APPEAL NO. 980228
FILED MARCH 23, 1998

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 January 7, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. She determined that the respondent's (claimant) emotional and psychogenic dysfunctions are related to her compensable injury of _____; that the appellant (carrier) waived the right to contest the compensability of the claimant's emotional and psychogenic dysfunctions by not timely contesting compensability; and that the claimant had disability from December 9, 1996, through June 9, 1997. The carrier appeals these determinations, urging both legal error and evidentiary insufficiency. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was struck on the side of the head by a ricocheting projectile from a lawn mower while in the course and scope of her employment on _____. She did not lose consciousness, but felt dazed and said she had difficulty understanding what was going on around her. She continued working and first sought treatment from Dr. H. In an Initial Medical Report (TWCC-61) reflecting a visit of June 29, 1996, he diagnosed a concussion. Subsequent reports note complaints of headaches and memory problems. The claimant last saw Dr. H on October 16, 1996, and then began treatment with Dr. T. In his report of an October 28, 1996, visit, Dr. T diagnosed emotional and psychogenic dysfunction together with a concussion. He attached no diagnostic codes to these diagnoses. In subsequent medical reports he noted the "dysfunctions" and provided (without explanation) diagnostic codes 850, which, according to the International Classification of Diseases (1995), is an intracranial injury, and 301.3, which is explosive personality disorder, including aggressiveness, emotional instability, pathological emotionality, and quarrelsomeness. Because her mental status and neurological examination was within normal limits, Dr. T suspected from a November 11, 1996, visit that the claimant had a preexisting underlying disorder "unrelated to her alleged job injury." The claimant testified that the symptoms she presented to Dr. T included short-term memory loss, inability to make decisions, and lack of self-sufficiency. She disagreed that these symptoms had a component of emotional instability. On December 5, 1996, the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) which disputed the "explosive personality disorder as being not related to the compensable injury."

A CT scan of the brain on July 8, 1996, was read as normal. An electro-encephalograph of May 1, 1997, was abnormal for the left temporal area. A brain MRI on May 1, 1997, was normal.

The claimant then stopped treating with Dr. T and eventually changed treating doctors to Dr. B. On November 27, 1996, Dr. B diagnosed probable traumatic brain injury and mood disorder, "probably depression," secondary to the brain injury. On January 21, 1997, he further explained the results of the brain trauma to include not only the depression, but also short-term memory impairment, headaches, and various cognitive deficits. On March 19, 1997, he described the concussion as "severe" with the same "sequelae." On July 9, 1997, he described the sequelae as "concomitant to her head injury." On August 7, 1997, Dr. B added as a rationale for his conclusion that the depression and other mood disorders were the result of the concussion and that these problems did not exist prior to the trauma. Dr. B also relied on the opinion of Dr. C, Ph.D., a neuropsychologist, who administered various tests to the claimant and concluded that the "mild" traumatic brain injury "may be contributing to the decline in cognitive functioning, but does not account for all of her measured deficits or the complete degree of their magnitude." He considered her "response to her injury over the past year is similar to that of individuals who have suffered mild traumatic brain injuries without immediate and/or adequate rehabilitation services."

On August 18, 1997, Dr. HN examined the claimant at the request of the carrier. He concluded that her complaints "are causally related" to the concussion, which he considered mild to severe. Because he apparently was not aware of Dr. T's opinion of no causal connection, the carrier again asked Dr. HN's opinion in light of Dr. T's opinion. In a letter of October 23, 1997, Dr. HN said he agreed with Dr. T primarily because the claimant seemed able to "function fully" for some weeks after the trauma and that her "anxiety disorder" was "disproportionate to the other post head trauma complaints and suggests either a functional element, or a preexisting anxiety disorder prior to the head injury."

The claimant had the burden of proving that her "emotional and psychogenic dysfunctions" were caused by the trauma to the head. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 962389, decided January 2, 1997. The hearing officer was persuaded primarily by the opinion of Dr. B that there was a causal connection between the concussion and the dysfunctions. She also apparently found Dr. HN's first opinion of causation more credible than his later change of mind. In its appeal, the carrier challenges Dr. B's opinion and would have us adopt the view of Dr. HN's first opinion and the opinion of Dr. T. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In her role as fact finder, she could accept or reject in whole or in part any of the evidence, including the medical evidence. As an appellate reviewing body, we will reverse a factual determination of a hearing officer only if it is so against the great weight and preponderance of the

evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard to the record in this case, we find the evidence deemed credible by the hearing officer sufficient to support her determination that the dysfunctions were caused by the traumatic head injury and decline to reverse that determination.

Section 409.021(c) provides that if a carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability and the claimant's injury becomes compensable as a matter of law. Texas Workers' Compensation Commission Appeal No. 961176, decided July 26, 1996. The 60-day period for disputing compensability is triggered by a written notice of an injury. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)) provides that if no first report of injury has previously been filed by the employer, written notice of injury consists of any other notification, regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and "facts showing compensability." The hearing officer found that the various reports of Dr. B, beginning as early as November 1996 through March 1997, constituted written notice of the claimed dysfunctions, which triggered the 60-day reporting requirement. The hearing officer then concluded that the carrier first disputed the dysfunctions in a TWCC-21 of July 3, 1997. The carrier argues on appeal that it timely disputed the "dysfunctions" when it disputed Dr. T's diagnosis of an "explosive personality disorder" and that the various diagnoses of Dr. B were no more than different names for the same symptoms, not new injuries, which required a new dispute as each appeared in a medical record.

A carrier is required by Section 409.021 to dispute an "injury" to a body part, not a specific diagnosis. *See* Texas Workers' Compensation Commission Appeal No. 970494, decided May 2, 1997; Texas Workers' Compensation Commission Appeal No. 961850, decided November 1, 1996; Texas Workers' Compensation Commission Appeal No. 951742, decided December 15, 1995; Texas Workers' Compensation Commission Appeal No. 941320, decided November 17, 1994; and Texas Workers' Compensation Commission Appeal No. 93967, decided December 10, 1993. In this case, the terminology used by Dr. T referenced "personality disorder" and psychological dysfunction. That used by Dr. B included "mood disorder." The claimant testified that her psychological, or "psychogenic," symptoms have remained essentially the same since the concussion. Whatever the subtle differences may be in these diagnoses, the hearing officer failed to explain how, or to make a finding of fact that, Dr. T's diagnosis differed significantly from Dr. B's. It is clear that the claimed resulting injuries in this case were psychological in nature. The carrier contested a psychological injury in its TWCC-21 of December 5, 1996, which was within 60 days of the claimant's first visit with Dr. T. For the foregoing reasons, we find the determination of the hearing officer that various reports of Dr. B constituted written notice of an injury for purposes of triggering the 60-day dispute requirement, was contrary to the great weight and preponderance of the evidence. For this reason, we reverse the determination that the

carrier waived the right to contest the compensability of the claimant's emotional and psychogenic dysfunctions and render a decision that the carrier did timely dispute these dysfunctions. Because we have affirmed the determination of compensability, our reversal on the timeliness of the dispute does not affect the award of benefits in this case.

There remains the issue of disability. The hearing officer found disability from December 9, 1996, through June 9, 1997. The carrier appeals this determination on the grounds that the "only support" for this conclusion is Dr. B's records. Since Dr. B was not the Commission-approved treating doctor at this time[1], so the carrier argues, his opinion should be given no weight on this question. Rather, Dr. T's November 11, 1996, return of the claimant to duty should be controlling. We first observe that disability is a question of fact that can be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Whether or not Dr. B had the formal status of treating doctor, his opinion, just as the opinion of any other doctor in evidence, on the issue of disability was relevant and could be given the weight and credibility deemed appropriate by the hearing officer. The carrier further argues that Dr. B's opinion should be given no credibility because he does not explain how the claimant's "dysfunctions" prevented her from returning to work. This argument again goes to the weight to be given the evidence. Under our standard of review, we find the evidence sufficient and affirm the decision of the hearing officer on the disability issue.

One final matter requires comment. The claimant appears, in her response, to object to the carrier's reliance on documents submitted into evidence by the claimant, not by the carrier. The parties may rely on the evidence to support their positions, regardless of who introduced the evidence. In this case, as a matter of welcome courtesy, the carrier did not submit duplicate evidence which would have served no purpose other than to increase the physical size of the record.

[1]An Employee's Request to Change Treating Doctors (TWCC-53) to Dr. B was approved by the Commission on June 11, 1997.

For the foregoing reasons, we affirm the determinations of the hearing officer on the extent of injury and disability issues. We reverse the determination that the carrier waived its right to timely dispute the emotional and psychogenic dysfunctions and render a decision that carrier did timely dispute. The order of the hearing officer to award medical and income benefits to the claimant is not otherwise disturbed.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge