APPEAL NO. 93697

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Sections 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on June 17, 1993, with the record closing on July 19th. The issues before hearing officer (hearing officer) were as follows: (1) whether the claimant sustained a compensable mental trauma injury resulting from a back and head injury sustained in the course and scope of his employment on (date of injury); (2) whether (Dr. B) certification of maximum medical improvement (MMI) as of February 18, 1992, and his assignment of a whole body impairment rating of zero percent took into account claimant's mental trauma injury; (3) whether the Notice of Refused and Disputed Claim (TWCC-21) was timely filed in accordance with Article 8308-5.21 [now Section 409.021] and Rule 124.6; and (4) whether claimant was able to obtain and retain employment after February 18, 1992, and if not, was claimant's inability to obtain and retain employment and his need for medical treatment since February 18, 1992, the result of a work-related injury on (date of injury), a March 17, 1992, motor vehicle accident, or the result of pre-existing psychological problems. The appellant, who is the carrier, appeals the hearing officer's determination of issues 1, 2, and 4 in claimant's favor. The claimant filed no response.

DECISION

The decision and order of the hearing officer are affirmed.

It was not disputed that the claimant, who worked for (employer), suffered a compensable injury on (date of injury), when he was overcome by sulfur dioxide fumes which caused him to lose consciousness and fall, hitting his head. He was initially seen by Dr. B, employer's doctor, and treated for head and back injuries. In a letter dated February 22, 1993, Dr. B stated claimant was returned to work with eight hour limitation on December 24, 1991; that he returned for several follow-up visits, complaining of headaches; that claimant's neurological exams were found to be within normal limits; and that on February 14th claimant stated he had not had a headache in six days and no back pain in two days. Dr. B found claimant's back to have full range of motion, and he certified that claimant reached MMI on February 18th, with zero percent impairment rating. He also released the claimant to return to work on that date. In the February 22nd letter, apparently for clarification of the issue as to whether he had taken into account a mental trauma injury when assigning claimant's impairment rating, Dr. B stated that when claimant was released on February 18th there was no history or evidence of psychological problems from his fall.

Dr. B also referred claimant to (Dr. R), a neurologist with whom claimant was still treating at the time of the hearing. On January 6, 1992, Dr. R noted claimant's incapacitating headaches but stated that claimant's EEG, skull films, cervical spine films, CT scan of the brain, and detailed neurologic assessment were normal. Dr. R prescribed medication, including Elavil to help him rest and in light of claimant's history of depressive reaction. A January 14th notation from Dr. R indicates a diagnosis of post- concussion syndrome and recommends that claimant work with his supervisor to find a method for gradual return to work; on February 14th he wrote that claimant could be expected to resume

full work activities the following week.

The claimant testified that he attempted to return to work shortly after the accident, but in a different unit than he had worked in previously. He said that he experienced severe headaches, but that he could not take his prescription pain medication at work. He said he also became unable to perform his job duties because he was fearful about returning to his old unit, where the accident occurred. He said he was scared because he could have died; that what he inhaled killed birds, and "it could have killed me." He informed his employer about his fears, and began undergoing psychiatric treatment through employer's health care plan.

In February 1992 claimant began treating with a psychiatrist, (Dr. G), who diagnosed posttraumatic stress disorder with severe depressive features secondary to the concussion. Dr. G wrote that claimant's ability to be in the work place was impaired, and he noted symptoms which included headaches, vivid dreams about the chemical exposure incident, anxiety and irritability, and recall of events. Dr. G also described other problems claimant was experiencing, including marital difficulties. On March 24th Dr. G estimated that claimant would be away from work for another three months or more; on September 22nd he wrote that the claimant continued to have many of the same symptoms of posttraumatic stress disorder, and that "with continued treatment I expect him to be able to return to some type of gainful employment but not in the same field and probably not within the next twelve months."

In a letter dated December 16, 1992, Dr. G defined posttraumatic stress disorder to include symptoms from experiencing an event that is outside the range of usual human experience. Dr. G wrote that claimant's symptoms were directly related to the trauma he received at work in (date of injury) and that the traumatic event has been "persistently re-experienced by intensive recollections of the event, recurrent dreams of the event and panic attacks relating to stimuli which symbolized the traumatic event." Claimant was continuing to see Dr. G at the time of the hearing.

On March 17, 1992, claimant was involved in a motor vehicle accident in which his car was struck from behind. He was hospitalized under Dr. R's care. In a March 18th report Dr. R reviewed claimant's earlier injury and gave claimant's symptoms following the accident as headache which was not as severe as worsening of low back pain accompanied by tingling and numbness in the left leg. Dr. R found a normal neurological assessment, but proposed a lumbar MRI and EMG and nerve conduction studies. He stated his impression as postconcussive syndrome and posttraumatic syndrome complex.

In a letter dated September 22, 1992, Dr. R summarized his treatment of claimant for both the compensable injury and the automobile accident, and stated:

> [Claimant] has had a series of traumatic encounters. One that he had approximately a year prior to coming under my care was one from which he seemed to have enjoyed good recovery. He was seen by me for the second which was again a work related occasion and from which he was making good progress toward recovery having been released for work by both [Dr. B] and myself. These

> were prior to the motor vehicle accident . . . he has followed instructions carefully and he is making progress toward improvement. It is my belief that these latter matters were necessitated by the occurrence of the motor vehicle accident and absent which he might be expected to have been back at work and enjoying better quality of recovery.

At the carrier's request the claimant was seen by a psychologist, (Dr. P), who on April 19 and 23, 1993, examined claimant, reviewed his medical records, and administered a battery of tests. Dr. P wrote that he found no evidence of posttraumatic stress disorder and that "[t]here is no reason from a neuropsychological or psychological standpoint why this patient cannot return to work . . . [s]econdary gains are quite likely and there is strong evidence of malingering." He also described Dr. G's treatment as "marital therapy more related to the multiple marital difficulties and chronic behavioral problems. This has absolutely nothing to do with the accident." In response, Dr. G wrote on June 15, 1993, that Dr. P's report contained factual errors and in fact described symptoms and reactions which were indicative of posttraumatic stress disorder. He also said the tests performed by Dr. P were essentially noncontributory to diagnosis or treatment and that "in the final analysis diagnosis and treatment has to be made on clinical observation, data and the judgment of the clinician."

Because claimant sought long term disability benefits from his employer, he was also seen by another psychiatrist, (Dr. S). On December 16, 1992, Dr. S stated that the psychological testing he had administered, along with the clinical interview, revealed no profound depression or anxiety, and he recommended that the claimant either be returned to work or retrained as soon as possible. Claimant's application for long term disability benefits was denied due to lack of objective supporting medical evidence.

The claimant testified at the hearing that he has not gone back to work after his initial attempt, nor has he tried to find another job. He stated that he continues to have back and leg problems from the auto accident, and that he cannot drive long distances. He said that he has a pending lawsuit concerning the auto accident.

The hearing officer determined, in pertinent part, that claimant developed post-traumatic shock (sic) syndrome as a result of chemical exposure and the related events which occurred at work on (date of injury); that this contributed to his inability to obtain and retain employment beginning on February 18, 1992, and continuing thereafter; that Dr. B did not evaluate claimant's mental trauma injury in making his determination that claimant reached MMI with zero percent impairment; and that the injuries he sustained in the car accident were not the sole cause of his disability after the date of the accident. The carrier contends that the claimant's mental trauma injury is not a compensable condition resulting from the (date of injury) injury, citing reports of Drs. B, S, P, and R; that the injuries claimant sustained in the automobile accident, per medical opinion and claimant's own testimony, were the sole cause of any disability he may suffer at present; and that Dr. B's certification of MMI and finding of no impairment should be considered final because it was not timely disputed pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.5(e) (Rule 130.5(e)).

With regard to the latter, we find that the issue of timely dispute was neither an issue from the benefit review conference nor added by the parties at the hearing, and will not be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 93341, decided June 16, 1993.

The 1989 Act 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." Section 401.011(26). The scope of an injury thus can encompass ancillary conditions which are connected to the injury. *See* Hood v. Texas Indemnity Insurance Co., 209 S.W.2d 345 (Tex. 1948), where the evidence was held to support a finding that the claimant's "neurosis" was a proximate result of an accidental injury to his foot; Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992, wherein the Appeals Panel found no error in a hearing officer's determination that a claimant's compensable physical injuries resulted in a compensable aggravation of pre-existing psychological problems. In this case, the fact of the original compensable physical injury was not at issue and in fact was stipulated to by the parties; therefore, it is not necessary, as carrier contends, that claimant introduce evidence that a vapor release occurred. Rather, it is the claimant's burden to establish that his posttraumatic stress disorder was caused by his original injury. Clearly, claimant's psychiatrist believed that it was, while medical evidence to the contrary was provided by Drs. B, S, and P. Dr. R's reports refer to posttraumatic syndrome with reference to both the December incident and the motor vehicle accident.

Despite the foregoing, we cannot say from our review of the evidence that it was insufficient to support the hearing officer's determination that claimant's mental condition was a result of the "chemical exposure and related events" of (date of injury). To the extent that the evidence was conflicting, that was a matter for the hearing officer as fact finder to determine. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The fact finder in this case may have been more persuaded by the opinion of a doctor who treated claimant over an extended period of time, and whose diagnosis remained unchanged at the time of the hearing, rather than those of doctors whose contact with claimant was less extensive. In addition, Dr. R's September 22, 1992, letter states that claimant "had elements of both post-concussive syndrome and post-traumatic syndrome" from the incident.

The evidence on the issue of disability was in much the same posture. Dr. G had taken claimant off work due to his recurrent problems, and claimant testified that his early attempt to return to work was unsuccessful. Claimant, however, testified to the effect that his return to work was also hampered by the effects of his automobile accident, which clearly was not a compensable injury, and Dr. P's report notes similar statements. While somewhat ambiguous, Dr. R's September 22, 1992, letter indicates that absent the automobile accident claimant "might be expected to have been back at work." Dr. B had early on returned claimant to work, and Dr. P opined that claimant was malingering.

According to claimant's testimony, he had not sought other employment.

Despite strong evidence to the contrary, we cannot say that the hearing officer's determination on disability was so against the great weight and preponderance of the evidence as to require our reversal. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). The 1989 Act defines "disability" as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). As we have previously found, there was sufficient evidence to uphold the hearing officer's finding that claimant's posttraumatic stress syndrome was a compensable injury, and Dr. G's reports state consistently and unequivocally that claimant was not able to work because of that condition. That being the case, there was sufficient evidence to support the hearing officer's finding that the effects of the automobile accident were not the sole cause of claimant's disability. Further, the compensable injury itself need not be the sole cause of the disability. *See* Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992, and cases cited therein.

Finally, the hearing officer held that Dr. B did not consider claimant's posttraumatic stress disorder when he made his determination of MMI and impairment. Dr. B's letter of February 22, 1993, appears to acknowledge this fact in that he states, "[w]hen [claimant] was released on 2/18/92 [the same date of MMI] there was no history or evidence of psychological problems from his fall." At best, this statement is ambiguous and the hearing officer is entitled to resolve the ambiguity. Although MMI itself is not an issue in this case, we note that the Appeals Panel has previously considered the issue of whether an injured employee can be certified to have reached MMI when such employee's work-related injuries involve both physical and mental trauma injuries and the certifying doctor has considered only the physical injury. *See* Texas Workers' Compensation Commission Appeal No. 93100, decided March 25, 1993, and cases cited therein.

Although a different fact finder could have drawn different inferences from the evidence presented in this case, that fact is not a sound basis for our reversal. Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992. We accordingly affirm the decision and order of the hearing officer.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge