APPEAL NO. 92552

On September 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the appellant (claimant herein) sustained a compensable right knee injury on (date of injury) but the credible evidence failed to establish that the claimant sustained a work-related left hand injury on that date, or that such was reported within 30 days after its claimed occurrence. The hearing officer further found that claimant had disability due to his compensable knee injury from September 11, 1991 to June 3, 1992. Claimant appealed emphasizing facts he feels are favorable to him and alleging the "employer was trying to deny me medical care to my hand." Claimant alleges he injured his left hand and wrist in the (date of injury) accident and timely reported the injury as required. Claimant also submits with his appeal an unsigned note dated October 1, 1992 from the treating doctor. This note was not exchanged or introduced at the contested case hearing (CCH). Respondent (carrier) submitted a response requesting the appeals panel affirm the decision of the hearing officer.

DECISION

The issues framed at the hearing were: (1) whether the Claimant injured his left hand on or about (date of injury) in addition to the injury to his right knee; (2) whether an injury to the left hand was timely reported; and (3) did the Claimant have disability as a result of his injury and, if so, for how long.

The claimant's position is that he fell on (date of injury) injuring both his right knee in the fall and his left wrist when he extended his arm to break his fall. Claimant testified he was employed as a quality control inspector for (employer) and had been employed by the employer since 1967. Claimant testified he reported his injury to (Mr. S), employer's quality supervisor on (date of injury). Claimant also attempted to report the incident to (Ms. J), the company nurse, on (date of injury), but she was unavailable. Claimant testified he did contact the nurse on (date), and reported the accident to the nurse at that time. The hearing officer found that claimant continued to work from (date of injury) to September 6, 1991, which according to claimant's testimony was his last day of work. Claimant testified that on September 4, 1991, he had voluntarily elected to take an early retirement. Claimant further testified he began treatment with (Dr. G), an orthopedic surgeon on September 11, 1991 regarding his work-related injury. Claimant testified (Dr. G) took claimant off work on September 11, 1991.

Carrier's position is that the claimant never reported a left hand or wrist injury to the employer on (date of injury) and that the employer did not become aware of claimant's allegations regarding his hand/wrist injury until early 1992. (Mr. S) specifically denied he was told of the wrist injury on (date of injury) and another supervisor testified he did not learn of the accident until a week later and did not know of the hand/wrist allegations until sometime in 1992.

Although there was some initial confusion whether claimant had injured his right

knee, leg and/or calf in the (date of injury) accident the carrier at this time does not dispute the injury to the right knee/leg. Further, the carrier states, "carrier has accepted the decision on disability by the hearing officer." Claimant in the request for review challenges the hearing officer's findings and conclusions regarding compensability of the left hand injury and timely reporting of the left hand injury. As claimant, in the request for review, does not mention or rebut the hearing officer's decision regarding the disability issue and carrier had specifically accepted the disability findings, the existence and extent of disability is not an issue in this appeal.

Claimant relies heavily on claimant's Exhibit #5, an intake form from (Dr. G's) office dated 9-11-91, and to a lesser extent claimant's Exhibit #4, an intake form from (Dr. G's) office dated 9-3-91, to show that claimant reported his left wrist injury to the doctor in September and that this information was conveyed to the employer. Employer's nurse had apparently approved treatment for the knee, "but not hand & foot injury." On claimant's Exhibit #5, under type of injury, is listed "[right] knee (hand & foot)." In response the carrier submitted its carrier's Exhibits #2 and #3 which are identical copies of claimants' Exhibits #4 and #5 as given the carrier at the benefit review conference (BRC) on December 5, 1991 except information about the alleged left wrist injury is not on carrier's copy of the exhibits. It is all but conceded by claimant that the information about the "hand & foot" was added sometime after December 1991. In that the information is in the same handwriting as the other information the hearing officer could reasonably find it was added by someone in the doctor's office. One of the additions to claimant's Exhibit #4 states "[d]ate first seen for [left] hand (date)."

Further, carrier as its Exhibit #4, submitted a chronology prepared by claimant for the CCH which listed events and their date of occurrence. Nowhere does it mention a hand injury. It does list "Nurse (J) examined knee and gave me pain pills . . ." with a date of occurrence of "(date)."

It is well established that the claimant has the burden of proving, through a preponderance of the evidence, that the injury occurred within the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 91013 decided September 13, 1991 citing Parker v. Employer's Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969) and Texas Workers' Compensation Commission Appeal No. 92118, decided May 1, 1992, citing Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 977 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). It is equally well established that pursuant to Article 8308-6.34(e) that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. As such, the decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W. 2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e). In this case claimant alleges he reported the left wrist injury to his supervisors. Both supervisors testified at the CCH and denied claimant's allegations. Claimant submitted exhibits which would indicate that a hand injury was mentioned on the

doctor's intake forms on September 3 and 11, 1991. However, carrier rebuts that allegation by showing references to the hand were added after December 1991 and specifically state "[d]ate first seen for [left] hand (date)." The hearing officer found that claimant did not re-injure his left hand on (date of injury) and did not report a work-related left hand injury until early 1992. The hearing officer also found that (Dr. G) first learned of claimant's left hand injury on (date). There is probative evidence to support the hearing officers' findings and conclusions. The hearing officer clearly assigned greater weight to the carrier's evidence and as the sole judge of the weight and credibility of the evidence, we will not substitute our judgement for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

Claimant also submitted an additional unsigned letter from (Dr. G), dated October 1, 1992 for the first time with his appeal. This evidence may not be considered for several reasons. Article 8308-6.42(a)(1) indicates the appeals panel may consider only the record developed at the CCH, the written request for review and the response. In a similar situation in Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992, the appeals panel declined to consider new items of evidence attached to the request for review stating:

> The hearing officer is the fact finder, not the appeals panel. Article 8308-6.34(g), 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), 1989 Act; Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992.

As in Texas Workers' Compensation Commission Appeal No. 91132, *supra*, there is no indication that this medical report was unknown or unavailable at the time of the hearing. The item submitted is an explanation regarding a medical report and could certainly have been obtained for the CCH. Nor is this an item that would in any reasonable likelihood, cause a different result. Furthermore, as the report is not signed nor sworn to by any person, its evidentiary value is extremely limited.

The claimant has failed to sustain his burden of proof, and the hearing officer's decision is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge