APPEAL NO. 990234

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 11, 1998. The issue before the hearing officer involved whether the appellant, who is the claimant, had a compensable injury on _____, that "extends to claimant's bipolar II disorder." However awkwardly phrased, the issue before the hearing officer, as posed by the claimant, was her contention that symptoms of her bipolar II disorder began when she had a back injury and resulting surgery. The claimant asked to add a second issue on whether the respondent (carrier) had timely disputed this extent of injury but the hearing officer declined to add the issue, suggesting that it must be raised in another proceeding.

The hearing officer held that neither the claimant's injury nor resulting back surgery "caused" claimant's bipolar II disorder. The hearing officer further held that claimant's disorder and "other mental problems" were the result of an "ordinary disease of life."

The claimant appeals and argues that there was ample evidence to support her case. She argues that the hearing officer erred in not adding an issue of timely dispute to the CCH and that one of his recited bases–the fact that he would be compelled to grant a continuance to the carrier which would be hard on the claimant–was a statement made, although there would be no basis for the carrier to seek a continuance. She asserts that the carrier failed to timely respond to the claimant's interrogatories and admitted losing the exchange document, in which the request to add an issue was included, in its own office. The claimant argues that the hearing officer misconstrued the evidence because he stated she had been hospitalized prior to her injury for mental illness when such was not the case. She argues that the hearing officer erred in his conclusion that claimant had "symptoms" of bipolar II disorder prior to her injury or that it was an ordinary disease of life. She recounts in detail the evidence she believes is in her favor. The claimant also argues that the hearing officer erred in sustaining an objection to the testimony of a doctor witness as expert testimony and then accepting his testimony as such. The claimant contends that there were procedural errors and that her doctor was forced to leave early and therefore was not available for rebuttal. She argues that the ombudsman's rebuttal statement was rushed and ill-prepared and she consequently did not have a well-organized "last word." The carrier responds that the decision is supported by the evidence, which shows that the condition was preexisting, and that it timely disputed the compensability of the bipolar II disorder.

DECISION

Reversed and rendered in part, affirmed in part.

The claimant injured her back on _____, while employed by a company owned by (employer). She was attempting to push a box full of copier paper across the floor. Claimant was required to have back surgery on May 1, 1997.

Claimant (who was in her mid-50s at the time of the accident) did not deny that she had been diagnosed with depression in 1990; she stated that in 1989 she began to feel "down" and undertook treatment from Dr. R, who prescribed Lithium and later Prozac when the Lithium had physical side effects. She said that the medication change to Prozac was successful in controlling her symptoms. During this time, the claimant worked for a medical treatment hospital known as (T Hospital).

The claimant said that sometime before April 1994 she began feeling that the Prozac was not working anymore and sought treatment from Dr. K. Dr. K wrote a brief statement saying that claimant exhibited no signs of mania during his treatment, which lasted from February 3, 1994, through July 31, 1995. Subsequently, in April 1996, she undertook treatment from Dr. N, whom she had known at T Hospital, because she began experiencing depression once more. Dr. N testified that depression and bipolar II syndrome were two different conditions. He stated that he saw no symptoms of bipolar II syndrome prior to the claimant's injury, although he began to see such symptoms prior to the claimant's May 1997 surgery. Dr. N said he had not reviewed medical records prior to his own treatment of claimant and was basing his contention that she had no more than depression on her history and his own treatment observations beginning in April 1996. He said there were approximately five office consultations with the claimant prior to her injury and most took from 15-20 minutes. He adjusted her medication a few times. Dr. N testified that he wrote in a November 4, 1997, letter that claimant's condition was aggravated by her on-the-job injury and resultant pain and surgery. Dr. N also stated that claimant's depression was under control at the time of her injury.

Claimant testified to only one prior hospitalization about 30 years prior to her injury. She stated that she became involved with the Church of Scientology when she was in her mid-20s and her father, who knew a judge, obtained a commitment order because of his concern about her involvement. She said she was there for three months but was not diagnosed with a mental problem nor given medication. Claimant also agreed that she had been an alcoholic prior to joining Alcoholics Anonymous in 1976 with a resultant cessation of drinking. Claimant described her bipolar II disorder as arising from her pain-related stress and her concern that her surgery had not been successful in relieving her neurological problems. Claimant was hospitalized after her injury and surgery when she began having suicidal thoughts. This occurred in August 1996 and she was an inpatient for 10-12 days.

Claimant's husband, who had psychological training and volunteer experience regarding suicidal tendencies, said that his wife was a positive and upbeat person prior to her injury, but had gone downhill since that time. Claimant also called as a witness an internist, Dr. C; objection was made and sustained to him testifying as an expert because he was not identified as such before the CCH. However, Dr. C also made clear that he had never treated claimant as a patient and had no background in bipolar II disorder and could only testify from a lay perspective of having been a friend for 10 years. He stated that five or six years before the CCH he had observed that claimant had mood swings. He said that she had always seemed to him somewhat labile in terms of ups and downs and said that her peaks and valleys seemed a little deeper than in other people. Dr. C also said that at

times she had euphoria prior to the injury. On redirect, when the ombudsman asked him to characterize his observations in terms of whether they were "normal," objection was made and sustained, as this would involve medical knowledge. Dr. C said, however, that her problems had gradually worsened since her injury and were different from before.

Dr. CN, a psychiatrist who reviewed claimant's records for the carrier but did not examine her, wrote a report on November 26, 1997. He summarized the records he reviewed. One of the records provided to him was a report of the claimant's August 14 through 23, 1997, hospitalization and diagnosis of bipolar II disorder. He also noted that a record indicated to him that claimant had been hospitalized in 1987. Dr. CN stated that his review indicated that claimant's condition resulted from Major Depression Disorder, recurrent type, and that she had a persistent mood disorder which predated the injury. Dr. CN noted, however, that in many mood disorders, "sometimes a stressor can initiate the symptoms. Other times there does not necessarily need to be a stressor." He found no reference in her discharge summary from her hospitalization that chronic pain or her medical condition had led to her current condition. He found that other matters such as family relationships or inability to cope with activities of daily living were identified as issues, and it was not until Dr. N's November 4, 1997, letter that these were tied in with her injury. At the conclusion of his letter, he indicates that there are other records, such as Dr. N's earlier treatment records, that he did not have that could better assist him in making an evaluation. In response to Dr. CN's letter (by his own letter dated October 22, 1998), Dr. N noted that it was untrue that claimant was hospitalized in 1987, and that she had not been previously diagnosed with bipolar II disorder.

Claimant's treating doctor for her back was Dr. B. His September 8, 1997, notes record her hospitalization for bipolar II disorder. This is the first mention of this condition in the record presented from him. It was also brought out that at the time she was being treated by Dr. N, claimant was also having knee replacement surgery on both knees and coping well with the surgery (according to claimant and Dr. N). Claimant said that this was because the surgeries for her knees were successful.

Dr. G, a doctor who assessed a 27% impairment rating for the claimant, stated in a November 18, 1997, letter that he was unsure whether the carrier was accepting responsibility for the bipolar II disorder, and noted that she could return to work with restrictions due to her back injury alone, although Dr. N stated she could not return due to her bipolar II disorder.

The carrier presented medication sheets for various medications that were prescribed for the claimant prior to and after her injury (but before her 1997 hospitalization at T Hospital) such as Nardi, Effexor, and Lithium. According to these references, Lithium is prescribed for bipolar II disorder.

The evidence includes a hearing officer's exhibit that is a letter from the husband of the claimant requesting that an additional issue be added to the CCH on whether the carrier timely disputed the extent of the injury within 60 days after receiving written notice of the bipolar II condition. This letter was sent November 6, 1998, and stamped as received by

the field office on November 16, 1998. There is no copy shown to the carrier but it came out at the CCH that a copy was included in the claimant's documentary exchange following the benefit review conference (BRC). The carrier's attorney responded by noting that the exchange was sent to the carrier's Houston address (as apparently shown on the BRC report) rather than the carrier's local office address. He had tracked down the exchange only the week of the CCH. The hearing officer, noting that there was probably a problem with sending the request to add an issue along with the documentary exchange, declined to add the issue, but stated later in the CCH that it was his belief that the matter could be added in another proceeding and had not been waived as an issue. He said he would not add it in this proceeding as he would likely have to grant a carrier request for continuance (although one was not made on the record). The evidence showed that the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) on January 21, 1998, disputing the psychological condition. Neither party disputed that the first written notice of injury would be Dr. N's letter, which was dated November 4, 1997; the date this was actually received by the carrier was not developed.

Finally, the claimant presented affidavits from friends who stated that claimant had undergone a marked personality change since her injury and surgery. These affiants included a judge who had served as a district judge and appeals court judge, a corporate officer, a trial lawyer, and a local business owner and former broadcast executive.

The decision and discussion are very short. The hearing officer's operative findings are:

**FINDINGS OF FACT**

2. Neither the compensable injury of _____, nor the back surgery required by the compensable injury caused Claimant's Bipolar II disorder.

3. Claimant has a bipolar II disorder and other mental problems as the result of an ordinary disease of life.

No findings of fact were made as to whether claimant's disease preexisted the injury and, if so, whether it was, or was not, aggravated or made worse by the back injury. However, in the discussion is a brief sentence which may touch on this: "Claimant's history of treatment including symptoms and medications reflect many, if not all, of the symptoms of bipolar II disorder prior to the compensable injury."

At the outset, we cannot credit the procedural points of error made by the claimant. We note that no objection was made at the CCH to Dr. N being discharged, or to the ombudsman argument. In fact, claimant's husband commended the argument as representing a "marvelous job," and claimant declined, although given the opportunity by the hearing officer, to add to the statement. At no time does it appear in the transcript that the parties were urged to speed up their presentation of the case. Finally, we find no indication that Dr. C's testimony was taken as expert testimony by the hearing officer. He

could, however, be credited as a lay witness in his observation that the claimant had some mood swings prior to her injury. Such evidence was brought out in direct, not cross, examination. Moreover, it was offset by the affidavits from claimant's friends and we do not believe that the hearing officer ultimately credited this testimony as expert testimony.

It was the carrier's theory of defense that claimant had a preexisting condition, including undiagnosed bipolar II disorder, that continued past the date of her injury, and that it was not aggravated or caused by the injury. The carrier never argued that such a condition was an ordinary disease of life or was any expert evidence elicited to that effect. We cannot agree that it would be within common knowledge that a psychological disorder constitutes an ordinary disease of life. The matter of whether that was what claimant's illness presented was interjected by the hearing officer in his own cross-examination of Dr. N and then in closing argument, when he asked the carrier's attorney to respond to this concern. In Texas Workers' Compensation Commission Appeal No. 982184, decided October 28, 1998, we held that such a finding of ordinary disease of life was error when made by a hearing officer in the absence of evidence or being raised as a defense by the carrier, and we likewise reverse the fact finding in this case.

However, it is worth noting that even an ordinary disease of life which is incidental to a compensable injury may be found to be an occupational disease as defined in Section 401.011(34). In this case, although the claimant presented evidence and argued the case as identifying her injury as the trigger for a bipolar diagnosis, the matter of whether her underlying depression had been aggravated was also actually litigated. Dr. N regarded the manifestation of clear symptoms of bipolar II disorder as an aggravation of her depression, which he was already treating and opined was under control. While we are in one respect concerned with language as to whether the bipolar II disorder was "caused" by her back injury and surgery, we believe that the hearing officer had also considered whether the underlying condition was also "aggravated." Along this line, we note that the Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 951754, decided December 8, 1995, stated that aggravation of a preexisting psychological condition must be proven by a reasonable medical probability, and the claimed compensable psychological injury must not be merely a recurrence of symptoms inherent in the etiology of an underlying condition. While we acknowledge that evidence was certainly presented of an aggravation or enhancement that could also have persuaded the fact finder (and the assertion in the discussion that claimant had prior "hospitalizations" is somewhat exaggerated), the resolution of the conflicting evidence in this case was not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. We do not agree that the claimant's upbeat mood was necessarily held against her; it appears that Dr. R prescribed Lithium for her in 1990, a medication associated with bipolar II disorder. The hearing officer could also choose to believe, from claimant and Dr. N, that she was also under active treatment for depression at the time of her injury and that she showed the first signs of bipolar II disorder before her surgery. 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 Company of Pittsburgh, Pennsylvania v. Soto, 819

S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

We would, however, caution that a psychological syndrome or disorder need not be found to be part of an injury in order for medical treatment for an episodic recurrence, in reaction to an injury, to be forthcoming. The carrier is liable under Section 408.021(a) for medical treatment that not only cures or relieves the compensable injury, but generally promotes recovery and enhances the ability of the employee to return to or retain employment. The causation issue does not fully resolve the issues that the Medical Review Division may ultimately be asked to resolve in this regard regarding liability for treatment of the episode of depression.

Concerning whether an additional issue should have been added, it is clear that whether the carrier timely disputed was not an issue reported from the BRC. Under such circumstances, it could only be added by agreement of the parties or upon a finding of good cause for not raising the issue at the BRC. Section 410.151(b). Whether or not the hearing officer would have had to grant a continuance was speculative in light of the absence of a request for same. Strictly speaking, the hearing officer was not required to explain why he did not add an issue. We would note that whether the carrier had filed a timely TWCC-21 could have been ascertained well before the BRC in this case. Consequently, we cannot agree that there was error.

For the reasons stated above, we reverse and strike the finding of fact that claimant's condition was an ordinary disease of life. However, we affirm the decision otherwise for the reasons set forth in this decision, noting that it may have limited practicality in limiting the carrier's liability for some medical benefits.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge