APPEAL NO. 94284

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 27, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue presented for resolution was: "Are the Claimant's psychiatric problems a result of the compensable injury sustained on (date of injury)?" The hearing officer determined that appellant's, claimant herein, psychiatric problems are related to problems she allegedly had with her coworkers and are not the result of the compensable injury sustained on (date of injury) (all dates will be 1993 unless otherwise noted).

Claimant contends that the hearing officer erred in excluding certain evidence offered by claimant and that the key determinations of the hearing officer are not supported by the evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds to claimant's allegations and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant was employed as a file clerk by (employer) employer, and on (date of injury), sustained an injury when she slipped, fell and some boxes or files fell on her. Claimant stated she was taken by ambulance to the hospital, where she was seen and released the same day. Claimant was seen by (Dr. G), who apparently was the treating physician. Claimant testified that she was "in bad shape," couldn't move, was crying, and that she thought she had broken a bone. Claimant was then seen by (Dr. B), an orthopedic surgeon, and then Dr. G eventually referred claimant to a neurologist, (Dr. E). Although not clear from the record, apparently in June 1993, Dr. E referred claimant to (Dr. S), a psychiatrist. In August, claimant's records were reviewed by (Dr. BL), who apparently is a preventive medicine specialist, at the request of the carrier. Dr. BL, as indicated in a report dated August 23rd, apparently consulted with Dr. E, Dr. S and Dr. S's nurse regarding claimant's condition. Claimant denies ever seeing Dr. BL and Dr. BL's report indicates his opinion is based on ". . . reviewing the medical records and speaking to her physicians . . ." (apparently Dr. E and Dr. S). Subsequently, claimant was examined by (Dr. M) specialty unknown, apparently at carrier's request (as the September 21st report is addressed to carrier) who, in a Report of Medical Evaluation (TWCC-69), certified maximum medical improvement (MMI) "9-15-93" with zero percent impairment rating (IR). At some point, apparently after a benefit review conference (BRC), claimant was referred to (Dr. MO) for an Independent Medical Evaluation (IME). Carrier refers to Dr. MO as a "designated doctor," however there is no evidence in the record to indicate that Dr. MO is other than an IME doctor.

There is no medical report or record in evidence from Dr. G, the treating doctor. Dr. B, the orthopedic surgeon, by report dated March 29th, refers to a previous examination (not in the record) but essentially finds no abnormalities, neurological examination was

categorized "normal" and "not remarkable." Dr. B's report makes no reference to claimant's psychiatric condition.

Dr. E, the neurologist, by report dated April 6th, recited claimant was in the hospital "for about a week for physical therapy [PT]" which corresponds with claimant's testimony. Dr. E notes some "left cervical paraspinal and superior trapezius tenderness" with "diminished range of motion." Dr. E diagnosed a "mild closed head injury," recommended PT and stated "[w]ill obtain prior medical records for review." On April 12th, some kind of "cervical spine series" showed a "negative plain film study of the cervical spine."

The first medical report in evidence which deals with claimant's psychiatric problems is the report dated August 23rd by Dr. BL, carrier's preventive medicine specialist who only reviewed the records and spoke with two other doctors and Dr. S's nurse. That report records that in response to the question of how much of claimant's condition "was due to the accident in January and how much due to her underlying psychiatric problems," the nurse said "not really clear cut." Dr. BL notes that Dr. S believes claimant's condition is work related. Comments that claimant "is suspicious of others at work . . ." are based entirely on what Dr. S's nurse told Dr. BL. Based on such secondary sources, Dr. BL expressed the opinion:

> that stress and/or depression are perpetuating the cycle of muscle spasm and pain. The trigger point injections will only give temporary relief unless the patient can learn some coping mechanisms for other problems. It is not clear from the records that you sent me whether she is on an anti-depressant at this time, however, I believe a sedating type of anti-depressant would be helpful if taken at bedtime.

Dr. S, the psychiatrist, in a report dated September 29th, indicates he first saw claimant on June 9th, (no report of that visit is in evidence) at the request of Dr. E. Dr. S noted claimant's depressed mood crying spells, interrupted sleep, low energy level, and panic attacks. Dr. S noted in his September 29th report that on June 9th, claimant had "no evidence of obvious cognitive deficits or psychosis upon initial evaluation." By September 29th, claimant was diagnosed as having "symptoms of Major Depression, Panic Disorder Without Agoraphobia, and Post Traumatic Stress Syndrome." Further, it was noted that claimant ". . . continued to decompensate mentally and emotionally despite out patient interventions . . . became increasingly depressed in mood . . ." to the point where claimant could not promise that she would not injure herself. Claimant was noted as having "panic episodes almost continually" until she was psychiatrically hospitalized. Dr. S notes claimant's symptoms during her hospitalization. Dr. S concludes that claimant's psychiatric symptoms which prompted hospitalization "are directly related" to the (date of injury) injury.

Claimant was examined by Dr. M at carrier's request and Dr. M in a report dated September 21st concluded:

The patient is extremely emotional, anxious, crying and constantly blames her employer and supervisor for her present status and poor health. Her complaints are not supported by objective physical findings and there is much inconsistency and symptom magnification. I cannot demonstrate objective findings to substantiate her pain and do not feel that she has a significantly disabling physical examination [sic].

Claimant was finally seen by Dr. MO, a neurosurgeon, for an IME. Dr. MO in a report dated November 18th, recorded a complete history, including claimant's hospitalization, noting claimant's complaints about her coworkers ignoring her and her other personal problems (divorce, a Filipino in a foreign land, break up with her boyfriend). Dr. MO concluded:

[Claimant] is obviously in a chronic pain cycle at the present time, with a very significant emotional overlay which is more than one usually sees in chronic pain and certainly meritorious of psychiatric treatment which she has been obtaining. Any further attempts to help her heal would definitely involve continuing psychiatric treatment and emphasize a well behavior. In my opinion she is not a candidate for any type of surgical procedure or other invasive procedures.

On January 14, 1994, claimant requested permission to take depositions by written questions of Dr. E, the neurologist and Dr. S the psychiatrist. Carrier objected because Dr. E and Dr. S ". . . have generated extensive written medical reports pertaining to their diagnosis, treatment and prognosis of [claimant] . . . [and] to depose these individuals . . . would do nothing but continue to escalate the costs . . . ." A Texas Workers' Compensation Commission (Commission) staff attorney denied claimant's request, for the following reasons:

because carrier has objected to claimant's requests, because no written questions were provided with the requests and because it appears the depositions on written questions seek information that may readily be derived from documentary evidence and/or duplicate information that may readily be derived from documentary evidence.

In a recorded prehearing conference on January 27, 1994, the hearing officer reviewed the proposed questions to be submitted to the doctors and determined that the proposed questions had already been answered by the doctors' reports, thereby affirming the staff attorney's order sustaining carrier's objection.

Carrier at the prehearing conference, the CCH, and in response to claimant's appeal consistently refers to the "extensive written medical reports" and "voluminous medical records" in this case. However, we find the records in evidence to be marginal. For example, although Dr. G was the initial treating doctor no report from him is in evidence; Dr. B's report refers to a prior examination, the report of which is not in evidence. Neither Dr.

S's report of his initial evaluation of claimant on June 9th or apparently a subsequent January 16, 1994, report are in evidence. Only one report of Dr. E and one report of Dr. S are in evidence in addition to reports of carrier's doctors and the IME doctor.

The hearing officer recited in her statement of evidence that:

> Throughout her testimony the Claimant related her psychiatric problems to her belief that her co-workers have treated [sic] differently since her injury because of her pain. The Claimant testified that she believes that her co-workers ignore her because of her pain.

A review of the record does not indicate this statement to be correct in that claimant consistently testified she was depressed "because of constant pain," that the pain "travels," that she is unable to concentrate because of pain, and that the "constant, chronic pain causes [her] to be depressed." Although several of the doctors' reports document claimant's complaints regarding her coworkers, we do not find that to be her testimony on the record before us.

The hearing officer determined that claimant's psychiatric problems are not the result of the compensable injury of (date of injury), but rather are related to problems claimant has allegedly had with her coworkers.

Claimant contends as error that refusing to allow the claimant to depose her treating doctors, Dr. E and Dr. S, by written questions was "illegal" and an abuse of discretion. The hearing officer, as opposed to the staff attorney that initially denied claimant's request, reviewed the questions claimant proposed to ask and determined the existing reports answered those questions. The key question to Dr. S was whether claimant's symptoms can be "linked directly or indirectly" to the original injury. Dr. S in his September 29th report unequivocally stated claimant's symptoms <u>are</u> directly related to the work injury. The hearing officer recognized Dr. S's opinion and noted it in her statement of evidence. Similarly, Dr. E's report of April 6th more or less addresses most of claimant's proposed questions. While we would rather err on the side of including extra evidence, we are unwilling to say the hearing officer abused her discretion in denying the claimant the opportunity to depose her doctors at the risk of further delaying the proceedings, where the documentary evidence included essentially the same information. In determining whether there is an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. <u>Morrow v. H.E.B.</u>, 714 S.W.2d 297 (Tex. 1986). While we believe the better choice would have been to allow the claimant to depose her treating doctors, we are unwilling to say the hearing officer abused her discretion and acted without reference to any guiding rules or principles.

Claimant also argues it was an abuse of discretion by the hearing officer to refuse to allow a psychotherapist to testify at the CCH. However, claimant conceded this proposed witness had not been identified as a witness known to have knowledge of relevant facts. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). In fact,

claimant had largely failed to comply with any of the applicable discovery provisions (Section 410.158 and Rule 142.13) by failing to exchange documentary evidence within 15 days of the benefit review conference (BRC). Although the psychotherapist may have had highly relevant and material evidence, the fact is that claimant had not complied with the discovery rules in identifying that witness, and carrier timely objected to its admission, as carrier had a right to do. Claimant submits, with her appeal, a copy of a letter, dated January 14, 1994, to carrier's attorney advising him that claimant intended to call the psychotherapist as a witness at the CCH. This letter is not part of the record, but even if it were, it would not constitute the discovery notice required by Rule 142.13(c)(1). It is a duty of the attorneys practicing before the Commission to adhere to its rules.

Claimant states "the hearing officer excluded the last report of [Dr. S] on [claimant] dated January 16, 1994." We do not find any such document in the record and the audio tape record reflects only that certain medical reports had not been timely exchanged. It would appear claimant did not specifically advance the January 16, 1994, report or get a ruling from the hearing officer as to whether or not good cause might exist for claimant's not having previously exchanged such information. *See* Rule 142.13(c)(3). We do note that the date of the report is alleged to be January 16, 1994, only eleven days prior to the date of the CCH.

The record before us is not clear what reports and records (including Dr. S's January 16, 1994, report) were actually offered into evidence. We would note that it would be desirable to have the exhibits marked, identified on the record and if offered either admitted or excluded on the record. Exhibits which are excluded should be marked as "not admitted" but nonetheless are included as part of the record submitted for appellate review.

Claimant's second major basis of appeal is that the hearing officer's determinations are not supported by the evidence. The hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer to resolve any inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer could choose to accept Dr. S's opinion and claimant's testimony that there was a direct casual relationship between claimant's psychiatric condition and her compensable injury, or not. The hearing officer obviously gave greater weight to the opinions of Dr. MO, the IME doctor, Dr. M, carrier's doctor and Dr. BL, all of whom documented claimant's complaints that her coworkers and supervisor were treating her differently because of her injury. This is not to indicate that we give any credence to carrier's response that claimant's questioning the sufficiency of the evidence is "an attempt to gain a favorable ruling of the factual merits from the Appeals Panel [and] is an abuse of process as well."

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact, even if the

evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We do not so find and consequently, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge