

APPEAL NO. 92493

On August 19, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held pursuant to remand of the case for further development of the evidence, as appropriate, and reconsideration not inconsistent with Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992. The first hearing was held on April 28, 1992. The issues on remand were whether the claimant's back injury was caused or aggravated by her fall on (date of injury), and the period for which temporary income benefits (TIBs) are due.

The hearing officer found that respondent, referred to as the claimant herein, suffered a work-related injury on (date of injury) when she stepped on a tray and slipped and fell to her knees, injuring her left knee and aggravating her preexisting low back condition, and further found that the claimant has not worked and has not been able to work since (date of injury) because of the pain from either her knee injury or the aggravation of her preexisting low back condition. The hearing officer concluded that the claimant sustained a compensable injury on (date of injury) when she fell injuring her left knee and aggravating her preexisting low back condition in the course and scope of her employment, and further concluded that the claimant had an inability to obtain and retain employment at wages equivalent to her preinjury wage because of her compensable injury since (date of injury). The hearing officer ordered appellant, who is the employer's workers' compensation insurance carrier and who is referred to as the carrier herein, to provide medical benefits to the claimant for her left knee and low back injuries, and to provide TIBS to the claimant from (date of injury), adjusted for any amounts previously paid, as authorized by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

The carrier contends that the claimant suffered a compensable injury to her left knee only, that the accident of (date of injury) did not cause a new back injury or aggravate the claimant's existing back condition, that the claimant had no disability after July 22, 1991, that (Dr. C') diagnosis of an aggravation of a preexisting back condition is not credible, and that the claimant was terminated from work when she failed to return to work after being released to return to work by her treating doctor. In the alternative, the carrier contends that claimant's period of disability should be limited to one week of disability after July 22, 1991. No response was filed.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that she had been working for (employer) for just a few weeks when on (date of injury), she slipped on a tray while carrying two plants and fell on her knees on a concrete floor. A coworker gave a statement that, while she did not see the claimant fall, she did help her up. The carrier does not dispute that the accident occurred as claimed. The claimant said that the next day she reported to her employer that her left leg hurt and

that her employer referred her to (Dr. C), whom she saw that day. The parties stipulated that (Dr. C) was the claimant's initial treating physician. The claimant complained to (Dr. C) of left knee pain and he diagnosed a contusion of the left knee. He released her to return to work on July 15, 1991. The claimant was then seen by (Dr. S) on July 16, 18, and 19, 1991. (Dr. S) practices at the same clinic as (Dr. C). It is not clear whether the claimant was referred to (Dr. S) by (Dr. C) or whether (Dr. C) was not available to see the claimant on the days she saw (Dr. S). The claimant complained to (Dr. S) of left knee pain and numbness in her left leg. (Dr. S) diagnosed a contusion of the left knee and released the claimant to return to regular work on July 22, 1991. The claimant said that she did not return to work but instead went to (Dr. H), D.C., on July 23rd for treatment of pain in her left foot. (Dr. H) recommended that the claimant be excused from work until July 30, 1991. (Dr. H) had previously treated the claimant for back and knee pain she sustained when she fell on her knees at a shopping mall in (date). The claimant said that she had last seen (Dr. H) in May 1991 for her (date) injury.

The claimant said that she had not experienced back pain at work prior to her fall on (date of injury), and that it was not until a month or two after her fall that she started having back pain and that she reported the pain to (Dr. C). (Dr. C)' records showed that the claimant first complained of back pain to him on August 20, 1991. In a note dated August 30, 1991, (Dr. C) noted that the claimant complained of persistent pain in the area of the left calf and popliteal fossa, and advised her to stay off work for an additional week while further studies were pending. According to Dorland's Illustrated Medical Dictionary, 27th Edition (W.B. Saunders Company 1988) p. 657, "popliteal fossa" is the depression in the posterior region of the knee. All tests performed on the claimant's left knee, including an x-ray and an MRI, were reported as negative by (Dr. C). (Dr. C)' patient notes indicated that the claimant continued to complain of back pain and left knee pain and swelling in October 1991 and January 1992. In a report dated April 15, 1992, relating to his treatment of the claimant for her accident of (date of injury), (Dr. C) diagnosed the claimant's condition as "1. Spondylosis lumbar spine aggravated by fall; 2. Contusion left knee." He noted that an MRI of the claimant's lumbar spine taken in September 1991 "demonstrated bulging disc at L4-L5 and L3-L4." The claimant testified that (Dr. C) told her that her back injury was related to her work-related fall of (date of injury).

The claimant was treated by (Dr. W), D.C., for her injury of (date of injury), in February, March, and April 1992. (Dr. W) found that the claimant had positive signs of neurological compression syndrome, recommended physical therapy and spinal manipulation, and released her to limited type of work on March 17, 1992. (Dr. W) noted that the claimant's symptoms were pain in the low, mid, and upper back, and neck pain. He said that while the claimant's symptoms had improved, they remained quite troublesome for her. Work limitations included no heavy lifting, bending, stooping, repetitive lifting or movements, or any other activity which places stress on the claimant's areas of complaints. The claimant testified she went to the Texas Rehabilitation Commission following her release to limited work to look for light duty work; however, she said she was told that no light duty work was available for her. She said that she did not go back to the employer

because the employer had fired her on July 23, 1991. She also said that the employer did not offer her light duty work. The claimant further testified that no doctor had released her to return to work from the time (Dr. H) took her off work on July 23, 1991, until (Dr. W) released her to limited work on March 17, 1992. The claimant said that she believed her back condition was affected by her fall on (date of injury). She also said she has swelling in her left knee after she walks for 15 or 20 minutes and that she can not bend down.

The claimant further testified that in addition to her previous injuries from her fall at the mall in (date), she had also sustained a back injury in a work-related accident while working for another employer in 1988. An MRI of the lumbar spine done in 1989 was normal. Two medical reports were in evidence for the period between the (month) and (month) (year) accidents. In April 1991, (Dr. B), a neurologist, examined the claimant for low back pain and reported his impression as "S1 radiculopathy versus sciatic nerve irritation further out; in short, sciatica both clinically and electrically." He noted that the most common cause of sciatica is herniated nucleus pulposus L5-S1 with pressure on the S1 nerve root. In May 1991, (Dr. H) reported that he suspected that the claimant had a herniated nucleus pulposus at L5-S1 and that she was in need of a CT scan of the lumbar spine to confirm that. He felt that the claimant's back problem was a longstanding one and most likely due to her 1988 injury.

(Ms. E), who was the employer's office clerk at the time of the (date of injury) accident and who filled out the employer's first report of injury, testified that between the date of the accident and July 23, 1991, the date the claimant was terminated for failing to return to work after being released to return to work by Drs. (C and S), the claimant never mentioned any back pain. She said that the claimant only reported an injury to her left knee to the employer.

Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). Under the prior workers' compensation law it was held that an injury that aggravated a preexisting condition was compensable provided that an accident arising out of employment contributed to the incapacity. Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806, 807 (Tex. App.-Houston [1st Dist.] 1988, no writ). It was also held that the aggravation of a preexisting spondylothesis condition by a work-related accident was compensable. Oswald v. Texas Employers Insurance Association, 789 S.W.2d 636 (Tex. App.-Texarkana 1990, no writ); Texas Employers Insurance Association v. Thornton, 556 S.W.2d 393 (Tex. Civ. App.-Fort Worth 1977, no writ). The Appeals Panel has held that under the 1989 Act the aggravation of a preexisting condition by a work-related accident is compensable. Texas Workers' Compensation Commission Appeal No. 92010, decided March 5, 1992. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). It is within the province of the hearing officer as the trier of fact to resolve conflicts

and inconsistencies in the evidence, including expert medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.], no writ). Having reviewed the evidence from the first hearing and the hearing on remand, we conclude that the evidence is sufficient to support the hearing officer's finding that the claimant injured her left knee and aggravated her preexisting back condition when she fell at work on (date of injury), and further conclude that the finding is not against the great weight and preponderance of the evidence.

Under the 1989 Act, an employee who has disability and who has not attained maximum medical improvement is entitled to TIBs. Article 8308-4.23(a). "Disability" is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). In this case, the claimant testified about the physical problems she experienced after her fall at work and her continuing difficulties with walking and bending. She also testified about her unsuccessful attempt to obtain light duty work after she was released to limited work duty in March 1992. The medical evidence bearing on when the claimant would be able to return to work prior to her release to limited work in March 1992 was conflicting. In determining the issue of disability, the hearing officer may consider all the evidence bearing on the issue, medical as well as non-medical. Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992. Disability can be established by a claimant's testimony, even if contradictory of medical testimony, and objective medical findings are not a prerequisite to a determination of disability. Appeal No. 92299, *supra*. An unconditional medical release to return to work does not, in and of itself, equate to an end to disability, although it may be evidence that disability has ended. Appeal No. 92299, *supra*. Where a medical release is conditional and not a return to full duty status because of a compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Pain from a work-related injury can be the cause of disability. Houston General Insurance Company v. Peques, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. Having reviewed the evidence from the first hearing and the hearing on remand, we conclude that the evidence is sufficient to support the hearing officer's finding that the claimant has not been able to work since (date of injury), because of the pain from either her knee injury or the aggravation of her preexisting back condition, and further conclude that the finding is not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge