APPEAL NO. 992040

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 19, 1999, a contested case hearing (CCH) was commenced, and concluded on July 20, 1999. The issues at the CCH were:

1. Is the compensable injury a producing cause of the diagnosed thoracic outlet syndrome?

2. Is the compensable injury a producing cause of the diagnosed Fibromyalgia to the spine?

3. Is the compensable injury a producing cause of the diagnosed bladder disorder?

4. Did Carrier [appellant] waive the right to contest the compensability of the claimed fibromyalgia and thoracic outlet syndrome injuries by not contesting compensability within 60 days of being notified of the injuries?

5. Is Claimant [respondent] entitled to reimbursement of travel expenses for medical treatment at the direction of [Dr. H] and, if so, for what amount?

With regard to those issues, the hearing officer determined that the compensable (back) injury was a producing cause of the thoracic outlet syndrome, fibromyalgia and "diagnosed bladder disorder," that carrier had not waived the right to contest compensability of the claimed conditions (not having fairly informed carrier) and that claimant is entitled to reimbursement of travel expenses in the amount of $1,457.40.

Carrier appeals, basically alleging six points of error: 1) that claimant's case had been judicially dismissed; 2) that the hearing officer admitted evidence which did not meet the "scientifically reliable" standards of Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), and E. I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 553 (Tex. 1995); 3) that the medical records contained hearsay; 4) that the medical records were not shown "to be based upon a reasonable degree of medical probability or certainty"; 5) that there was insufficient evidence to support a finding that the compensable injury was a producing cause of the three named conditions; and 6) that claimant was not entitled to reimbursement of travel expenses to see Dr. H, as expenses were for treatment of noncompensable injuries. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant also timely appeals the hearing officer's decision that carrier had timely contested compensability, citing medical reports of January,

April, July and August 1992. Claimant requests reversal on that issue. Both parties respond to the other's appeals, urging affirmance of the issue in their favor.

DECISION

Affirmed on all issues.

At the outset, we will note that this case has an extremely long and complex medical as well as legal procedural history having been appealed to the (District Court) and the (Court of Appeals). The hearing officer, in both her Statement of the Evidence and findings of fact, makes detailed comments and findings regarding both claimant's medical history (which includes reports and records of at least 17 doctors, plus additional reports and records of hospitals, diagnostic testing and other health care practitioners) and procedural legal history and will not be repeated in detail here.

Claimant had been employed as a respiratory therapist at the employer hospital and, in the course of her employment on _____, felt a pain and "pulling" in her neck and back while lifting an obese patient. Claimant reported low back and thoracic pain. The injury was disputed, the case was eventually heard at a CCH, and resulted in being appealed by the carrier to the Appeals Panel, which resulted in Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993. In that decision, the Appeals Panel affirmed the hearing officer's decision that claimant sustained a compensable cervical, thoracic and lumbar spine injury, had disability and that claimant did not have a compensable psychological injury. Much of claimant's medical history, up to that point, is recited in Appeal No. 93705. That case included as a prime issue whether claimant had reached maximum medical improvement (where the Appeals Panel affirmed that claimant had not). Regarding a claim for a urological problem, which the hearing officer found "unproven," the Appeals Panel held that the hearing officer's decision and affirmance "does not foreclose the question of whether the bladder problem results from the compensable injury."

Carrier appealed to the District Court to set aside the Texas Workers' Compensation Commission (Commission) Appeals Panel decision on November 9, 1993. Subsequently, claimant requested that the Commission intervene in the District Court proceeding (Claimant's Exhibit No. 5), which it did, arguing that Appeal No. 93705 was correct and should be upheld, and that carrier had failed to timely file its petition (Claimant's Exhibit No. 6). After some legal maneuvering, a jury trial was held which found against the claimant (Claimant's Exhibit No. 14). Claimant and the Commission appealed to the Court of Appeals which, in an order dated May 2, 1996, entered a judgment dismissing claimant's appeal (because claimant failed to timely file a bond) for lack of jurisdiction and severing claimant's appeal from the Commission appeal (Claimant's Exhibit No. 20). In an *Amicus Curiae* brief, claimant stated that she did not seek to relitigate the prior dismissal (for failing to timely post a bond), that the "dismissal is now final," but that claimant "is still entitled to relief, even though she is a non-appealing party" (Claimant's Exhibit No. 24). The Court of

Appeals, in a judgment and order dated October 9, 1997 (Claimant's Exhibit No. 26), held that carrier's appeal to the District Court was not timely, reversed the District Court's decision and rendered carrier's cause of action dismissed for want of jurisdiction. On a cross-point whether claimant could obtain relief, the Court of Appeals held:

> By its cross-point, [carrier] maintains that neither [claimant] nor [the Commission] has standing to seek affirmative relief for [claimant], on the ground that the interests of [claimant] and [the Commission] are "independently divergent." [Carrier], however, presents no authority in support of its position. An intervening party has the status of a plaintiff. *First Heights Bank FSB v. Gutierrez*, 852 S.W.2d 596, 618 (Tex. App.-Corpus Christi 1993, writ denied). Unless the intervention is struck, an intervening party is a party for all purposes. *Brook v. Brook*, 865 S.W.2d 166, 172 (Tex. App.-Corpus Christi 1993) *aff'd* 881 S.W.2d 297 (Tex. 1994). [The Commission] intervened pursuant to Section 410.254 of the Texas Labor Code, which reads: "On timely motion initiated by the executive director, the commission shall be permitted to intervene in any judicial proceeding under this subchapter or Subchapter G." TEX. LAB. CODE ANN. § 410.254 (Vernon 1996). Because it is not disputed that [the Commission] filed a timely motion to intervene, the trial court was required to grant the intervention. *See Esis, Inc. Servicing Contractor v. Johnson*, 908 S.W.2d 554, 563 (Tex. App.-Fort Worth 1995, writ denied). No "justiciable interest" requirement applies to such an intervention.[2] *Id.* To the extent, therefore, that [carrier] is challenging the discretion of the trial court to have allowed [the Commission's] intervention, we hold that the court did not abuse its discretion. [Carrier's] cross-point is overruled.

On February 13, 1998, the Supreme Court of Texas denied carrier's petition for review (Claimant's Exhibit No. 29). The effect of the Court of Appeals' decision was to revive the Appeals Panel decision in Appeal No. 93705, *supra*, as the final judgment.

Regarding the medical evidence, the hearing officer referenced reports of Dr. P supporting the diagnosis of thoracic outlet syndrome and reports of Dr. T, Dr. S and Dr. Y, which diagnosed "fibromyalgia syndrome." Dr. O, in a report dated March 2, 1995 (Claimant's Exhibit No. 37), assessing an impairment rating (IR) in addition to referencing several reports diagnosing fibromyalgia, commented:

> Another report was noted dated 1/6/94, however, unsigned; hence the name of the physician was not known. Nevertheless, it was mentioned in that report that the patient started experiencing "bladder problems" after extensive

[2] Even so, [the Commission's] stated bases for intervention are the administration of workers' compensation law and the protection of its interests as administrator of its "subsequent injury fund." *See* TEX. LAB. CODE ANN. § 403.006 (Vernon 1996).

> rehabilitation at (Institute). Indeed, these bladder problems occurred about 10 months post injury. Mention was also made in the report that the patient was hospitalized for catheterization. This indeed was the first mention of the patient's bladder dysfunction. In other words, the bladder dysfunction occurred sometime in August of 1992 which coincided with the report dated August 25, 1992 by [Dr. G].

Dr. H, in several reports (Claimant's Exhibit No. 36), comments on claimant's "myofascial dysfunction" and, in a report dated March 28, 1994, stated claimant "has a chronic cervical-thoracic-lumbar pain syndrome, post traumatic, associated with fibromyalgia." In another report and Report of Medical Evaluation (TWCC-69) (date unclear), Dr. H mentions claimant's "urinary incontinence" in assessing an IR. As previously indicated, there are numerous other medical reports in evidence. The hearing officer, in her Statement of the Evidence, comments:

> Subsequently Claimant was referred to (rehabilitation center) Rehabilitation, where her bladder retention problems began. Ultimately, Claimant was seen by [Dr. H], with whom she has treated since. Claimant has consulted with numerous other doctors and underwent surgical treatment to her cervical spine on 1-23-95. Although the medical evidence was in conflict, Claimant has been diagnosed by numerous doctors with fibromyalgia, thoracic outlet syndrome, and bladder dysfunction, with several of them identifying causation as her compensable injuries.

With regard to claimant's appeal of the hearing officer's finding that carrier had timely contested compensability of the new claimed injuries, the hearing officer commented:

> Regarding the waiver issue, Claimant failed to establish that Carrier ever received sufficient written notice of the fibromyalgia and thoracic outlet syndrome as required by Rule 124.1 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1], that would initiate the 60-day time period for Carrier to timely dispute compensability of these injuries. Without establishing the initiation of the time-period, it could not be determined that Carrier waived the right to dispute these injuries.

Carrier, in its first point, contends that, after claimant's appeal to the Court of Appeals was dismissed for lack of jurisdiction, "the District Court's trial judgment becomes final against [claimant]" and that the appeals of the Commission and claimant "are not so interwoven or dependent upon each other so as to provide relief to [claimant] who was not a party to the [Commission] appeal." The Court of Appeals' reasoning on this point was quoted previously and the hearing officer commented:

> Despite Carrier's assertions and arguments to the contrary, a careful reading of the decision of the [Court of Appeals] demonstrates that Carrier's

> argument that (Claimant) was not entitled to the relief that [the Commission] was entitled to as Appellant-Intervenor due to severance and dismissal of her appeal and the independently divergent interests of Claimant and [the Commission] was not found to be persuasive and was specifically overruled.

We hold the hearing officer's reading of the Court of Appeals' decision to be a fair and accurate reading and is supported by the evidence. Consequently, carrier's appeal on this point is denied as a matter of law.

Carrier's next points are that the hearing officer erred in admitting medical records which contained hearsay, were not shown to be based upon a reasonable degree of medical probability or certainty and which are not shown to be scientifically reliable pursuant to the standards in Havner, *supra*, and Robinson, *supra*. We have recently addressed basically the same issues in Texas Workers' Compensation Commission Appeal No. 991964, decided October 25, 1999. First, we would note that Havner and Robinson are not workers' compensation cases and that neither in Appeal No. 991964 nor this case did carrier refer to, or comment on, 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).)

As we noted in Appeal No. 991964, Section 410.165(b) specifically requires the hearing officer to "accept all written reports signed by a health care provider" in a workers' compensation dispute resolution proceeding. Consequently, we hold that carrier's application of Havner and Robinson to a workers' compensation CCH to be in direct conflict with Section 410.165 of the 1989 Act. Regarding the weight and relevancy of those reports, Section 410.165(a) makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and to the weight to be given to the evidence. Regarding carrier's contention that the medical reports and records contain hearsay, we also note that Section 410.165(a) provides that conformity to the legal rules of evidence is not necessary.

Regarding carrier's contentions that causation was not proven within a reasonable degree of medical probability pursuant to Robinson, Havner, and others, in Texas Workers' Compensation Commission Appeal No. 990857, decided June 9, 1999, a carpal tunnel syndrome (CTS) occupational disease case, the Appeals Panel, in commenting on Havner, 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 [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, . . .

Further, as we held in Appeal No. 991964, *supra*, we are not saying that Havner and Robinson 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 was 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 on the issues of extent of injury and waiver.

Regarding carrier's appeal of the travel expenses issue, carrier bases its appeal on the fact that claimant's conditions are not compensable and, therefore, "travel expenses for treatment of claimant's alleged conditions are not subject to reimbursement." Having affirmed the hearing officer's findings that there is sufficient evidence to support the hearing officer's decision on the compensability of the thoracic outlet syndrome, fibromyalgia and bladder disorder, and that the hearing officer's findings on those issues are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, Cain*, supra*, we also affirm the hearing officer's decision on the travel expense issue.

Regarding claimant's appeal that carrier had fair and adequate notice in 1992 of claimant's claimed condition and that carrier failed to timely contest compensability of those conditions, we note, as does the hearing officer, that there was scant, if any, evidence presented when carrier may have received the reports relied upon by claimant or whether

those reports met the requirements set out in Rule 124.1(a)(3). Consequently, we also affirm the hearing officer's decision on that issue.

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:

_____
Philip F. O'Neill
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge