

APPEAL NO. 94428

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq.* On February 1, 1994, a contested case hearing was convened. At this hearing, a continuance was sought and apparently granted in order to allow development of more current medical evidence; there is no indication that any evidence was admitted. The hearing was reconvened on March 14, 1994. At this hearing, one issue relating to payment of temporary income benefits was withdrawn by agreement of the parties. The two issues that were determined by the hearing officer were whether the claimant's compensable injury was a producing cause of claimant's psychological problems, and her correct impairment rating. The date of injury was_____, an injury to the knee that occurred while claimant was working in the course and scope of her employment with (employer). The parties stipulated that claimant had reached statutory maximum medical improvement (MMI) on August 14, 1993.

The hearing officer determined that claimant suffered depression as a result of her injury of_____, and that she suffered increased symptoms related to her personality disorder that were a result of the compensable left knee injury. In his discussion of the evidence, the hearing officer indicated that notwithstanding evidence that claimant had a pre-existing psychological condition, her depression after the injury was nevertheless compensable because it was an aggravation. The hearing officer indicated that he "disregarded" all evidence that her psychological condition may have been aggravated by difficulty with various aspects of her claim. The hearing officer further noted that impairment rating could not be established because there were no valid ratings that both took the psychological injury into account and used the proper version of the American Medical Association Guides to the Evaluation of Permanent Impairment, third edition, second printing, February 1989 (AMA Guides).

The carrier appeals the hearing officer's determination. Specifically, the carrier argues that the great weight and preponderance of the evidence indicated that the sole cause of claimant's depression was the pre-existing personality disorder, and it points out that the diagnosis before this injury and afterwards is the same. The carrier recites at length much of the evidence favorable to its position. The carrier further argues that the doctor most favorable to claimant's case acknowledged, under oath, that there was no qualitative difference in her symptoms before and after the injury. The carrier further argues that it was against the great weight and preponderance of the evidence for the hearing officer to invalidate the designated doctor's report because it omitted the psychological condition, and asks that the designated doctor's impairment rating be adopted. The claimant responds disputing some of the facts set out by the carrier, and asks that the hearing officer's decision be upheld. The claimant also asks that the transcript of the hearing be ignored and only the tape recording considered.

DECISION

We affirm the hearing officer's decision; although another finder of fact could well have reached the opposite conclusion, the decision is not reversible under our standard of review.

We note that a court reporter's transcript of a hearing is regarded as an accurate record of testimony by the Appeals Panel unless specific errors are pointed out. The claimant has not specifically pointed out why the tape recording should be preferred over the transcript of the hearing. We have, therefore, reviewed the transcript and the documentary evidence admitted in this case in reviewing the hearing officer's decision.

The hearing was long and the documents voluminous, however, our summary will be brief. The claimant was injured early in the morning of_____, as she leaned into a supply cabinet. She stated she felt her left knee "pop;" medical records refer to a twisting injury occurring at this time. The injury was initially diagnosed by her doctors, Dr. W and Dr. K, of Clinic 1, as a strain, and she was released to full-duty work effective August 29, 1991. It was later determined in (subsequent date of injury) that claimant had a left knee meniscus tear that required arthroscopic surgery on September 25, 1991.

Medical notes over the ensuing months by Dr. W and Dr. K indicate that claimant began to experience back pain (observed as a flare-up or aggravation of prior back problems) and later right knee pain, which is attributed to altered or awkward gait during recovery from surgery.¹ None of these doctors' notes reflect that any psychological problems or symptoms were observed or treated by them during their course of care of claimant. The claimant changed treating doctors on May 22, 1992 to Dr. R.

Claimant said that she lost her job of 19 years sometime in September 1992 when she had not returned to work in a calendar year, which termination was provided for in the union contract. Dr. R's first comments concerning any emotional or psychological problems of claimant are made in an October 15, 1992, letter in which he referred claimant to a counselor, Mr. C for evaluation and therapy. Mr. C saw claimant on November 2, 1992. There is some indication that coverage for further treatment or consultation with Mr. C was denied by the carrier. Mr. C noted claimant was angry, and he stated that claimant's assessment that it related to her injury might be accurate as "she has not gotten what she feels she deserves and still has pain." He noted tremendous depression and anxiety.

¹ Although there was no issue regarding the extent of the injury to the back or right knee, the hearing officer has somewhat gratuitously observed that substantial evidence showed neither was related to the injury. We note, however, that the Appeals Panel has affirmed such "altered gait" injuries to be part the original compensable injury. See Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993.

Personality testing underscored the conclusion of depression, and noted also elevated scores in hypochondriasis.

The heart of carrier's case involves claimant's history of psychological problems prior to _____. Evidence indicated that she was hospitalized for treatment in May 1989. In March 1991, she was again hospitalized, and in May 1991, for three periods, she was hospitalized in a combination of inpatient and outpatient "day" hospitalization at (Hospital B). Discharge records from Hospital B dated May 24, 1991, stated that claimant was discharged due to exhaustion of financial resources. Claimant admitted these periods of hospitalization, which she stated were voluntary and attributed to job or life stress. The notes from these periods also document various sources of family stress, which claimant denied as significant. Claimant also denied she had been discharged from Hospital B for financial considerations, and stated that her psychological problems had been resolved, and that she thereafter entered into evening therapy and twice a month therapy as "maintenance." Claimant testified that whether she was still having depression when she left Hospital B would depend upon the definition of depression. She said that she had some depression after she left because the employer started her on a new job when she returned that was "nerve-wracking." She later denied any stress between the date of discharge and _____.

The primary psychiatrist who treated her in 1991, including follow-up counseling, was Dr. V. The principal diagnoses reflected in her 1991 hospitalization records are major depression and generalized anxiety, with a secondary diagnosis of personality disorder, with traits of passive aggression and dependency. Although treatment for bulimia and alcohol abuse are noted, claimant denied that these were problems she had encountered.

On August 20, 1992, Dr. V wrote to the Texas Workers' Compensation Commission (Commission) indicating that claimant had been under his care since January 1991. He stated that she was learning to cope "until she began running into a lot of problems with insurance over her workman's compensation situation." He stated that she talked repeatedly during their sessions about insurance and medical treatment she needed, and predicted that loss of income would be another stress factor.

In July 1993, Dr. V wrote to the Commission and stated that it was his opinion that claimant's psychological status "was somewhat affected by the _____ work injury. This, however, is a complicated issue since the patient had other stressors" Even so, he attributed her present state to feelings of lack of support from her company, hurdles placed in her way getting help, and chronic pain.

Beginning October 1993, claimant was treated by psychiatrist Dr. N, as a day patient at Clinic 2. Dr. N stated that he believed her current problems were caused by the injury, a conclusion he reached from reviewing records prior to the injury, talking to Dr. V,

and from his own evaluation. However, in a hearing held by the Commission relating to other matters, he testified that qualitatively, her symptoms now were no different than before the injury.

We would note that claimant was also examined by other physicians she characterized as insurance doctors. The pertinent examination to the issues in this case was that of Dr. P, a psychologist. Dr. P commented that claimant had a histrionic personality, and had a chronic personality disorder which predated the accident. It was his judgment that there was no relationship to the _____, accident of present symptoms.

Claimant was examined by a designated doctor appointed by the Commission, Dr. W, an orthopedic surgeon, who found that claimant had a seven percent impairment rating. He considered injuries to claimant's right knee and back but assessed zero percent impairment for both. No impairment was assessed for psychological injury, and Dr. W has informed the Commission that he does not feel qualified to assess psychological impairments.

An "injury" for purposes of workers' compensation includes not only the immediate physical harm resulting from an accident or trauma at work, but diseases or infections naturally resulting from the damage or harm. Section 401.011 (26). Although the hearing officer's theory for compensability is not entirely clear, because he refers to her psychological condition as an aggravation (which can be an injury in its own right), we believe that his findings of fact, which relate the psychological condition back to the _____, injury, underscore that he viewed the psychological condition as part of the compensable injury, a naturally resulting disease. This would also be the theory most closely tied to the evidence, which indicated that the _____, incident itself did not that day or immediately afterward cause a separate mental trauma injury, covered by Section 408.006, but that the condition came to fruition following claimant's surgery and events after that, including the disputes with the carrier which the hearing officer inexplicably chose to "disregard." Consequently, the theory for compensating the psychological distress in this case would be similar to that in Peeples v. Home Indemnity Co., 617 S.W.2d 274 (Tex. Civ. App.- San Antonio 1981, no writ), which involved a suit for coverage of psychiatric care for a condition that was argued to be the natural result of a knee injury. This is the basis upon which we can affirm the decision as based upon sufficient evidence.

To the extent that the hearing officer's discussion concerns aggravation as a factor, we note that we have stated many times, an aggravation of a pre-existing condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.- Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. However, we've also stated that

merely asserting aggravation does not carry the burden that the proponent has to prove that an injury occurred. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. We believe that what must be proven is not a mere recurrence of symptoms inherent in the etiology of the pre-existing condition that has not completely resolved (Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992), but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury. See Texas Workers' Compensation Commission Appeal No. 93416, decided July 8, 1993; Texas Workers' Compensation Commission Appeal No. 94168, decided March 25, 1994. Whether there has been an aggravation is generally for a trier of fact. Texas Workers' Compensation Commission Appeal No. 92654, decided January 22, 1993.

The evidence in favor of carrier's case is strong. There is evidence also that it was the process of the claims handling, that was a major factor in triggering claimant's current distress. Nevertheless, there was conflicting expert evidence on the relationship between injury and the distress, and it was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.- Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied). In considering all the evidence in the record and despite the fact that different inferences could reasonably be drawn for the evidence, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Because the hearing officer found that part of the injury was claimant's psychological condition, he was correct in rejecting the designated doctor's report to the extent it did not assess for the psychological condition. We would note that in order to qualify as an "impairment" under the 1989 Act, there was must be some assessment that the psychological condition will be permanent.²

² "Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Assessment of impairment must be based upon "objective clinical or laboratory finding." Section 408.122(a).

Recognizing that another trier of fact might reasonably determine the case another way, we nonetheless affirm the hearing officer's decision and order, finding it is supported by sufficient evidence in the record.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge