

APPEAL NO. 980037

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 2, 1997. The issues at the CCH involved whether claimant's psychological disorder would be compensable, and this was phrased as whether her compensable injury was a "producing cause" of her psychological disorder. Also at issue was whether the carrier had the basis for reopening the issue of compensability based upon newly discovered evidence that could not have been reasonably discovered at an earlier date. The carrier expressed dissatisfaction with this phrasing of the issue, arguing that there would be no showing that it ever received written notice of injury requiring it to dispute, and the parties after a recess, thus agreed to add an issue as to whether the carrier had timely disputed compensability on or before the 60th day of notice of the psychological disorder.

At the beginning of the CCH, the hearing officer expressed understandable dissatisfaction with the "producing cause" language in the reported issue, and indicated, to the satisfaction and agreement of the parties, that she viewed the bottom line issue as having to do with whether claimant's psychological problems would be compensable, whether phrased as an "extent of injury" issue or producing cause. She further stated that she viewed medical evidence of a causal connection as integral to her determination however the issue was phrased. The parties therefore agreed to the stated issues. The hearing officer determined that the carrier was made aware as early as October 24, 1994, that claimant had depression secondary to her compensable back injury, but did not dispute it until August 6, 1997. She therefore held that the carrier did not either timely dispute the injury under a 60 day standard, nor did it prove it had newly discovered evidence to reopen compensability on August 6, 1997. On the compensability of claimant's depression, the hearing officer concluded as a matter of law that the compensable injury was a "producing cause" of the claimant's psychological injury. However, there are no fact findings that the psychological injury naturally resulted from the compensable back injury or represented a mental trauma injury in its own right. The discussion of evidence, however, states that the hearing officer determined that there was medical evidence rising to a "reasonable degree of medical certainty" that claimant's depression was caused by her back injury and resulting pain syndrome. The discussion also indicates that the hearing officer did not view the claim as one for mental trauma.

The carrier has appealed, and argues that the issue was faulty and that "producing cause" is not a basis for compensability. It states that its argument is, and always has been, that the compensable back injury did not extend to or include a psychological component. The carrier states that the hearing officer departed from her stated position that extent of injury was the crux of the matter at hand. The carrier argues that there has been no aggravation of a previously existing psychological problem. The carrier further argues that because it received no medical evidence indicating causation of the condition,

it essentially had no duty to controvert until it did. The carrier argues that the doctor's report cited by the hearing officer merely stated that the psychological condition was "secondary" to the original compensable injury and that this was not enough to trigger the carrier's duty to dispute the condition. The claimant responds that the hearing officer's decision is supported by the evidence in the case.

DECISION

Affirmed.

It was undisputed that on _____, while employed by (company) , the claimant slipped on a stairway and fell hard on her buttocks, causing injury to her back. The medical records in evidence make clear that she developed a pain syndrome although her objective testing primarily indicated bulging discs and degenerative disease. There is no indication in the medical records that the claimant was felt to be faking her pain. Claimant said she began to experience problems that she later realized were depression some three to four months after her injury. Claimant testified that she has become essentially nonfunctional and cannot concentrate, and has pain radiating in her lower back and hips and down her legs. Claimant said that prior to her injury, she had undergone marriage counseling and she had discussed this with her doctors who treated her injury. Medical evidence recited a history of physical and mental abuse from her ex-husband. Reports also recite that the marriage counselor was a pastor.

The medical evidence is considerable and we shall summarize only highlights pertinent to the issues at hand. On October 24, 1994, (Dr. B), to whom the claimant was referred for pain management, found normal range of motion, no hypersensitivity to light touch, and no indications of radiculopathy. He stated that she should be treated as having a long standing low back syndrome or sprain, and noted that claimant had periods of tearfulness, poor appetite, and disturbed sleep. He stated that she had become "secondarily depressed" and it was negatively impacting her rehabilitation program. Part of his prescribed medications included antidepressant medication. This report was date-stamped by the carrier on December 15, 1994. Other medical records from Dr. B which were submitted by the carrier observed that claimant experienced depression in 1991 related to her marriage.

Part of carrier's exhibits also included records dated April 4, 1995, from (NCMHC) (Mental Health Center) that record claimant's depression as due to chronic back pain.

Claimant identified her primary treating doctor as (Dr. D). A letter from Dr. D dated June 14, 1995, stated that claimant was 53 years old, that her CT scan and blood work testing were unremarkable, and that she complained of subjective symptoms of irritability, insomnia, decreased energy or interest in pleasurable activities, and that her psychological status was being further evaluated that day. Dr. D concluded that claimant met the criteria

for major depressive disorder. He extensively details in several pages his testing and results thereof. Dr. D reported that claimant denied any history of depression preceding her low back injury, and that it seemed to him that she could not handle the stressor of her pain related work injury and thus decompensated psychologically. His first diagnosis was major depression, single episode. He recommended at the conclusion of the letter that further physical treatment of her back pain would not be effective without psychological treatment. Dr. D referred the claimant to (Dr. BR). On September 13, 1995, Dr. BR wrote a report, which the carrier submitted as one of its exhibits, of a psychological interview with the claimant. Dr. BR noted that claimant had high levels of situational distress which manifested as depression and somatically. He stated that she was emotionally labile, socially isolated, and dependent. Dr. BR concluded that claimant was in need of counseling and medication for a "severe effective distress associated with her condition." He stated that he would "request" 10 individual and 10 group psychotherapy sessions. The claimant testified that he told her this request would be made from the workers' compensation insurance carrier. Claimant further testified that Dr. BR's office called later to say they had received approval for this, but she had decided at that point to move to another city and did not attend those sessions.

Claimant was referred for psychotherapy at (medical center) on June 19, 1997. But records indicate that her physical condition was evaluated at the same time. Her discogram was essentially normal although a small defect at L3-4 was observed. She was treated for depression.

Records indicate that claimant was certified by a designated doctor, (Dr. C), to have reached maximum medical improvement (MMI) on February 9, 1995, and that she had a 7% impairment rating (IR), related to her back injury only. Virtually all of claimant's medical opinions recommend against surgery.

Concerning the appealed point about the injury issue, we must start by observing that the essence of the dispute here is that the carrier, at some point, formed the conviction that treatment of depression was not reasonably and necessarily related to treatment of the compensable back injury. For whatever reason, it has not gone through the more appropriate medical dispute resolution process, but has been expressed as a dispute over whether the psychological condition of claimant is actually an injury in its own right tied to the back injury. Thus, phrasing the issue as one of "producing cause" is an unsatisfactory one. See discussion in concurring opinion in Texas Workers' Compensation Commission Appeal No. 971725, decided October 17, 1997, discussing "extent of injury" issues. Compensability is not conferred on every consequence that arguably would not have happened "but for" the initial injury. See Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993 (reversing finding of compensability for drug dependency due to abuse of prescription drugs taken for injury); Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993; Texas Workers' Compensation Commission Appeal No. 94067,

decided February 28, 1994 (injuries from fall at home resulting from weakened knee not compensable); and Texas Workers' Compensation Commission Appeal No. 941575, decided January 5, 1995 (burn at home from family picnic and subsequent infection held not compensable as related to work injury causing loss of sensation). These cases all involved injuries in which it could have been argued that the injury was in some sense a "producing cause" of the consequence.

It is important to emphasize, as was indicated in such cases, that an injury that does not manifest itself until some time after the initial injury must be tied to that injury either because it happened on the same day, was a natural result of the compensable injury, or was the result of necessary medical treatment for that injury. We have stated that psychological stress or an emotional condition that results from a physical injury can be compensable as an extent of that injury. Texas Workers' Compensation Commission Appeal No. 93100, decided March 25, 1993. Whether a psychological condition results from the original injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. We agree that the hearing officer, in her discussion at the beginning of the CCH, correctly indicated that, however stated in the wording of the issue, the essential determination was whether the psychological condition would be compensable as resulting from the original injury. We do not agree with the carrier that there was in any way a departure from this. Although it would have been the better practice for the hearing officer to make an express finding of fact that claimant's psychological injury resulted and was part of her back injury, there is clearly an implied finding to this effect as indicated by her discussion and her conclusion of law. Although the hearing officer in her discussion further articulates an alternative argument of "aggravation" in the event that a preexisting psychological condition existed, she clearly did not believe that there was proof of a preexisting condition and her observations about "aggravation" are essentially dicta. She evidently did not believe, and is supported by the record, that the fact that an injured worker may be emotionally labile was equivalent to a pre-existing mental illness disease. The expert medical evidence is sufficient to support the hearing officer's decision within reasonable medical probability ("certainty" not being the required standard, as the discussion indicates).

On the matter of whether the carrier timely disputed or moved to reopen the issue of compensability, we tend to agree with the issue as originally stated from the benefit review conference (BRC), that what was at stake was whether the carrier could reopen compensability originally accepted. The back injury was accepted. The evidence in this matter additionally demonstrated that the carrier paid for some antidepressive drugs and treatment of claimant's depression, which the hearing officer believed, with sufficient support, were linked early on to the claimant's injury. As we noted above, the carrier apparently formulated the opinion that continued treatment of the psychological condition had begun to exceed the severity of the back injury as a reasonable means for treating that injury. Under such circumstances, it was entitled to seek a review of liability for those services. The hearing officer could conclude that Dr. B's assessment, that claimant was

secondarily depressed, was related to her injury. Whether we endorse the discrete finding that October 24, 1994, was written notice of injury requiring a 60-day reaction from the carrier is somewhat academic in light of all the medical records, well prior to 60 days before August 5, 1997, spelling out claimant's depression and its linkage to her back injury and chronic pain. For example the April 4, 1995, report of the Mental Health Center, one of carrier's exhibits, relates her depression to her chronic pain. Contrary to what the carrier argues, the Appeals Panel has not required that there be an express assessment by a doctor that the compensable injury has caused the "follow on" condition. The Appeals Panel has stated that the duty to investigate arises from notice of injury, asserting the work-relatedness of a condition, rather than the subjective determination of the carrier that it has a basis for dispute. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993; Texas Workers' Compensation Commission Appeal No. 961173, decided August 1, 1996 (and decisions cited therein). And we would finally observe that where, as here, the carrier has been allowed to fully try the issue of compensability, and it is clear that the hearing officer made an independent determination that the condition was compensable, there is in effect harmless error by a subsequent finding that the compensability was not timely disputed or adequately reopened. A trier of fact could opt to base a determination of compensability solely on the fact of waiver by the carrier. That did not occur here. At best, in this decision, the determination that carrier is liable for the claimant's condition of depression is an alternative, not the sole, theory of liability.

We therefore affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge