APPEAL NO. 992764

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 18, 1999, a contested case hearing (CCH) was held. The issues concerned whether the respondent's (claimant) low back injury included a lumbar disc herniation, as well as cervical spondylosis (phrased as whether his compensable injury of _____, was a "producing cause" of those injuries), and whether the appellant (carrier) waived the right to contest the lumbar and cervical conditions by not contesting compensability within 60 days of being notified of those injuries, pursuant to Section 409.021.

The hearing officer determined that the carrier waived the right to dispute compensability, because it had notice of the treating doctor's report mentioning these extended injuries not later than October 10, 1998, but did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until May 28, 1999. The hearing officer further held that claimant injured his low back and neck on _____, and that it was a producing cause of disc herniation at L3-4 as well as cervical spondylosis.

The carrier has appealed. First of all, the carrier asserts an abuse of discretion by the hearing officer in admitting numerous documents of the claimant, where failure to exchange within 15 days after the benefit review conference (BRC) was admitted. The carrier argues that the basis recited by the hearing officer for admitting these documents, that they were "mentioned" in the BRC report, does not constitute sufficient compliance with the exchange requirements. Second, the carrier argue that the stated medical report did not constitute written notice of injury because it did not fairly inform the carrier of additional physical damage linked to the _____, accident. The carrier disputes that the cervical injury is medically linked at all to this accident in question. Finally, the carrier points out that the medical records in evidence show that the claimant continued to suffer low back pain after his _____ accident and surgery, and that the evidence establishes that lumbar problems are a continuation of the _____ injury. There is no response from the claimant.

DECISION

Reversed and remanded for further consideration of the evidence, except that evidence which should have been excluded by the hearing officer based upon failure to timely exchange.

The claimant was employed by (employer), a meat packing company. He had also been employed by the employer at the time of a previous lumbar injury that occurred on _____, although the employer was insured at that time by a different carrier. According to the claimant, his primary job was "washing heads" with a high pressure hose. He was on a raised steel platform on _____, when he slipped and fell backwards. The carrier did not dispute that claimant sustained a lumbar strain on that date.

The employer's Employer's First Report of Injury or Illness (TWCC-1) was filed on August 25, 1998, and stated that the nature of the injury was a sprain in the lumbar area. Although it is not clear, it may be inferred from records in the CCH (including an affidavit from the adjusting firm) that the adjusting firm was the same one who adjusted the 1992 injury. Likewise, claimant had the same treating doctor, Dr. P, for both injuries.

At the beginning of the CCH, the claimant tendered, through the ombudsman for the Texas Workers' Compensation Commission (Commission), numerous records. The carrier objected to part of Exhibit 1, specifically seven pages from 21 pages of Dr. P's records; to Exhibit 4 (a cervical MRI); also to Exhibit 5 (records detailing three epidural steroid injections for the neck); also to Exhibit 6 (nine pages of records from a spine clinic); also to Exhibit 7 (a second opinion on spinal surgery); and finally to Exhibit 8 (another second spinal opinion, apparently from the doctor chosen by the carrier). The ombudsman admitted that these documents had not been exchanged until shortly before the CCH, on October 15, 1999, and further stated that there "probably" was not good cause. However, the ombudsman argued that all such records were discussed or "listed" in the BRC report.

The carrier countered that only pages 18 and 19 of Exhibit 1 had been discussed, but not actually presented, at the BRC, and that all others had been neither presented nor discussed. The carrier noted that the benefit review officer (BRO) appeared to have listed most of the mentioned documents due to a post-BRC review of the claims files or file. Indeed, the BRO's report states, as to the recommendation on the first issue of waiver, that he made the recommendation "from review of documents contained in the Commission file, as well as documents presented at the [BRC]."

The claimant agreed he had missed five months of work due to his _____ back injury, and that he had lumbar surgery as a result. He asserted that he was fully recovered from this injury and surgery. A review of Dr. P's earlier records (not the pages to which objection was made) showed that Dr. P assessed a 19% impairment rating for the _____ injury, and that claimant had surgery on or about October 29, 1992, for herniated discs at L4-5 and L5-S1. Dr. P's records document continued difficulty into 1993 with pain in lower back radiating to claimant's extremities. Dr. P's June 15, 1993, note reviewed a post-myelogram CT as showing a small "midline disc" at L3-4, and further testing was recommended. In July 1993, Dr. P wrote to another person, apparently an attorney, stating that claimant's pain stemmed from the _____ injury and was not the result of any new injury.

Dr. P then saw claimant on September 26, 1994, and he continued to have low back pain, with loss of control of his lower left extremity several times. Claimant was still working light duty for the employer. After further testing, which showed a deformity of the nerve root at L3-4 and herniation, Dr. P recommended decompression surgery; however, he wrote on December 6, 1994, that the claimant did not wish to have surgery because he thought he would not receive benefits from worker's compensation. Dr. P noted he called on February 8, 1995, to check on claimant 's benefits. On March 24, 1995, Dr. P's office recorded that the claimant was not going to have surgery because he was no longer qualified for impairment income benefits and would look into social security disability.

Claimant testified, although records supporting this were among those objected to, that he had three epidural injections to his neck, which afforded some relief, but that he had had no further treatment for his neck. The record shows that the current carrier had pursued the second opinion process for spinal surgery, although the initial doctor's recommendation listed the _____ injury date.

The carrier filed a TWCC-21 on May 28, 1999, which disputed an extent of injury to claimant's "entire back and left leg" as well as his neck. There is no date filled in the slot for the date that the first written notice of injury was received.

We reverse and remand. Initially, we observe that the Appeals Panel has stated that where compensability of an injury to a body part is accepted, and the carrier later wishes to revisit compensability due to an argued new or more severe condition in that region, it is the "reopening" provision of Section 409.021(d) that applies. Texas Workers' Compensation Commission Appeal No. 971949, decided November 5, 1997; Texas Workers' Compensation Commission Appeal No. 982282, decided November 9, 1998; Texas Workers' Compensation Commission Appeal No. 992626, decided December 30, 1999. Therefore, with respect to the lumbar extent-of-injury issue in this case, it appears that the matter has been miscast as a "waiver" issue rather than a reopening of compensability. The TWCC-1 is, by definition under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1)), written notice of injury. It is the investigation by the carrier following written notice of injury that should yield information about the scope and extent of the region for which written notice was given. Texas Workers' Compensation Commission Appeal No. 971401, decided September 3, 1997. A carrier may not sit as a passive repository of documents and dispute later an extent of injury that would have been apparent upon timely investigation of the claim. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. Consequently, the hearing officer should analyze whether the carrier has presented newly discovered evidence to justify a May 28, 1999, reopening of compensability of the lumbar injury due to a herniated disc rather than a lumbar strain.

By contrast, it appears to us that the claimed cervical injury does indeed fall within the "60 day" provisions. While a determination of what constitutes written notice of injury is a fact determination to be made by the hearing officer, our remand here is necessitated because we believe the hearing officer abused his discretion by finding good cause due to the fact that certain documents, admittedly not timely exchanged, were "mentioned" in the BRC report. One of these documents is the doctor's report that was fund to constitute written notice of injury.

We have held that documents that are actually exchanged or made available to both parties at the BRC need not be re-exchanged within 15 days. Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994. We find no authority to carry that principle a step further to embrace, as a timely "exchange" or good cause, those documents not at the BRC but subsequently reviewed by the BRO in the claims files of the Commission. *See* Texas Workers' Compensation Commission Appeal No. 951136, decided August 28, 1995. (The potential problems are exacerbated where,

as here, there are claims files to which the carrier in the present dispute would not have access.) In our opinion, the statutory and regulatory provisions requiring an exchange of documents involve, at a minimum, some action of the parties in affecting disclosure of information prior to the CCH. Section 410.160; Rule 142.13(c). While the carrier admitted that pages 18 and 19 of Exhibit 1 were at least "discussed," she argued that none of the other protested exhibits were discussed or made available, and this was not refuted by the claimant. The hearing officer was not necessarily faced with believing or disbelieving the carrier's contention, because the BRO on the face of his report alludes to sua sponte review of the Commission claims files. Thus, while there might be good cause found for the two pages that the carrier agreed were discussed, we find no good cause under the record developed herein for admitting other exhibits over objection because they were merely listed or mentioned in the BRC report, and we hold that the hearing officer abused his discretion by admitting these other documents.

The hearing officer should reconsider the evidence given the record left after the objected-to documents (except pages 18 and 19 of Exhibit 1) are excluded. We note that we do not accept the carrier's argument, advanced in its appeal, that the hearing officer may not apply his common experience to the claimant's testimony concerning his undisputed _____ slip and fall on the job and that medical evidence of a casual connection would be required. This is not to say that the application of common sense substitutes for or replaces the requirement for evidence to support factual findings. *See* Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994.

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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge