

## APPEAL NO. 001206

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 17, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) sustained "a psychological injury to include a post traumatic stress disorder [PTSD] causally related to the compensable injury sustained by the claimant on \_\_\_\_\_"; that the appellant/cross-respondent (carrier) did not waive its right to contest compensability of the psychological injury under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)); and that claimant had disability as a result of his compensable injury from \_\_\_\_\_, through the date of the hearing. In its appeal, the carrier argues that the hearing officer's extent-of-injury and disability determinations are against the great weight of the evidence. The carrier also contends that the hearing officer erroneously expanded the issue to include psychological problems beyond PTSD, which was the only condition mentioned in the disputed issue. In his response to the carrier's appeal, the claimant urges affirmance. In his cross-appeal, the claimant contends that the hearing officer erred in finding that the carrier had not waived its right to contest compensability of the PTSD, arguing that the hearing officer "improperly applied the cited Rule 124.3 in a retroactive manner." The carrier responds to the claimant's appeal, urging affirmance.

### DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that on \_\_\_\_\_, the claimant sustained a compensable injury, when he fell from the top of a large fertilizer truck. He sustained multiple fractures to his right hip, right wrist, right patella, and left thumb. The claimant's treating doctor for his orthopedic injuries is Dr. R. Dr. R performed surgery to repair the claimant's fractures. Dr. K, the claimant's family doctor, has been supervising his medications.

In a letter of November 23, 1998, Dr. R noted that the claimant is "having significant anxiety and stress related symptoms and needs to be seen either by his family doctor there in \_\_\_\_\_, or by a psychologist, or preferably a psychiatrist here in \_\_\_\_\_, to help him deal with his anxiety from a medication standpoint." In a progress note dated November 17, 1998, Dr. R states that he has spoken to Dr. K and that Mr. B is available to provide psychotherapy to the claimant twice a week and that Dr. R is recommending that claimant begin psychotherapy with Mr. B.

Mr. B testified at the hearing that he began seeing the claimant on December 2, 1998, and that he has been treating the claimant for PTSD and depression. Mr. B stated that the claimant met the diagnostic criteria for PTSD according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) in that he experienced an event that involved actual or threatened death or serious injury, or a threat to the physical integrity of self, namely the fall from the truck, and his response involved intense fear, helplessness, or horror. In addition, Mr. B testified that the claimant "persistently reexperienced" the

traumatic event in that he had recurrent and intrusive distressing recollections of the event; he had recurrent dreams about the event; and he had the feeling of reliving the experience. Mr. B also testified that the claimant exhibited “persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness.” Specifically, the claimant made efforts to avoid thoughts, feelings, and conversations about the incident; he was unable to recall important aspects of the trauma; he had diminished interest and participation in significant activities; he became detached and estranged from his family; and he was hopeless and had a sense of a foreshortened future. Mr. B noted that the claimant also met the diagnostic criteria of having difficulty sleeping and of being irritable and having outbursts of anger. Mr. B also testified that the claimant exhibited the “classic symptoms” of depression. Mr. B concluded that there was no doubt in his mind that the claimant’s PTSD and depression were directly related to his compensable injury because the onset of symptoms occurred after that event and because the claimant’s recollections, flashbacks, and concerns are related to that event. Mr. B further testified that it is a “classic PTSD sequence” for there to be delayed onset following a period of little or no symptomatology, as occurred with the claimant. On cross-examination, Mr. B stated that he encouraged the claimant to attempt to return to work because he did not want him to “shut down”; that he understood that the claimant in fact returned to work for a period during which time Mr. B did not see the claimant; and that on October 14, 1999, the claimant returned to Mr. B with a “histrionic presentation.” Mr. B acknowledged that at that time, the claimant expressed concern about financial difficulties, concerns about his employer’s not being responsive to safety issues, and difficulties dealing with the carrier and his workers’ compensation claim.

In an October 18, 1999, progress note, Dr. R stated that the claimant “is on the verge of an emotional breakdown” and that he “needs to be off work completely for at least the next month . . . .” In a December 2, 1999, letter to the claimant’s attorney, Dr. R stated that the claimant’s “present condition is complicated by [PTSD]. I am not a practicing psychiatrist or psychologist, but I have seen this commonly after the severity of the injury, particularly when the patient tries to return to work early in order to satisfy requirements of his employer.” In a “To Whom it May Concern” letter dated December 13, 1999, Dr. K likewise opines that the claimant has PTSD, explaining how the claimant satisfies the diagnostic criteria for PTSD.

Mr. W, a licensed professional counselor, testified at the hearing that he met with the claimant at the request of the carrier to determine if he had PTSD and to determine his “overall diagnostic condition.” Mr. W testified that the claimant’s fall could qualify as an extreme stressor for purposes of satisfying that diagnostic criteria of PTSD. However, he stated that he did not diagnose PTSD in the claimant because the claimant did not exhibit intense fear, helplessness, or horror from the accident and did not give any indication of reliving the experience. That is, Mr. W stated that he could not substantiate the basis for such a diagnosis because the claimant did not exhibit recurrent and intrusive distressing recollections of the trauma. Mr. W testified that he diagnosed the claimant with major depression because he met the diagnostic criteria for depression and that the claimant’s compensable injury “played an important part in the depression.” Mr. W explained that he

believes that the claimant was predisposed to depression and the accident at work “was the straw that broke the camel’s back.” On cross-examination, Mr. W stated that there is “no doubt in his mind” that as a result of the claimant’s compensable injury, the claimant has some psychological injury and that Mr. W does not think there is any question about the fact that the claimant’s compensable injury plays some part in his psychological problems.

The claimant had the burden to prove the causal connection between his PTSD and his compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass’n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The parties appear to agree that causation of PTSD is a matter beyond common experience such that expert evidence of causation is required in this instance. When reviewing a hearing officer’s decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly 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).

The carrier contends that the hearing officer’s injury determination is against the great weight of the evidence. As noted above, there was conflicting evidence on the issue of whether the claimant had PTSD and whether it was causally related to his compensable injury. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence from Mr. B, Dr. R, and Dr. K over that of Mr. W. The hearing officer’s determination that the claimant’s compensable injury included PTSD is supported by sufficient evidence and our review of the record does not reveal that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse it on appeal. Pool; Cain.

The affirmance of the hearing officer’s determination that the PTSD is part of the compensable injury does not end the inquiry in this case, however, because the hearing officer made a broader determination that the claimant sustained a compensable psychological injury, including PTSD. The carrier asserts that the hearing officer erred in expanding the issue to include any psychological condition beyond PTSD. The carrier’s argument in that regard is well-taken. Although the better practice would have been to couch the disputed issue in terms of whether the claimant sustained a compensable psychological injury rather than adjudicating compensability of diagnoses, as it appears the hearing officer may have been attempting to do, the fact remains that the issue reported out of the benefit review conference (BRC) was phrased in terms of the compensability of PTSD. The parties did not file a response to the BRC report asking to modify the issue and they agreed to the issue as framed at the outset of the hearing. In addition, the carrier objected during the hearing to preserve its claim of error that depression was not included

in the issue certified out of the BRC. By its plain language, the issue was limited to PTSD. As such, the only question before the hearing officer and the only issue he could properly resolve was the compensability of PTSD. The hearing officer abused his discretion in expanding the issue before him to consider the compensability of conditions other than PTSD. Accordingly, we reverse the determination that the claimant sustained a compensable psychological injury, including PTSD, and render a new decision that the claimant's compensable injury extends to and includes PTSD. The hearing officer was without the authority to determine compensability of any psychological condition other than PTSD and the compensability of any such condition remains unresolved.

The success of the carrier's challenge to the disability determination is premised upon the success of its argument that the claimant did not sustain a compensable psychological injury. Given our affirmance of the extent-of-injury determination, we likewise affirm the determination that the claimant had disability from \_\_\_\_\_, through the date of the hearing, in light of the uncontroverted evidence that, although the claimant's hourly wage remained the same during the period from April 1999 to October 1999 when he returned to work, he worked fewer hours.

Finally, we briefly consider the claimant's cross-appeal, that the hearing officer erred in finding that the carrier did not waive its right to contest compensability of the PTSD because the carrier had no duty to contest the extent of injury within 60 days under Rule 124.3. The claimant contends that the hearing officer erred in applying Rule 124.3 retroactively. We find no merit in this assertion. In Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000, we determined that the Texas Workers' Compensation Commission (Commission) cannot impose a waiver in an extent-of-injury case given the essential rationale expressed by the Commission in the preamble to Rule 124.3 to the effect that the Commission construes Section 409.021 as not providing for waiver of extent of injury. Accordingly, we perceive no error in the hearing officer's application of Rule 124.3 in this case.

The hearing officer's determination that the claimant sustained a compensable psychological injury, including PTSD, is reversed and a new decision rendered that the claimant's compensable injury extends to and includes PTSD. In all other respects, the

hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Kathleen C. Decker  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge