APPEAL NO. 991435

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 3, 1999, a contested case hearing was held. With respect to the issues before him the hearing officer determined that the respondent's (claimant) compensable (low back) injury of _____, extends to the right knee and resultant depression and that appellant (carrier) did not timely contest compensability of the right knee injury but did timely contest compensability of claimant's resultant depression.

Carrier appeals certain of the findings, asserting that claimant's injury did not extend to his right knee and depression, that carrier had timely disputed "its first receipt of written notice of injury to the knee" and that the hearing officer's decision is against the great weight of the evidence. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, stating that he agrees with most of the hearing officer's findings but disagrees with Finding of Fact No. 5 and Conclusion of Law No. 5, giving reasons. Claimant's response is timely as a response but is untimely as an appeal of the hearing officer's determinations regarding carrier's timely contest of compensability of claimant's depression and therefore the hearing officer's determinations on that issue have become final. *See* Section 410.169.

DECISION

Affirmed on the appealed issues.

It is undisputed that claimant sustained a compensable right knee injury in August 1994 (not directly at issue in this case), had knee surgery in October 1994, and eventually was released to return to work without restrictions but with an eight percent impairment rating. Dr. G was claimant's treating doctor for that injury. Subsequently, claimant sustained a compensable low back lifting (a heavy object) injury on _____. Claimant went to the hospital emergency room and subsequently saw his regular family doctor, Dr. H, who diagnosed a lumbar strain with possible sciatic nerve irritation and referred claimant to Dr. CB, who has become claimant's treating doctor for the low back injury. Carrier has accepted liability for the back injury. Claimant had spinal surgery on April 10, 1997, in the form of a decompressive laminectomy at L3-4 bilaterally. Claimant continued to have some back complaints and was referred to the (rehab clinic) program for rehabilitation under Dr. M on or about September 3, 1997. In a report dated September 16, 1997, sent to Dr. CB, Dr. M recites the history of the back injury, comments that claimant has seen a Dr. B for injections, that claimant planned to change to Dr. CB as his "official" workers' compensation doctor and references a psychophysiological profile assessment. Claimant testified that he began in the rehab clinic physical therapy (PT) program eight hours a day, five days a week in October 1997. Claimant testified that the lower extremities exercises caused pain in his right knee and that he complained to the therapist. A rehab clinic report dated October 31,

1997, indicates claimant completed the first week of the program and is "prepared to begin intensive treatment." There is a notation that claimant complained of bilateral leg pain. Claimant testified that he was required to continue the exercises with stress to his knee. On or about November 18, 1997, claimant asked for a day off from PT in order to see an attorney about "a personal matter." Claimant testified that the appointment was regarding his house and/or homeowners' insurance. A rehab clinic note dated November 18, 1997, states:

> Although this patient has been doing very well physically in the gyms, he continues to be a somewhat perplexing and ambivalent patient. He is leaving this Wednesday to take a day off to "meet with my attorney on a personal matter" and will not reveal the issue or any relationship to his workers' compensation claim for which he is currently in rehabilitation. There also appears to be an ambivalence about returning to work as it may be possible for him to retire on work comp benefits with the "clock ticking" even though he is still receiving workers' compensation.

Claimant returned to Dr. CB on November 19, 1997, and, in a report of that date, Dr. CB summarized the events at the rehab clinic, that claimant believed that the rehab clinic was conspiring with the carrier, and concluded by taking claimant out of the rehab clinic program. Claimant testified that he returned to Dr. G for treatment of his knee (apparently with Dr. CB's blessing, who, in a note dated December 22, 1997, said "the final situation is [claimant] will see [Dr. G] for his knee"). Subsequent reports from Dr. CB reference continued right knee complaints.

> In a note dated December 17, 1997, Dr. G comments:
>
> [Claimant] returns today. He has had some surgery on his back in April. He has been in an aggressive rehabilitation program and is doing a fair amount of leg workout and strengthening. Back in November, he started having pain and swelling in his right knee which has not been previously bothering him since his surgery. He eventually was taken out of the rehab program. He has continued to have swelling in his knee, and he is here today for evaluation.

Dr. G diagnosed an aggravation of claimant's knee injury. In a report dated January 5, 1998, Dr. G commented that claimant's "knee became aggravated during his [rehab clinic] back rehab program." Claimant was noted to have effusion in his right knee. Continued effusion was noted on February 18, 1998, when Dr. G stated:

> I suspect he does have some additional cartilage damage in his knee since he has continued to swell in spite of me draining it and injecting his knee.

Dr. G suggested another month of conservative care and, said that, if claimant failed to show improvement, a repeat arthroscopy of the right knee might be necessary. In a Report of Medical Evaluation (TWCC-69) and narrative dated March 23, 1998, received date stamped by carrier on June 18, 1998, Dr. G recites claimant's history, including the 1994 injury and surgery, treatment by Dr. CB for the low back, claimant's rehabilitation program and concluded:

> During the course of his rehabilitation for his back, he aggravated the condition in his right knee in approximately November of 1997. He was seen again by me on 12/17/97, at which time he was noted to have a considerable amount of discomfort in his right knee and a large effusion. He was felt to have aggravated and worsened his previous underlying arthritic condition in his right knee. This was treated with aspiration and injection with corticosteroid preparation. He was then seen in follow-up in the office on both 1/05/98 and 3/18/98. He continued to have discomfort and persisted effusions in his right knee.

In a report dated October 21, 1998, to the carrier, Dr. G states:

> After review of the notes, it is my opinion based on reasonable medical probability that [claimant] did, indeed, sustain additional injury to his knee as a result of his treatment received at [rehab clinic]. Specifically, it is my opinion that the damage has occurred in the region of the patellofemoral joint due to excessive forces applied to this region and most likely resulted in fragmentation or additional loosening of cartilage fragments from this area. This, of course, is quite irritating to the knee and would produce a large effusion such as [claimant] had on his examination in my office on 12/17/97.

In the meantime, reports from Dr. M about claimant's course of treatment at the rehab clinic became increasingly harsher and defensive, accusing claimant of lying and dishonest behavior. Dr. M refers to a designated doctor's examination as "a fraudulent examination." At some point, Dr. M apparently contacted Dr. G about his allegations. Dr. G replied by letter dated December 17, 1998, stating:

> Thank you for your letter of 12-1-98. I have reviewed the notes, as well as my letter of 10-21-98. I do not have any objective evidence that the effusion in his knee noted on 12-17-97 was related to his activities at [rehab clinic]. This assertion was based on statements made to me by [claimant]. If indeed these were false statements, that could change everything and entirely negate my letter of 10-21-98.

The hearing officer noted Dr. M's reports, including some of the specific language, notes "inappropriate commentary" and concludes that "[l]ittle weight, if any, can be given to the

opinions of [Dr. M] because of [Dr. M's] own efforts to attack and discredit Claimant once Claimant left the [rehab clinic] program because of the new injury sustained during treatment for the low back injury."

Regarding the extent of injury to include claimant's depression, several of the cited reports reference claimant's psychological problems, including Dr. M's report of September 16, 1997. Claimant contends that carrier was fairly informed in writing of the depression claim on October 7, 1997, when carrier denied pre-authorization for a mental health evaluation. Nonetheless, claimant was referred to Dr. L for a psychiatric evaluation and, in a report dated March 18, 1998, Dr. L recites claimant's history, starting with the 1997 compensable low back injury and surgery (some earlier injuries are mentioned but not the 1994 compensable knee injury). Dr. L vaguely appears to consider the 1994 knee and 1997 back injuries as being related, recited a history of worsening depression and rage "about his circumstances and previous mistreatment at [rehab clinic]." Dr. L has the impression of depression disorder, moderate to severe. The hearing officer found that claimant developed depression as a result of the medical treatment in the form of PT for the low back injury at the rehab clinic, but that carrier had timely contested compensability at the April 6, 1999, benefit review conference (BRC). As previously indicated, the finding of timely contest of compensability for the depression has not been timely appealed so no further discussion on that issue is warranted. The hearing officer's finding that the depression is a result of the compensable low back injury and treatment of that injury is supported by the medical records, including Dr. L's report.

Carrier basically contends that no injury or aggravation of the knee occurred during PT at the rehab clinic, based principally on Dr. M's vitriolic attack on claimant, accusing claimant of dishonesty, and utilizing threats of lawsuits to intimidate Dr. M. Texas Workers' Compensation Commission Appeal No. 951108, decided August 23, 1995, had occasion to consider the compensability of injuries sustained by employees while undergoing medical treatment for compensable injuries. In Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992, the employee's neck and back were injured during PT to relieve the effects of a compensable injury involving bilateral carpal tunnel syndrome, tendinitis and shoulder impingement, and the Appeals Panel affirmed the hearing officer's decision that the subsequent injuries received during the PT were compensable. In Texas Workers' Compensation Commission Appeal No. 93861, decided November 15, 1993, the employee had sustained a compensable neck injury on July 3, 1991, and underwent neck surgery later that month. In February 1992 a work hardening program was prescribed to relieve the effects of the neck injury and, while performing knee exercises under the supervision of a physical therapist, the employee injured his left knee. The hearing officer found the knee injury to be compensable and the Appeals Panel affirmed, citing the following from Maryland Casualty Company v. Sosa, 425 S.W.2d 871 (Tex. Civ. App.-San Antonio 1968, writ ref'd n.r.e. *per curiam* 432 S.W.2d 515):

> The law is well settled that where an employee sustains a specific compensable injury, he is not limited to compensation allowed for that specific injury if such injury, or proper or necessary treatment therefor, causes other injuries which render the employee incapable of work.

The concurring opinion in Appeal No. 93861 observed that whether a subsequent injury was caused by the compensable injury, or the proper and necessary treatment thereof, is generally a question of fact and that factual issues frequently are "very close calls relying on reasonable inferences from the evidence presented." In the present case, the hearing officer chose to believe the medical evidence that claimant sustained an aggravation of his prior knee injury doing strenuous and extensive PT for his compensable back injury. Those findings are supported by Dr. CB's reports and Dr. G's reports prior to being influenced by Dr. M. The hearing officer notes that the medical records "reflect a drastic change in the opinion of Claimant's knee doctor [Dr. G] once [Dr. M] intervened with the knee doctor." Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. 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, 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 trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The hearing officer found that the carrier was given fair notice of the claimed knee injury pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)) in Dr. G's TWCC-69 and narrative report dated March 23, 1998, and date stamped received by carrier on June 18, 1998, but not disputed or contested until the BRC on April 6, 1999. Carrier's only response is that since claimant had not sustained a new knee injury during PT, carrier was not obligated to file a dispute. The hearing officer's findings on this issue are supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge