APPEAL NO. 000623

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 February 25, 2000. The hearing officer determined that the respondent=s (claimant) hearing loss results from the _____, compensable injury. The appellant (carrier) files a request for review, arguing that we should reverse the decision of the hearing officer and render a decision in its favor because the hearing officer erred as a matter of law in finding the claimant's hearing loss was compensable. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____. The parties further stipulated that the claimant's left knee injury did not result from this compensable injury. Dr. P, a physical medicine and rehabilitation physician, describes the claimant's injuries as follows in a report dated June 2, 1999:

> [Claimant] is a 57 year old Latin American male who had been at work on _____, when he got pulled up by a rack. The hook of the rack pierced through his right hand. He got lifted off the ground for a few feet and within seconds was put back down. He sustained right hand, which is his dominant hand, injury. Patient was seen and treated in the Emergency Room. Patient had numerous surgeries and treatments for infection, including a bone graft, removal of a row of carpal bones, debribement [sic] as infection set in, patient also needed eight (8) to ten (10) weeks of antibiotics via a subclavian line in the Spring of 1998. On 2/19/98 it was established that the patient's hearing loss was indeed contributed to by the treatment with Vancomycin used to treat patient's infection in the injured hand.

Also in evidence is a report from Dr. C, an ear, nose and throat specialist, dated April 1, 1998, where he states as follows:

> Bilateral sensorineural hearing loss secondary to noise exposure and ototoxicity.

In a June 4, 1998, report Dr. D, also an ear, nose and throat specialist, states as follows:

> The following quote is from the 1998 edition of the Physician's Desk Reference: "a few dozen cases of hearing loss associated with Vancomycin have been reported. Most of these patients had kidney dysfunction or a pre-existing

hearing loss or were receiving concomitant treatment with an ototoxic drug. Vertigo, dizziness and tinnitus have been reported rarely."

I am enclosing a copy of his audiogram done today, which is almost identical to the audiogram of February 6, 1998, done by [Dr. C]. I also agree with [Dr. C's] impression: 1) Bilateral sensori-neural hearing loss secondary to noise exposure and ototoxicity; 2) Tinnitus, secondary to ototoxicity; and 3) Chronic dysequilibrium probable labyrinthine dysfunction.

Dr. A, stated as follows in a report of August 10, 1998, concerning the claimant:

He was seen by ENT consultation on April 1, 1998, who felt that the patient had bilateral sensory neural hearing loss secondary to noise exposure and ototoxicity due to antibiotic he received after surgery. Tinnitus secondary to the former and chronic dysequilibrium and probably labyrinthine dysfunction.

The records of Drs. P, C, D and A, were admitted. The carrier did not object to the admission of these documents as they were signed medical reports but stated that for the record, "we are making our Havner [Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), cert. denied, 118 S. Ct. 1799 (1998) (hereinafter Havner)] objection to the opinions contained therein." The carrier argued at the CCH that applying the holding of Havner the opinions of Drs. P, C, D and A did not establish that the claimant's hearing loss was a result of his compensable injury.

The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. Following surgery related to the _____ compensable injury, Claimant developed an infection.

3. Claimant's infection was treated with the antibiotic Vancomycin.

4. Claimant has developed hearing loss.

5. [Dr. C] and [Dr. D], both ear, nose and throat specialists, each opined that Claimant's hearing loss is secondary to noise exposure and ototoxicity.

CONCLUSION OF LAW

3. Claimant's hearing loss does result from the _____ compensable injury.

The carrier files an extensive brief, citing numerous cases and making a number of arguments. We shall attempt to reduce the carrier's line of argument to its components. The carrier does not dispute that it is the law that injury which results from the treatment of a compensable injury is itself compensable. This is the holding of 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 carrier concedes that the Texas Rules of Evidence do not apply to CCHs conducted under the 1989 Act. The carrier correctly argues that the Appeals Panel has in a number of cases refused to apply the evidentiary standards set out in Havner to evidence proffered at a CCH. The carrier argues that our refusal to apply Havner has been incorrect, relying primarily on the recent decision of the Court of Appeals in Texas Workers' Compensation Insurance Fund v. Lopez, No. 04-98-00338-CV (Tex. App.-San Antonio January 12, 2000) (hereinafter Lopez).[1]

In Lopez, the Court of Appeals affirmed the decision of the trial court based on a jury verdict to award the claimant workers' compensation benefits for chronic obstructive pulmonary disease which he asserted was caused by working as a sandblaster. The trial court's decision overturned a decision of the Appeals Panel affirming a hearing officer's denial of workers' compensation benefits. The carrier contends that in Lopez, the Court of Appeals applied the standards of Havner in analyzing the decision of the trial court. The carrier argues that this analysis establishes that Havner is applicable to workers' compensation cases.

This argument misses the essential point of our prior cases in this area. We have not said that Havner has no application to workers' compensation cases. What we have repeatedly held is that the hearing officer at a CCH is not required to apply the standards of Havner in regard to evidence proffered at a CCH. This is because Havner deals primarily with the admissibility of evidence under Texas Rules of Evidence 702. This rule is applicable to court proceedings, including court proceedings involving workers' compensation cases, but is not applicable to administrative income benefit hearings conducted pursuant to the 1989 Act because the Texas Rules of Evidence do not apply to such hearings. While the carrier argues that the Court of Appeals in Lopez applied the standards of Havner in determining whether the evidence introduced in the district court trial was sufficient to support the jury verdict as opposed to whether or not it was admissible, an intellectually honest reading of Lopez reveals that this is simply untrue. The Court of Appeals in Lopez applied Havner to determine whether the testimony of the claimant's medical expert was properly admitted at trial. The Lopez decision applied the Supreme Court decisions in Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994) and Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993) in determining whether the evidence was sufficient to support the jury's verdict.

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[1]Cited by the carrier as Texas Workers' Compensation Fund v. Lopez, 2000 WL 31519 (Tex. App.-San Antonio January 12, 2000, pet. filed).

This points to the fact that another distinguishing feature of workers' compensation litigation between administrative proceeding before the Texas Workers' Compensation Commission (Commission) and court proceedings is that in court proceedings the parties have a right to have factual disputes resolved by juries, whereas in administrative proceedings the fact finder is a hearing officer. 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 of 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, 702 (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, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review, we find the hearing officer's decision in the present case sufficiently supported by the evidence.

The carrier argues that applying different evidentiary standards in administrative proceedings before the Commission rather than in litigation of these cases in court is contrary to public policy for a number of reasons. No less an authority than the Supreme Court of Texas has recently pronounced on the fact that different evidentiary standards are appropriate in Commission hearings and court proceedings. The Supreme Court states as follows in National Liability and Fire Insurance Company v. Allen, No. 98-1046 (Tex. February 3, 2000):

> The dissent also complains that our construction of Section 410.306(b) flouts the legislative intent of streamlining workers' compensation proceedings and results in more expense for workers. But it is the dissent's view of the statute that would require workers to spend more time and money in resolving disputes. Making testimony in the Commission record admissible at trial just because it was admissible when offered at the Commission would force workers to hire attorneys to represent them in Commission proceedings. Workers would need attorneys to effectively cross-examine witnesses and object to inadmissible evidence at Commission proceedings to protect the record. This result would be especially ironic because the Labor Code specifies that the evidentiary rules do not apply to Commission proceedings. *See* Tex. Lab. Code ' 410.165.

Therefore, the dissent's view would make Commission proceedings more formal and costly than the Legislature intended. Finally, the dissent's interpretation would lead to the anomalous and cumbersome result of trial courts having to retroactively apply the evidentiary rules to evidence offered art the Commission to determine whether that evidence is admissible at trial.

In any case, we conclude that the hearing officer's determination that the credibility of claimant's medical evidence and whether it is inherently unreliable is not erroneous. The hearing officer chose to credit the opinions of Dr. C and Dr. D concerning causation and, having reviewed the record, we perceive no error.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge