APPEAL NO. 92323

On June 16, 1992, a contested case hearing was held at (city), Texas, with (hearing officer) presiding. The issues were whether or not appellant (claimant below) was injured in the course and scope of his employment, and whether he had disability as a result of such injury. The hearing officer held that appellant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right knee on (date of injury), and that claimant does not have disability.

Appellant disputes the hearing officer's findings and conclusions, contending they rest on the hearing officer's statement that the evidence shows appellant tends to become confused and has communication problems which may have caused his prior inconsistent statements but which may also have caused confusion over the manner in which his injury occurred. Appellant says this interpretation of the record is against the greater weight of the evidence and is not supported by substantial evidence, and asks that this panel reverse the decision below. In the alternative, appellant asks the appeals panel to reverse and remand for a second, expedited hearing to consider additional medical evidence not previously available, including a 1982 report of X-ray taken pursuant to previous injury to his left knee.

Respondent contends the decision was correct. Respondent also argues that the additional medical records should not be considered, as they were subpoenaed and supposedly obtained in their entirety. In addition, respondent argues that these records do not strengthen appellant's case.

DECISION

We affirm the decision and order of the hearing officer.

Appellant testified that on (date of injury), while working as a porter with (employer), he injured his right knee which became painful and locked when he stood up while vacuuming a car. He said his supervisor, (Mr. T) came by while he was sitting down. Appellant said he told him he had hurt his knee while vacuuming, but Mr. T told him to get back to work. The next day he saw a doctor, and the same day spoke to Mr. T when he came in to bring a note from his doctor. He said Mr. T asked him how he hurt his knee and whether he had hurt it before. Appellant said he replied he had hurt his knee playing football in high school, but that he meant his left knee. He said when he saw Mr. T a few days later Mr. T asked again if he had hurt his knee at work and that he said yes; however, he said he also responded affirmatively when Mr. T asked whether he had hurt his knee in 1986. Appellant said at the hearing that he had not hurt his knee in 1986, but at the time of the occurrence there were a lot of people around, which causes him to get confused. Later he came in to talk to (Ms. M), and (Mr. K). When asked whether he had hurt his knee on the job before he said yes because he was scared and confused.

Appellant's doctor released him to work, and he went back to employer on a date he

cannot remember. He said his knee was hurting while he was at work. That day, after he had been at work about three hours, he was fired for reasons that were not made part of the record.

Appellant said he had never had problems with his right knee in the past. He had hurt his left knee playing football in a high school PE class, but said he had never sought medical treatment for that injury. A note from appellant's (date) visit to (Dr. I) said appellant complained of pain in his right knee, low back pain, and hurting to bend, with onset of one day. However, a report from (Dr. D) dated (date) said appellant sustained an injury to his right knee two years before and that he has had a locking episode since then about every six months.

Appellant's mother, sister, and wife testified that they were not aware of any previous right knee problem before. All testified regarding appellant's tendency to get confused and his communication problems resulting from a severe head injury he had suffered as a child which caused him to be out of school for a year. That injury also left him with impaired hearing which requires him to wear a hearing aid.

Mr. T, appellant's immediate supervisor, said appellant did not report an on the job injury to him on (date of injury). On the (date) he said appellant's wife called and said he was going to the doctor because his knee was locking up, and that appellant came in with a doctor's note that evening. On that day, he said appellant said he thought the injury occurred as a result of playing football. He came in to work two or three days later and told Mr. T and Mr. K he didn't know exactly how he had hurt himself, but made reference to hurting himself when he worked on "the Honda side" for the same employer in 1990. Mr. T said he was not aware of appellant telling him that the injury occurred in (date) when appellant was working under his supervision. He said he thinks appellant understood him when he asked appellant on (date) and a few days later whether he had been hurt on the job.

Mr. K, employer's treasurer, said appellant told him on (date) he had hurt his knee and that it was an old football injury. On the (date) he said he was told by Mr. T that appellant had indicated the football injury was to the other knee, and that he had hurt his right knee in 1988. At that point, Mr. K said he called appellant in to find out whether he had been hurt on the job. When asked when he hurt his knee, appellant said it was when he was working on "the Honda side."

(Mr. S), a service manager for employer, said appellant had suffered a job-related injury to his back which occurred two to three months before he reported it in October of 1990. Mr. S said he assisted appellant at that time in filling out the workers' compensation claim form, and instructed him as to procedures for reporting on-the-job injuries. Appellant received compensation for that claim.

We find that the hearing officer's decision and order were supported by sufficient

evidence. The 1989 Act provides that 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 the evidence. TEX. REV. CIV. STAT. ANN. art 8308-6.34(e). As fact finder, the hearing officer may believe all, part, or none of any testimony; judge credibility; assign weight; and resolve conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. Civ. App.-Amarillo, 1988, writ denied). In this case, the conflicts and inconsistencies were within the appellant's own rendition of facts regarding his knee injury. Despite clear evidence of appellant's communications problems, the record showed that he had been able to communicate a prior work-related injury for which the same employer had paid compensation in 1990. Under these circumstances, we believe the hearing officer was entitled to find that the appellant had not met his burden of proof to establish by a preponderance of the credible evidence that an injury was sustained in the course and scope of his employment. Washington v. Aetna Casualty and Surety Co., 521 S.W.2d 313 (Tex. Civ. App.-Fort Worth 1975, no writ). Because we affirm the hearing officer's decision with regard to the existence of a compensable injury, we will not address the issue of disability.

Appellant also asks us to remand based on certain medical information relating to appellant's 1982 knee injury that was not disclosed to him despite the issuance of a subpoena to the doctor in question. Under the 1989 Act the Appeals Panel is limited in its consideration of evidentiary matters to the record developed at the contested case hearing. Article 8308-6.42(a)(1). Because the incomplete medical records were acquired by subpoena, there appears to have been no lack of due diligence in procuring such information. However, the additional records appear to be cumulative of what had been testified to at hearing regarding an earlier injury to appellant's left knee, and thus would not tend to produce a different result from that reached by the hearing officer. *See* Holgin v. Texas Employers Insurance Assn., 790 S.W.2d 97 (Tex. App.-Fort Worth 1990, writ denied).

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Sue M. Kelley
Appeals Judge