

## APPEAL NO. 002920

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 5, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) had sustained a compensable, bilateral carpal tunnel syndrome (CTS) injury on \_\_\_\_\_, and that the respondent's (carrier) contest of compensability was based on newly discovered evidence, but the carrier did not act with due diligence after receipt of such evidence, and, therefore, the carrier is not entitled to reopen the issue of compensability.

The carrier appeals the hearing officer's determinations on both issues, contending that the evidence of an injury is not supported by the evidence and that the hearing officer improperly imposed a due diligence requirement on the carrier. The appeal file does not contain a response from the claimant.

### DECISION

Affirmed.

The claimant was employed as a machine operator and testified as to the details of his work. It is undisputed that the claimant has bilateral CTS. The medical evidence is conflicting whether the claimant's work caused the CTS. The hearing officer's determination that the claimant's injury was work-related is supported by sufficient evidence, namely Dr. F's report.

Regarding the issue of whether the carrier's contest of compensability based on newly discovered evidence allowed the carrier to reopen the issue of compensability, Section 409.021(c) provides that a carrier must contest compensability of an injury on or before the 60th day after the carrier receives written notice or the carrier waives its right to contest compensability. Section 409.021(d) provides that a carrier may reopen the issue of the compensability of an injury if it learns of evidence that could not reasonably have been discovered earlier.

In this case, the hearing officer found that the carrier did discover new evidence, but did not use due diligence in presenting the new evidence to the Texas Workers' Compensation Commission (Commission). The carrier received written notice of the claim on April 13, 2000, sent an ergonomics job analysis to its doctor on May 25, 2000, received the doctor's response on June 25, 2000, and filed a Payment of Compensation or Notice of Refused /Disputed Claim (TWCC-21) disputing the injury on July 13, 2000, more than 60 days after its receipt of notice. The hearing officer found that, while the evidence was newly discovered, the carrier failed to exercise due diligence in contesting compensability on July 13, 2000. The hearing officer found that the delay in filing the TWCC-21 was "not reasonable."

The carrier argues that neither the 1989 Act nor the Commission rules create a "due diligence" requirement with respect to the newly discovered evidence. We agree that neither the 1989 Act nor the Commission rules speak to a due diligence standard in this regard; however, the Appeals Panel has consistently noted that there is a "due diligence" requirement on the presentation of newly discovered evidence in order to bring claims to a prompt resolution. See *generally* Texas Workers' Compensation Commission Appeal No. 982930, decided January 28, 1999, and Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993.

Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The Appeals Panel has written that the matter of "newly discovered" evidence and "due diligence" in the presentation thereof is one for the sound discretion of the hearing officer. See Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992, and Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. Several Appeals Panel decisions, including Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000, have commented that the carrier does not get an additional 60 days to bring forth its new evidence upon its discovery. See Texas Workers' Compensation Commission Appeal No. 951051, decided August 16, 1995. The hearing officer's analysis in determining whether the carrier acted with reasonable due diligence should include a review of the totality of the circumstances. Texas Workers' Compensation Appeal No. 94943, decided August 31, 1994.

We hold that the hearing officer's determination on this issue is sufficiently supported by the evidence. In any event, even if the carrier had timely contested compensability, in that we are affirming the hearing officer's finding of a compensable injury, the end result would be the same.

The hearing officer's decision and order is affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

CONCURRING OPINION:

I concur, and would further observe that the hearing officer was generous in characterizing the fruits of deferred investigation of the claim (April 13 written notice, May 25 ergonomics analysis to doctor) as “newly discovered.” The subsequent two-and-a-half week reaction time after receiving this evidence may be fairly characterized as leisurely, and the “new” was by then becoming stale.

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Susan M. Kelley  
Appeals Judge