APPEAL NO. 002740

Following a contested case hearing held on November 6, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the respondent/cross-appellant (claimant) sustained a compensable injury on _____, and had disability resulting from that injury. The appellant/cross-respondent (carrier) appeals the hearing officer's determinations, asserting that the expert medical evidence upon which the hearing officer's decision is partly founded is so weak as to constitute no evidence. The claimant responds that the hearing officer's decision is supported by the evidence, but asserts that the hearing officer erred in failing to grant a motion to add an issue on the carrier's alleged waiver of the right to contest compensability and that the hearing officer compounded that error by failing to allow the claimant to present evidence to substantiate her allegation of waiver. The claimant further alleged that the carrier had waived the right to dispute an injury in the course and scope of employment by failing to adequately disclose the basis of its dispute of compensability. The carrier responded to the claimant's cross-appeal by asserting that the cross-appeal had not been timely filed and by further asserting that the carrier was under no obligation to dispute because there was no injury.

DECISION

Affirmed.

The claimant worked for (employer) as an aircraft mechanic. On the date of the claimant's injury she was involved in draining and removing fuel bladders from aircraft, a task which necessitated her entry into the fuel bladder to remove any remaining fuel, disconnect fittings, and remove fuel pumps. On _____, while preparing to remove a fuel bladder, the claimant experienced the onset of breathing difficulties which she stated were more severe than any asthma symptoms she had suffered in the past and were accompanied by a burning sensation in her lungs.

The hearing officer found that the claimant had sustained an occupational disease identified as Reactive Airways Dysfunction Syndrome (RADS), which was triggered and caused by the inhalation of jet fuel vapors. The hearing officer stated in his opinion that he based his findings on the testimony of the claimant and the opinion of a pulmonary specialist who had undertaken the claimant's care, Dr. N. The hearing officer further noted that he found evidence from an expert witness tendered by the carrier to be of very little credibility. The carrier attacks the opinion of Dr. N, asserting, in essence, that it amounts to no more than a guess or speculation and is unworthy of any weight or credibility.

The hearing officer correctly notes that Dr. N's opinion is admissible in a CCH. As the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 991964, decided October 25, 1999:

> [W]e are not saying that Robinson [E. I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995)], and Havner [Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997, cert. denied 523 U.S. 1119)], 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. [Citations omitted.]

Dr. N's testimony and documentation indicated that the claimant's exposure to jet fuel vapors resulted in her RADS. The hearing officer determined that Dr. N's testimony was credible and, in combination with the other evidence, was sufficient to establish a causal connection between the work-related exposure and the claimant's RADS. It is noted that the hearing officer expressed his opinion on the potential for the admissibility of the expert testimony and/or opinion of Dr. N should this matter ultimately be addressed by the judiciary. We note that it is inappropriate for either a hearing officer or the Appeals Panel to speculate on what a court might do in assessing the admissibility of evidence under Havner, *supra*, inasmuch as admissibility of evidence is not limited by Havner, *supra*, in administrative hearings before the Texas Workers' Compensation Commission (Commission).

The carrier further asserted that the hearing officer erred in finding the claimant's testimony to be credible and in assigning any weight to Dr. N's opinion, noting that Dr. N's opinion was dependent, at least in part, on the history given by the claimant. The hearing officer is the arbiter of the weight and credibility to be assigned to the evidence before him. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. While another hearing officer may have reached a different result based upon the evidence before him, the hearing officer's determinations on causation and disability are supported by the evidence, both lay and medical, and are not so against the great weight of the other evidence as to be clearly wrong or unjust.

The claimant's cross-appeal asserts that the hearing officer erred in not adding an issue of waiver. The claimant's motion to add an issue regarding the alleged waiver of the right to contest the compensability of the injury was first raised in the claimant's response to the benefit review officer's (BRO) report. Section 410.151(b) provides, in part, that an

issue that was not raised at a benefit review conference (BRC) may not be considered unless the parties consent or, if the issue was not raised, the Commission determines that good cause exists for not requesting the issue at the BRC. *See, also,* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). The claimant conceded, both in his response to the BRO's report and in his later motion to reconsider the denial of the motion to add the issue, that the issue of waiver had not been requested at the BRC. The hearing officer found there was no good cause for the failure to add the issue.

The claimant's request to add an issue on waiver was based upon the carrier's alleged failure to contest the compensability of the claimant's injury within seven days of the date the carrier received written notice of the alleged injury. The claimant's assertion of waiver relied on the decision in Downs v. Continental Casualty Company, No. 04-99-00111-CV (Tex. App.-San Antonio, January 26, 2000). Commission Advisory 2000-07, signed on August 28, 2000, states that following consultation with the Office of the Attorney General and in light of Section 410.205(b), the Commission understands that the Downs decision should not be considered as precedent at least until it becomes final upon completion of the judicial process and that the provisions of Rules 124.2, 124.3, and 132.17 remain in effect. Under this set of facts, we cannot say that the hearing officer's ruling denying the claimant's request to add the requested issue amounted to an abuse of discretion. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The claimant further asserts that the carrier waived the right to dispute the compensability of the claimant's injury by failing to adequately identify the reasons for its dispute. We disagree. The carrier specifically stated that it was denying benefits because there was no injury in the course and scope of employment and that the claimant's asthma, an ordinary disease of life, had not been aggravated by her employment. In Texas Workers' Compensation Commission Appeal No. 992679, decided January 12, 2000 (Unpublished), we stated that:

> The carrier is required to specify the grounds for the refusal to pay benefits under Section 409.022 and Rule 124.6(a). Specific words are not required for a full and complete statement of the grounds for refusal but a fair reading must indicate why the claim is being refused.

The foregoing has long been the test in determining whether a dispute is adequate. The carrier's notice of dispute in this instance tracked the wording of the statute and the hearing officer did not err.

There being sufficient evidence in the record to support the hearing officer's decision and no reversible error found in the record, we affirm the decision and order of the hearing officer.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge