APPEAL NO. 92080
FILED APRIL 14, 1992

On January 14, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The issues at the hearing were: (1) whether or not the appellant, claimant herein, sustained an injury in the course and scope of her employment with her employer; (2) whether or not claimant notified her employer of an injury within 30 days of her injury; and (3) whether or not claimant sustained disability as the result of a compensable injury. The hearing officer concluded that claimant did not sustain an injury arising out of and in the course and scope of employment and determined that she was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). The hearing officer made no findings or conclusions on the other two issues. Claimant contends that the evidence was sufficient to support a finding that she was injured in the course and scope of her employment and requests that we set aside the hearing officer's decision and enter a new decision that she sustained a compensable injury. Carrier, who is the employer's workers' compensation insurance carrier, asserts that the evidence supports the hearing officer's findings and decision, and that the findings and decision are not against the great weight and preponderance of the evidence.

DECISION

Finding that claimant's request for review was not timely filed, the decision of the hearing officer is affirmed.

Although not raised by carrier in its response to claimant's request for review, we find that claimant's request for review was not filed within the time limit imposed for an appeal to the Appeals Panel under the 1989 Act and rules of the Texas Workers' Compensation Commission. Article 8308-6.41(a) (1989 Act) provides in part as follows:

> A party that desires to appeal the decision of the hearing officer shall file a written appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings and shall on the same date serve a copy of the request for review on the other party. . . .

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (TWCC Rules) provides that a request for review of the hearing officer's decision shall be filed with the Commission's central office in Austin "not later than the 15th day after receipt of the hearing officer's decision; . . ." Rule 143.3(c) goes on to provide the following:

> (c)A request made under this section shall be presumed to be timely filed or timely served if it is:

(1)mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2)received by the Commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision.

Article 8308-6.34(h) provides in part that: "The decision of the hearing officer regarding benefits is final in the absence of a timely appeal by a party. . . ."

At the close of the hearing, the hearing officer advised that if any party was dissatisfied with his decision and wished to appeal it to the Appeals Panel, the party must file its appeal with the Appeals Panel no later than the 15th day from the date the party received his decision.

The hearing officer signed his decision on January 16, 1992. By letter dated January 27, 1992, the Commission's Division of Hearings & Review forwarded to the parties a copy of the decision and a fact sheet explaining what to do if a party wanted to appeal the decision. The letter also stated the office and the address to which an appeal should be directed.

Claimant's request for review, signed by claimant's attorney, contains a certification to the effect that he served a copy of the request for appeal on the carrier's attorney on February 25, 1992. The envelope in which the Commission received claimant's request for review was addressed to the Commission at the address given in the Commission's letter of January 27, 1992, and the postmark bore the date February 26, 1992. The request was received by the Commission's central office on February 28, 1992.

Claimant's request for review does not state the date she received the hearing officer's decision. Accordingly, we apply Rule 102.5(h) which provides in part that: "the Commission shall deem the received date to be five days after the date mailed." Assuming the Commission's transmittal letter with the hearing officer's decision attached was mailed on the date shown on the letter, January 27, 1992, claimant is deemed to have received the hearing officer's decision on February 1, 1992. Thus, claimant was required to file her appeal not later than 15 days from February 1, that is, by February 16, 1992. Since February 16, 1992, was a Sunday, and February 17, 1992, was a legal holiday (Presidents' Day), claimant had until Tuesday, February 18, 1992, to file her appeal. *See* Article 8308-1.05; Rule 102.3(a)(3). However, since claimant did not mail her request for review until February 26, 1992, her appeal was not timely. Consequently, the jurisdiction of the Appeals Panel has not been properly invoked. *See* Texas Workers' Compensation Commission Appeal No. 92036, decided March 11, 1992; Texas Workers' Compensation Commission Appeal No. 92046(A), decided March 23, 1992; Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. Pursuant to Article 8308-6.34(h) and Rule 142.16(f), the decision of the hearing officer is final.

Although not necessary to our decision, we will review the evidence to determine whether there was sufficient evidence to support the hearing officer's determination, and whether his determination was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Claimant, who worked as a salesperson, testified that while she was helping a customer select a pair of boots on (date of injury), she injured her left knee when she bent down to pick up some boxes. She said she felt something "pop" behind her knee and felt it "pop" again when she straightened up. She said she experienced a lot of pain and a burning sensation down the calf of her left leg and into her left ankle. Claimant stated that she immediately reported her injury to the assistant manager of the store, Ms. V, the day it happened, and reported it to Mr. M, the manager of the employer's other store location, the next day when he asked her why she was limping. She said that Mr. M told her that every time he sends someone over to the other store location they come back "all tore up." She said she wore a flexible knee brace to work the day after the incident. She said she saw her family physician, Dr. W, two days later on June 7, 1991. Dr. W referred her to Dr. T, an orthopedic specialist, who had performed surgery on her left knee in November 1989. Claimant further testified that Dr. T had her wear the same knee brace, one with metal rods, that she had worn after her prior knee surgery. Dr. T referred her to Dr. J who she said performed arthroscopic surgery on her left knee on June 18, 1991. Claimant said she discussed her doctors' findings with the store manager and assistant store manager prior to her surgery, that her last day of work was June 16, 1991, that she again reported her injury as being work-related to Ms. V on her last day at work, and that she was not able to work for several weeks after her operation. About the second week of July, 1991, she said that Dr. W asked her if she had hurt herself at work, she told him she had, and he told her to check with her employer to see if she was covered by workers' compensation insurance. Claimant said she asked Mr. L, who is also a store manager, on July 15, 1991, if anyone had filed a report on her injury. She said that prior to talking to Dr. W in July about the possibility of workers' compensation coverage, she had thought that part-time employees, such as herself, were not covered by workers' compensation. Claimant also stated that, except for answering telephones for two days for another employer, she had not worked anywhere since June 16, 1991. She said her doctors never released her to light duty work, but that Dr. S had released her to return to work without restriction as of December 30, 1991. She said she felt that she could return to work now.

Claimant testified that she had hurt her left knee, or the area around her left knee, on four other occasions. In 1983 she was involved in a motorcycle accident which knocked her left kneecap to the side and pulled ligaments and tendons. She had one visit to the emergency room for that accident. In 1985 she cracked her left kneecap in three places and pulled ligaments and tendons when she slipped and fell at a swimming pool. Her doctor told her she had fractured her kneecap and she had to wear a brace and use crutches, but did not have surgery performed. In 1987 she said she pulled the ligaments and tendons behind her left knee in a waterskiing accident. She had swelling and a burning

sensation in her leg and wore a knee brace for awhile, but did not see a doctor for that injury. In 1989 claimant said she slipped in a hole in her yard and fell on her left knee. Dr. T told her she had shoved her kneecap up and had pulled ligaments and tendons. He also said that she had a birth defect in her left kneecap.

According to claimant, Dr. T performed surgery on her left knee in November 1989. She said he "reconstructed my kneecap" and "pulled my ligaments over." She said she visited Dr. T for a checkup in February 1990, and again visited him in July 1990 for an arthritic condition in her left knee. Claimant testified that after her surgery in 1989 she had not experienced any problem with her left knee except for arthritis, which gave her problems when the weather was cold. She said she wore a flexible knee brace when she played sports, but had not had to wear the metal rod knee brace from her first surgery until the day after her incident on (date of injury). Claimant said she had told Mr. M about her prior knee surgery shortly after starting work for her employer.

A medical report from Dr. T dated September 3, 1991, noted that claimant had made a very adequate recovery from her first surgery, but was seen in July 1990 for some discomfort she experienced in the region of the patella tendon near the transplant. He further noted that, almost a year later, she was seen for pain in her left knee and that she showed evidence of a tear of the lateral meniscus, and that an arthroscopic examination was carried out. Dr. T stated that claimant's new complaint of pain could occur with squatting and twisting. In a letter to claimant's attorney dated August 16, 1991, Dr. T gave his opinion that "the accident on (date of injury), is the sole cause for her problems with the left knee." He also stated that claimant had recovered sufficiently from her prior patella tendon transplantation performed in November 1989 and that "there is no connection to the present problem." In a medical record dated December 30, 1991, Dr. S advised that claimant was "O.K. to Return to Work" on a "Full Duty" basis, as of that date.

Mr. M testified that claimant told him she had a doctor's appointment for a recurring knee problem. He did not remember the date she told him that. He said claimant never told him she hurt her knee on the job, nor did she mention picking up boxes or a "popping" in her knee. Ms. V testified that she had overheard claimant tell other employees about her previous knee problem, and that she assumed that when claimant told her she had hurt her knee, that it was due to previous knee problems. Ms. V did not recall the date claimant told her she had hurt her knee. She said claimant never told her she had hurt her knee on the job, and that claimant said nothing about lifting boxes and feeling a "pop" in her knee. On June 16, 1991, claimant's last day working for her employer, Ms. V said claimant came to work on crutches and told her how she had hurt her knee before and about her prior knee surgery. Ms. V said she first knew on July 22, 1991, that claimant claimed an on-the-job injury. Mr. L testified that he first learned on July 15, 1991, that claimant claimed an on-the-job injury when she asked him if he had filled out a workers' compensation form, and told him she had hurt her knee picking up boxes at work. He also testified that claimant had previously told him about her prior knee surgery and that she said her knee was never back to 100 percent after that operation and thought her knee might need "additional work."

Under the 1989 Act, a "compensable injury" means an injury that arises out of and in the course and scope of employment, and an "injury" means damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm. Article 8308-1.03(10) and (27). In a contested case hearing held under Article 6 of the 1989 Act, the hearing officer is the trier of fact, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R.J. McGalliard v. Kulman, 722 S.W.2d 694, 697 (Tex. 1987). The trier of fact is not bound to accept the claimant's testimony at face value. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ).

To recover workers' compensation benefits, a claimant must prove that his injuries were suffered while he was acting in the course of his employment. Rose v. Odiorne, 795 S.W.2d 210, 213 (Tex. App.-Austin 1990, writ denied). To defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The trier of fact is entitled to decide causation, for purpose of the sole cause defense to a workers' compensation claim, with or without medical testimony in areas of common knowledge. Director, State Employees Workers' Compensation Division, State of Texas v. Wade, 788 S.W.2d 131, 133-134 (Tex. App.-Beaumont 1990, writ denied). Generally, opinion evidence of expert medical witnesses is but evidentiary and is not binding on the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). However, when a subject is one of such scientific or technical nature that the jury or court cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in that subject has any probative value. Pegues, *supra*.

In the present case there was evidence tending to show that claimant injured her left knee at work on (date of injury), and that her prior surgery was unrelated to her current injury. However, the hearing officer was not bound to accept claimant's testimony at face value, Garza, *supra*. He was also not bound by the opinion of claimant's doctor. Pegues, *supra*. There was also evidence of four prior injuries to claimant's left knee within the last eight years, and evidence of a birth defect and arthritis affecting her left knee. In addition, there was evidence that she continued to experience some discomfort in her left knee in the region of her prior surgery eight months after that surgery which required further treatment within a year of her current problem. The hearing officer found that claimant "experienced a manifestation of a preexisting condition and was not injured by anything related to her employment," and concluded that she did not sustain a compensable injury. In Ledesma v. Texas Employers' Insurance Association, 795 S.W.2d 337 (Tex. App.-Beaumont 1990, no writ), the court held that an inference could be drawn from the testimony of the claimant

and his brother that any pain in claimant's neck, back, or side following his leg injury in May 1986 was the result of an injury in February 1985 which had continued to bother the claimant over the year leading up to the May 1986 accident. The court noted, however, that there was a distinct lack of hard medical evidence objectively reflecting a neck, back, or side injury to the claimant. *See also* Evans v. Casualty Reciprocal Exchange, 579 S.W.2d 353 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.) wherein the court held that the jury finding that the claimant did not suffer incapacity as a result of his injury was not against the great weight and preponderance of the evidence in light of a history of medical problems before his current injury and a continuation of those problems after his injury. The court also noted that the claimant had obtained and retained employment at the same or higher rate of pay than before his injury.

Having reviewed the entire record, had our jurisdiction been properly invoked, we would be of the opinion that the hearing officer's conclusion that claimant did not sustain a compensable injury is not so against the great weight and preponderance of the evidence so as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). The hearing officer's decision is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge