claim file copy reflected a receipt date of July 18, 1994, and not a TWCC-21 bearing an earlier receipt date. The Appeals Panel went on to observe, "The hearing officer reviewed the claim file and on several occasions during the hearing commented that documents that should be in the claim file were not in the file. The claimant testified that he did not receive a copy of the TWCC-21 contesting the compensability of the hernia until after the benefit review conference (BRC) that was held on July 21, 1994. The BRC report does not indicate whether a TWCC-21 contesting compensability of the hernia was available for consideration at the BRC. The computer records of the Commission reveal that a Commission employee made an entry on May 20, 1994, indicating that [the adjuster] told her that the carrier was contesting compensability."

In its appeal the carrier first asserts that the hearing officer mistakenly states that timely contesting compensability was discussed in the second, and not the third, CCH; however, the above chronology shows that the hearing officer's statement was accurate. Nevertheless, the carrier argues, the carrier introduced numerous TWCC-21s, including the March 30, 1994, form specifically disputing the knee condition. It points out that the BRO's report notes the existence of a TWCC-21 in the Commission's file and contends that the lack of a Commission date stamp should not be dispositive. It also states that the claimant failed to rebut the existence of a filed TWCC-21 or the failure of the carrier to meet its obligation to file one.

Section 409.021 provides that a carrier waives its right to contest compensability of an injury if it does not do so on or before the 60th day after the date on which it was notified of the injury. *See also* Rule 124.1 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1), which provides that the notice of injury must be in writing and must fairly inform the

carrier of certain facts, including "facts showing compensability." The carrier in this case does not appear to challenge the hearing officer's finding that March 30, 1994, was the date by which the carrier "should have been fully informed" of the knee injury at issue here; rather, it contends that it has met its burden to establish that it timely disputed compensability of the injury.

Whether a carrier timely disputes a claim is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941480, decided December 12, 1994. In that case the carrier also failed to produce a TWCC-21 which was date-stamped as received by the Commission within 60 days of receipt of written notice of injury. *And see* Texas Workers' Compensation Commission Appeal No. 951919, decided December 28, 1995, an unpublished case which is factually similar to the instant one. The panel in that case affirmed the hearing officer's finding of no timely dispute, noting that there was no indication on the face of the TWCC-21 that it was ever received by the Commission, and no testimony or evidence offered by the carrier that the TWCC-21 was duly mailed to or received by the Commission. Compare the facts in Texas Workers' Compensation Commission Appeal No. 92279, decided August 6, 1992. Appeal No. 951919 also pointed out that comments by the BRO were not binding on the hearing officer. Under the similar facts of the instant case, we hold that the evidence does not compel the hearing officer to find that carrier timely filed its TWCC-21, and that the hearing officer's decision as to the lack of timely dispute is supported by the evidence and is not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also argues in the alternative that in Texas Workers' Compensation Commission Appeal No. 941052, decided September 19, 1994, the Appeals Panel has made clear that only the actual compensable injury should be considered for an IR, and failure to timely dispute an injury does not preclude the carrier from disputing an IR that might include more than the actual compensable injury. Thus, it argues that even if it were delinquent, it should not be ordered to pay the claimant's medical and income benefits for the medial meniscus.

Appeal No. 941052 involves an entirely different factual situation. In that case it was clear that the carrier did not dispute the compensability of the claimant's injury of [date of injury], in which he fell and struck his head at work. The medical evidence showed, however, that the claimant had seen a doctor two weeks before, and had had an MRI which showed degenerative changes to the cervical spine; diagnostic tests after his injury contained consistent findings. The designated doctor, who had not seen claimant's preinjury medical records, originally assigned an IR of 42%; after receiving more complete information, she wrote that the claimant's problems prior to his injury were the sole cause of his current problems, and that the 42% IR should not be considered to be related to the original injury.

The hearing officer found that the claimant's IR was 42%, and the Appeals Panel reversed, surmising that the hearing officer either believed that although the 42% was solely caused by a preexisting condition, the carrier had waived its right to contest the compensability of claimant's injury and hence the IR, or that since there was some aggravation of the previous condition by the injury, and the IR covered the claimant's overall impairment at the time of MMI, he would be entitled to 42% reduced only by any contribution (which was not an issue). The panel wrote that it did not find a basis in law to uphold the recovery under either theory, stating,

> Initially, whether a carrier decides not to contest compensability of an injury or waived the right to contest by not doing so timely, the carrier is not foreclosed from contesting or disputing other benefit issues such as disability, IR, date of MMI, supplemental income benefits, etc. We do not find any authority under the 1989 Act nor would it seem reasonable to hold that by the mere fact that an injury is deemed to be compensable, disputes as to whether there is any disability, or as to when and if MMI occurs or not, or the quantum of impairment are thereby foreclosed. While we find sufficient evidence to support the hearing officer's determinations that the carrier waived its right to contest the compensability of the [date of injury], injury . . . such does not preclude a dispute or contest of the IR. However, since the [date of injury] injury is compensable because it was not timely contested the claimant remains entitled to appropriate income and medical benefits based upon the compensable injury.

The panel went on to stress that while there was sufficient evidence to show a compensable injury was sustained by the claimant, "that does not automatically mean there was necessarily some degree of permanent impairment flowing from the injury." To the contrary, it found, the designated doctor believed that there was no permanent impairment due to the injury itself.

We believe, based upon the language quote above, that Appeal No. 941052 does not stand for the proposition advanced by the carrier. We do note, however, that the hearing officer accepted the IR of the designated doctor, Dr. H, which did not award any permanent impairment due to the later-diagnosed meniscus tear. As noted earlier, neither party has appealed this determination. Appeal No. 93714, *supra*.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge