APPEAL NO. 991964

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). On August 5, 1999, a contested case hearing (CCH) was held. The issues were:

1. What is the date of injury?

2. Did Claimant [respondent] sustain a compensable [occupational] disease injury?

3. Does Claimant's injury include right wrist carpal tunnel syndrome, (CTS)?

4. Is Carrier [appellant] contest of compensability based on newly discovered evidence that could not have been reasonably discovered at an earlier date, or has Carrier waived its right to contest compensability?

5. Did Claimant have disability?

The hearing officer determined that the date of injury was _____; that claimant had sustained a compensable repetitive trauma occupational disease injury; that the injury does not include a right wrist CTS; that carrier's contest of CTS was based on newly discovered evidence, but that carrier's contest of tendinitis is not based on new evidence and carrier has waived the right to contest compensability; and that claimant has had disability from February 5, 1999, and continuing to the date of the CCH. The finding on the date of injury has not been appealed and has become final. Section 410.169.

Carrier appealed all the other issues, basically arguing that there was no injury because of lack of scientific probative evidence of an injury and that claimant had only a limited exposure to repetitive activities. The principal thrust of carrier's argument on all the issues is the legal contention that claimant's medical evidence does not comport to certain standards of admissibility, relevance or reliability set forth in cases cited by carrier. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from claimant.

DECISION

Affirmed.

Although this was a relatively lengthy and legally complex case, the basic background facts are not much in dispute. Claimant was hired by (Company) (Employer 1) to be a "packer" (packing bags of snacks in a box) and began her employment on December 9, 1998. Claimant was put in a training program and the first week was

classroom work and orientation and did not involve any packing. Claimant began packing with the assistance of a trainer on December 14th. While claimant did some packing, the expected rate was about 25% to 30% of the desired productivity goal. Exactly how much packing claimant did is in dispute but the idea was that claimant, with the assistance of a trainer packer, would eventually "ramp in" to the desired productivity goal. Claimant reported some hand/wrist pain on December 18, 1998, but a packer trainer that testified said this was not unusual because new employees would be using muscles they had not used before. Claimant continued packing (it is not clear to us whether she continued to have the assistance of a trainer) on December 28, 1998, having worked only three days the prior week because of the Christmas holidays, and, on _____, again complained of right hand and wrist pain and was sent to Dr. T. It is disputed how many days claimant actually worked packing (carrier says 9½, claimant says 13) and how much packing claimant actually did.

In a report dated December 30, 1998, Dr. T noted complaints of a "swollen, painful Rt hand . . . that she developed the above at work about 10 days ago after packaging boxes." Dr. T diagnosed "[r]epetitive use syndrome [illegible word or letters] early carpal tunnel." Carrier represents that illegible word was "R/O" meaning rule out. In another portion of the form report Dr. T wrote "[r]epetitive use injury. 2) ? Early carpal tunnel." Claimant was returned to light duty with restrictions to "avoid repetitive use of hands, especially right one." It is undisputed that claimant is only claiming a right hand/wrist injury. Claimant saw Dr. T again on January 4, 6 and 11, 1999, with Dr. T repeating his diagnosis. On the January 11th report, Dr. T adds the diagnosis of tendinitis and suggests that claimant not do work that "requires repetitive movement." It is undisputed that claimant continued to work in some kind of light, nonrepetitive-type duty until February 4, 1999. Subsequently, claimant changed doctors and began seeing Dr. D. In progress notes beginning February 5, 1999, Dr. D notes tendinitis of the right wrist and takes claimant off work. Another progress note of March 5, 1999, repeats that diagnosis. In a report dated February 26, 1999, Dr. D said claimant had "evidence of a probable [CTS] based on clinical history and physical examination." (It is undisputed that no EMG or nerve conduction studies were performed.) Dr. D concluded that claimant has "carpal tunnel involvement secondary to repetitive trauma." In a report for disability (group health) benefits, dated March 26, 1999, Dr. D notes "pain and edema in the right wrist" with an expected release to work effective March 27, 1999.

Subsequently, claimant began treating with Dr. VB, who noted bilateral wrist injuries and recommended treatment by "various physiotherapeutic modalities." Claimant's records were sent to Dr. K for a record review. Dr. K, in a report dated June 17, 1999, commented that it was "quite reasonable that [claimant] developed pain in the wrist and forearm after beginning a job for which she was perhaps not physically suitable" but that the condition almost always clears up after a week or two. The hearing officer notes several conclusions which he believes are significant and which are quoted from the report:

> In the records reviewed, there are no physical findings or clinical history that describes typical [CTS].
>
> It would be my suggestion to accept the concept that [claimant] has had a temporary tendonitis as a result of her new work activity, and one would expect this to resolve itself by three weeks, and leave her at her pre-injury status.
>
> The primary question here is whether or not she has any continuing difficulties, such as nerve entrapment or [CTS], and in order to answer this question, I would need to examine her.

Claimant testified that she began work for another employer (Employer 2) on July 6, 1999, working full time at a job (quality inspector), which did not require repetitive hand movements, at a lower rate of pay (claimant made about $12.50 an hour for Employer 1 compared to about $8.50 an hour for Employer 2). Exactly how much claimant earned, or her average weekly wage (AWW) including benefits, from each employer is in dispute; however, there was general agreement that claimant was earning less than her preinjury AWW with Employer 2.

At the CCH, Dr. C was called by carrier and qualified as an expert medical witness. Dr. C testified that he had only reviewed claimant's medical records (as had Dr. K) but that he was familiar with the packing job. Dr. C testified that claimant had not sustained an injury. The hearing officer summarized Dr. C's testimony as follows:

- The nature of the work should not have caused an injury. (He did state it was possible she could have had tendinitis.)
- The medical records did not indicate any objective clinical or examination findings to indicate there was an injury.
- Tests necessary to establish CTS were not done.

The hearing officer, in his Statement of the Evidence, commented:

> [Dr. T] and [Dr. D] both diagnosed tendinitis after examining Claimant. [Dr. D] noted both tendinitis and edema. [Dr. K] accepts that diagnosis and [Dr. C] acknowledges tendinitis is possible. The evidence indicates Claimant sustained a work related tendinitis injury.

At the conclusion of the CCH, the hearing officer agreed to leave the record open for the carrier to submit a brief regarding the admission and probative value of claimant's medical reports, and claimant's response. The file we have does contain carrier's brief on this point; however, it is not marked as either a hearing officer's or carrier's exhibit. We further note that Carrier's Exhibit Nos. 1 through 10 were admitted; however, only Carrier's Exhibit Nos.

1 through 8 are listed under "Evidence Presented." Carrier, in its appeal, comments that it is unsure of whether the hearing officer admitted, and considered for all purposes, Claimant's Exhibit Nos. 1 through 3. Our review of the record concludes that the hearing officer admitted those records for all purposes (about counter 200, tape 3, side A (side 5)).

Carrier initially complains that the hearing officer found that claimant had "tendinitis" and that over six months of disability was not supported by the medical evidence. Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Although both Dr. C and Dr. K indicated that tendinitis (if any) was of temporary duration and should resolve in two or three weeks, the Appeals Panel has long held that disability may be established based on claimant's testimony alone, if believed by the hearing officer, citing Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989) and Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, the main thrust on both the injury and disability issues is that "'tendinitis' is the kind of matter which is 'beyond the common experience' and therefore requires 'expert testimony' based on 'reasonable medical probability, as opposed to a possibility, speculation, or guess,'" citing Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). We do not necessarily agree with that proposition and note that we have frequently held that although a diagnosis of CTS must be based on expert medical evidence, the cause of CTS (and, in this case, tendinitis) can be established by the testimony of the claimant alone, if found credible, citing Harrison, *supra*, and Texas Workers' Compensation Commission Appeal No. 961008, decided July 1, 1996 and Texas Workers' Compensation Commission Appeal No. 941077, decided September 26, 1994. We hereby uphold the hearing officer's findings that claimant sustained tendinitis as being sufficiently supported by the evidence, and reject carrier's contention that that diagnosis would only support "three weeks of 'disability' related to that condition."

Carrier also contends that the hearing officer's comments in his Statement of the Evidence that claimant "does not have CTS at this time. However, in the future with proper testing it may be established that Claimant has CTS" as constituting error and the finding of no CTS was *res judicata.* We note that much of carrier's case that claimant did not have CTS was based on the fact that there had been no EMG, nerve conduction studies, or other testing to objectively show CTS and it was Dr. C's testimony that such testing was required before a definitive diagnosis of CTS can be made. Whether there would be a nexus between any future possible diagnosis of CTS and claimant's employment is purely speculation. In this case, the hearing officer is saying that claimant had not met her burden of proving she had CTS (which we agree must be based on medical evidence). Whether she can do so in the future is speculation and we decline to hold that this case forever precludes claimant from proving a CTS condition based on this employment.

Carrier contends that Dr. C only said that tendinitis was possible and not probable and that Dr. K's suggestion that claimant "had a temporary tendinitis does not equate to a medical opinion based on a 'reasonable degree of medical probability.'" Carrier, at the

CCH, objected to the admission of Claimant's Exhibit Nos. 1, 2 and 3 (medical reports from Dr. T, Dr. D and Dr. VB) on the basis that those medical opinions:

> do not meet the requirements for admissibility of expert opinions as enunciated by the Supreme Court of the United States in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) and by the Supreme Court of Texas in E. I. Du Pont De Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995), and as further clarified by the Texas Supreme Court in Gammill v. Jack Williams Chevrolet, 972 S.W.2d 713 (1998). Carrier asserts that the Claimant has failed to meet her burden of showing that the proffered medical reports, and any medical opinions contained therein, are relevant and reliable (i.e. meet the "fit" requirement), or that the persons preparing the reports are qualified to render opinions providing the necessary causal link between her work and the alleged development of [CTS].

Carrier also elsewhere cites Havner v. E-Z Mart Stores, 825 S.W.2d 456 (Tex. 1992), for the proposition that too many experts offer their testimony for a fee. Carrier contends that there is "almost an inherent bias by treating doctors" for a claimant. First, we will note that none of the cited cases are workers' compensation cases and none consider the 1989 Act. Gammill, *supra*, and Robinson, *supra*, are products liability cases and the experts in Gammill, *supra*, were engineers. Havner v. E-Z Mart Stores, *supra*, was a wrongful death case where the experts were police officers. Carrier's reference to the admissibility, relevance and reliability of the expert testimony in those cases omits any reference to Section 410.165 of the 1989 Act. That section provides:

> Sec. 410.165. EVIDENCE. (a) The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Conformity to legal rules of evidence is not necessary.
>
> (b) A hearing officer . . . shall accept all written reports signed by a health care provider. (V.A.C.S. Art. 8308-6.34(e) (part).)

We hold carrier's application of Robinson, *supra*, and Gammill, *supra*, at the administrative hearing level to be in direct conflict with Section 410.165 of the 1989 Act. Carrier sought to exclude the reports of Dr. T, Dr. D and Dr. VB on the basis that those reports did not meet the requirements of Robinson, *supra*, etc. We note that Section 410.165(b) provides that the hearing officer shall accept all written reports signed by a health care provider (not necessarily even a doctor). Further, Section 410.165(a) makes the hearing officer the sole judge of the relevance and materiality of the evidence and provides that conformity to legal rules of evidence is not necessary.

To digress from the issue strictly before us, we note that one of the purposes of the 1989 Act was to change the dispute resolution process from a jury-driven system to a

simplified administrative dispute resolution process. *See* 1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM, History, page 2 and Part 6, page 6-20. We also note that most workers' compensation claimants are not represented by counsel and are only assisted by lay ombudsmen, and that further, most claimants, if their claim is denied, do not have the financial wherewithal to pay for medical treatment from their own financial resources, much less pay an expert medical witness an hourly fee to review their case and testify at a workers' compensation proceeding. Based on the plain language of Section 410.165(a), we do not believe that the legislature, in enacting the 1989 Act, contemplated that only medical evidence from such witnesses as were qualified under Robinson, *supra*, etc., to be admissible in the administrative adjudication of benefit disputes before the Commission. Should an appellate court, or the legislature, tell us differently, we would, of course, comply with the spirit and letter of whatever instruction we are given.

As carrier has set forth in its brief to the hearing officer, the Appeals Panel has, on a number of occasions, addressed the cited cases. In Texas Workers' Compensation Commission Appeal No. 990857, decided June 9, 1999, a CTS occupational disease case, the Appeals Panel, in commenting on Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), held:

> Likewise, as observed by the hearing officer, expert evidence is not required to prove causation in cases of CTS. We note that the Havner decision itself does not require the finder of fact to refrain from considering the totality of evidence offered (not just expert evidence). *See* Havner, page 719. While we believe that it is a considerable oversimplification of the Havner case to state that it precludes consideration of an expert's "bare opinion," we find nothing in this toxic tort case to override the hearings scheme envisioned by the legislature in the 1989 Act. *See also* Texas Workers' Compensation Commission Appeal No. 990003, decided February 19, 1999; Texas Workers' Compensation Commission Appeal No. 981594, decided August 26, 1998. The doctor's opinions in medical reports expressly allowed in CCHs often represent the summary of the doctor's practical experience as well as his knowledge of learned treatises. There is no need in an Initial Medical Report (TWCC-61), Notice of Medical Payment Dispute (TWCC-62), or Report of Medical Evaluation (TWCC-69) to recite treatises for the opinions stated therein to be given credence by the hearing officer. We will not conclude that the claimant's doctor's opinions are not based, in part, upon the medical literature in favor of occupational causes of CTS, . . .

Contrary to the concurring opinion in Texas Workers' Compensation Commission Appeal No. 982642, decided December 23, 1998 (Unpublished), we are not saying that Robinson, *supra*, and Havner, *supra*, have no place in a workers' compensation proceeding; they can be used by the hearing officer to evaluate the evidence and to assess the weight and credibility he or she will assign thereto. However, we do not believe that those cases can be used to exclude reports from treating doctors and other referral doctors because no foundation is laid for their medical expertise. The reliability, weight and relevance of such

evidence rests solely with the hearing officer, and we will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong 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 of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

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:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge