APPEAL NO. 931013

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). At a contested case hearing held in (city), Texas, on September 10, 1993, with the record closing on October 13, 1993, the hearing officer, (hearing officer), considered the following unresolved disputed issues: 1. whether the appellant (claimant) also injured his left knee when he injured his right Achilles tendon and right knee on (date of injury); and 2. whether claimant's compensable injury of (date of injury) resulted in disability and, if so, the dates thereof. The hearing officer determined that claimant did sustain a left knee injury on (date of injury) at the time he injured his right Achilles tendon and right knee during football practice with the Houston Oilers (employer). The hearing officer also determined that from September 22, 1992, through the date the hearing was closed on October 13, 1993, the claimant had disability. On appeal, the respondent (carrier) asserts that the hearing officer erred in not granting a continuance and appointing a designated doctor to determine disability, maximum medical improvement (MMI), impairment rating, and whether claimant's left knee injury was pre-existing, erred in considering information the hearing officer obtained on her own motion and after the hearing record was closed, erred in determining that claimant's injury included his left knee, erred in determining that claimant had disability from September 22nd until the record closed on October 13th, and erred in ordering the payment of temporary income benefits (TIBS) if claimant can establish disability of more than eight days because the hearing officer already determined claimant had disability since September 22, 1992. The carrier also asserts that the hearing officer signed her Decision and Order on September 21, 1993, yet purported to consider disability at least until October 13th, the date she recited the hearing record was closed. The respondent's (claimant's) response asserts, in essence, the sufficiency of the evidence to support the challenged determinations, the absence of reversible error, and seeks our affirmance.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm.

The claimant testified that his usual occupation was that of a professional football wide receiver whose duties involved a great deal of pushing off, running, cutting, jumping, and catching, and that such had been his usual occupation since shortly after graduating from college. He said he had played with several professional football teams for varying periods of time before his injury while working for employer. Claimant said that on (date of injury), while participating in a team scrimmage for employer, he was hit in the air while attempting to catch a pass by a defensive player who drug him down and fell on him. He said he had pain in both knees and right Achilles tendon, that he did not practice further that day, and that he was treated with ice packs. He said he was able to practice the next day, a Friday, while taped up, and that he continued to be treated with ice packs and ice baths up to his waist. He did not practice during the weekend and his employment was

terminated the following Monday. Claimant said he tried, without success, to get the employer to get him examined by a doctor. Employer's trainer, (Mr. BB), testified that claimant had asked to see a doctor when he was released from the team. Claimant said he was eventually able to get an appointment on his own for October 13, 1992, with (Dr. K), an orthopedic surgeon.

Employer's "injury history" only referred to claimant's "right soleus" in documenting his treatments from (date of injury) through 21, 1992, the date he was released from the team. Mr. BB said he would have recorded a left knee injury had it been reported. Dr. K's "10-13-92" report states that claimant tore his Achilles' tendon on his right ankle and that he had some crepitus over his right knee which could indicate a torn medial meniscus. Claimant testified that Dr. K's initial record, which discussed his right knee and right Achilles tendon injuries, did not mention his left knee injury, which he said occurred at the same time, because he wanted diagnostic test confirmation before having medical records reflect a left knee injury. The carrier ultimately accepted liability for the injuries to claimant's right knee and Achilles tendon and commenced the payment of temporary income benefits.

In an affidavit, Dr. K stated that when he examined claimant on or about October 13, 1992, the examination included injuries to both knees as well as the right Achilles tendon. Dr. K's "7/29/93" report stated that claimant hyperextended his left knee at the same time his Achilles tendon was torn, that he hyperextended his spine and rolled to the left side popping his left patella and possibly the meniscus as well, that he was treated by the employer's trainer with waist deep ice baths for pain in both knees and the tendon, that he had asked the carrier to approve MRI examinations of one or both knees but such were denied, that claimant has "significant clinical findings in his left knee especially and to a lesser degree in his right," that claimant "has a severe chondromalacia or chondral fracture of his patella," and that he is a candidate for left knee surgery. Dr. K observed that he agreed with (Dr. G) that claimant "will not be returned to anywhere near normal following his injury until an arthroscopy has been performed on his left knee and a clean out of what appears to be a severe grade II to III chondral fracture of his patella along with possible meniscectomy if that is indicated by the MRI that we have requested of his left knee."

Dr. G's report of May 28, 1993, stated that he examined claimant's Achilles tendon and left knee on May 17, 1993, and that claimant said he then had no problem with his left knee but would find out if there was a problem when he returned to playing football. Dr. G's examination of the left knee found that "palpable and audible" crepitus, minimal synovial swelling, and possible minimal atrophy in the left thigh and calf, and his diagnosis included chondromalacia patella in the left knee. Dr. G also stated that the cause, date and knee complaints of claimant's left knee problems were "not clear," that there was no history of a left knee accident or injury during his employment as a professional football player but rather a vague history of current knee problems, and that the knee may need further care including but not limited to arthroscopy.

We are satisfied as to the sufficiency of the evidence to support the hearing officer's

finding and conclusion which determined that claimant sustained a compensable injury to his left knee on (date of injury), in addition to his right knee and Achilles tendon.

Disability is defined in the 1989 Act as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether and when a claimant has disability presents questions of fact for the hearing officer as the trier of fact to determine, and the hearing officer may consider all medical and non-medical evidence to determine the issue (Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992), including the testimony of the claimant (Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992). The Appeals Panel has observed with respect to disability under the 1989 Act: "There is no requirement that postinjury employment be precisely the same as that held prior to the injury. A claimant must be able to show a causal connection between his diminished wage and the compensable injury." Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel stated as follows:

> We do not perceive the intent and purpose of the 1989 Act to impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience and qualifications. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue to receive temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer.

The hearing officer made the following pertinent findings and conclusion regarding disability.

FINDINGS OF FACT

5. From September 22, 1992, through the date this hearing was closed on October 13, 1993, Claimant was not physically capable of working because of the injuries to his right Achilles tendon, right knee and left knee he sustained on (date of injury).

6. From September 2, 1992, through the date this hearing was closed on October 13, 1993, Claimant was unable to obtain and retain employment at wages equivalent to the pre-injury wage because of the injuries to his right achilles tendon, right knee and left knee he sustained on (date of injury).

CONCLUSIONS OF LAW

3.From September 22, 1992, through the date this hearing was closed on October 13, 1993, Claimant had disability.

Claimant testified he had baccalaureate degrees in psychology, sociology, and communications, but that he had very little experience in these fields in that he commenced his football career soon after graduating from college in 1990. He testified that his usual wage when playing professional football was approximately $3,450.00 per week. He said that after his injury on (date of injury), he was unable to play football and that he worked for some time as an unpaid intern for the Police department counselling juvenile offenders. He said that in July 1993, he went to (city) to try to play football with the professional team there. However, he discovered he could not do his cuts and run as fast because of his knees and after less than two weeks he and the team "mutually agreed" to his release. As claimant put it: "The bottom line is that I can't do what I used to do." Claimant's manager, (Mr. NB), testified that at (city) claimant did not have his "normal explosive power coming off the line," and that claimant told him he could not "deal with this any more," apparently referring to the effect of his injuries on his ability to play football. Claimant said that he is anticipating surgery on both knees, and that they ache, pop, crack, lock up, and at times cannot be extended. He said he has been attempting to do some screenwriting, that he unsuccessfully attempted to a obtain a counseling job in the Spring of 1993, and that he tried again to find a job in August or September 1993. He explained he cannot get a coaching job without a degree in education.

Dr. K stated in his July 29, 1993, report that claimant "has been unable to play football for any team or obtain employment since his release by employer because of his injury to his Achilles tendon and his knees," and that "[h]is unemployment in professional football is being caused by" his injuries. Dr. K's report of "10-11-93" stated that claimant "is still suffering a significant disability in regards to his Achilles and both knees," and remains under Dr. K's care.

We are satisfied that the hearing officer's determination of the disability issue is supported by sufficient evidence. The evidence sufficiently shows that claimant's inability to obtain or retain employment at his pre-injury wage equivalent since (date of injury), has been as a result of his compensable injury. That a fact finder might have arrived at different inferences and conclusions does not justify setting aside the facts deemed most reasonable by the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 93422, decided July 12, 1993. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial

Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier further complains on appeal that the hearing officer erred in failing to grant carrier a continuance of the session of the hearing re-opened on October 13th and in failing to appoint a designated doctor to determine when claimant reached MMI, his impairment rating, and whether his left knee injury resulted from an injury on (date of injury), or was a pre-existing condition. Carrier further complains that the hearing officer considered information she obtained on her own from Dr. K after the hearing record was first closed on September 15, 1993.

Succinctly, it appears, from the records of the two hearing sessions, the hearing officer's exhibits, and the assertions of the carrier, that at some time Dr. K signed a Report of Medical Evaluation (TWCC-69) which stated that claimant had reached MMI on "2-1-93" and which assigned a five percent impairment rating for his right Achilles tendon and a 10% rating for both knees and that at a benefit review conference on July 28, 1993, the carrier agreed to pay temporary income benefits (TIBS) from October 13, 1992, to February 1, 1993, while disability remained in dispute. Notwithstanding that disputed issues of MMI and impairment rating were not the subject of the hearing, at the first session of the hearing on September 10, 1993, claimant asserted that Dr. K erred in his TWCC-69 and intended to state the MMI date as "7-1-93." The hearing officer made that TWCC-69 a hearing officer's exhibit, reminded the parties that the disputed issue was whether claimant had a compensable injury to his left knee, and stated she would write Dr. K for clarification and schedule a future hearing. Neither party objected or manifested disagreement with the hearing officer's stated proposal. The hearing officer asked for closing arguments on the left knee issue possibly having decided to defer a decision on the disability issue. The record suggests the possibility of an off-the-record discussion on deferring a decision on disability while seeking clarification of Dr. K's TWCC-69.

When the hearing re-opened on October 13, 1993, the hearing officer stated that the record was open to develop the evidence on the disability issue but that both disputed issues would be addressed in her decision. The hearing officer introduced as hearing officer exhibits her September 16, 1993, letter to Dr. K seeking clarification of claimant's MMI date, indicating both that claimant had stated that Dr. K intended to state the MMI date as "7-1-93" and not "2-1-93," and, that claimant's "left knee is now included in his injury of (date of injury)." In her letter of October 5, 1993, the hearing officer sent the parties a copy of Dr. K's response and advised she was re-opening the hearing for the submission of evidence on the disability issue. Dr. K's response was another TWCC-69 which stated that claimant reached MMI on "7-1-93" as to his right knee and Achilles tendon and which assigned a five

percent impairment rating for his Achilles tendon and 10% for his right knee.

The hearing officer introduced a letter to her from the claimant dated October 4, 1992, which requested that she order the carrier to commence paying TIBS, stating that both his doctor and the carrier's doctor had indicated he had not reached MMI as to his left knee and that it would require surgery. The hearing officer also introduced as a hearing officer exhibit both carrier's letter to her dated October 8, 1993, which requested the Commission to appoint a designated doctor to determine claimant's MMI, impairment rating, and whether his left knee was injured on (date of injury), or "was a pre-existing injury not caused by a specific injury to the knee," as well as carrier's motion for a continuance until such time as a designated doctor was selected to examine claimant. At the hearing on October 13th, the hearing officer denied the continuance advising the carrier that additional disputed issues such as MMI and impairment rating should be taken up by the carrier through the dispute resolution process.

We find no merit in carrier's assertions of error respecting these matters. Clearly, there were only two disputed issues before the hearing officer at the outset of the hearing. There was no indication that the carrier responded to the benefit review officer's report seeking to add or to expand upon the disputed issues mediated at the benefit review conference. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). While the hearing officer might well have considered obtaining the consent of the parties to add issues regarding MMI and impairment rating and cause the selection of a designated doctor to determine such, she was not required to do so. Also, it was for the carrier, if it so desired, to assert (and meet its burden of proof) a sole cause defense respecting the compensability of the left knee injury.

Despite her reference in her September 16th letter to Dr. K that claimant's knee was a part of his (date of injury), injury, the carrier asserted at one point in the hearing on October 13th that there had been no decision yet by the hearing officer on any issue and the hearing officer expressly concurred.

We find no merit in the carrier's eighth and final point of error stating that the hearing officer's decision and order erroneously found disability from September 22, 1992, to October 13, 1993, on the one hand, and then orders payment of TIBS if the claimant can establish disability for eight or more days. We have already indicated we affirm the determination that claimant had disability as found by the hearing officer. The statement in the order is nothing more than the equivalent of ordering that TIBS be paid in accordance with the provisions of the 1989 Act. Section 408.082(a) provides that income benefits may not be paid for an injury that does not result in disability for at least one week.

Under this final point of error the carrier also asserts that the hearing officer's decision was signed on September 21, 1993, was received by the Commission's Chief of Hearings on September 24, 1993, and yet purports to consider disability lasting until at least October 13, 1993. The carrier states: "While this may be a clerical error, it appears the Hearing

Officer did not consider all of the record in making her determination." Notwithstanding the obvious discrepancy of the signature date of September 21st for a decision involving hearings on both September 10th and October 13th, we are satisfied that the hearing officer did consider all the evidence. Not only does the record show the identification and admission or rejection of each exhibit, but the hearing officer's decision specifically recites each exhibit admitted and excluded from the evidence including those considered at the October 13th hearing.

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm the hearing officer's decision.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge