APPEAL NO. 93670

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). At a contested case hearing held in (city), Texas, on May 21 and July 9, 1993, the hearing officer, (hearing officer), determined that while the appellant (claimant) established she sustained a compensable left knee injury diagnosed on (date of injury), she did not establish that she sustained a compensable left knee injury diagnosed on (date), nor did she establish that she gave timely notice of either injury to (employer), or that she had good cause for failing to timely report her injuries, or that her employer had actual knowledge of the injuries. The hearing officer decided that the claimant was not entitled to receive workers' compensation benefits. In her request for review, claimant asserts that the timely notice issue should not have been considered at the hearing, challenges the sufficiency of the evidence to support the salient factual findings and legal conclusions, and attaches certain documentary evidence not offered at the hearing. In its response, the respondent (carrier) details the evidence it views as sufficient to support the challenged findings and conclusions and urges our affirmance.

DECISION

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

Near the end of the first session of the hearing on May 21, 1993, the parties discussed carrier's contention that timely notice had been a part of its position and presentation of evidence at the benefit review conference (BRC), and that when the BRC report was issued stating the sole disputed issue to be injury in the course and scope of employment, the carrier prepared and forwarded to claimant and to the Texas Workers' Compensation Commission (Commission) a response to the BRC report pointing out, among other things, that carrier had presented evidence at the BRC in support of its contention that claimant had not notified employer of a work-related injury. After a recess in the hearing, the hearing officer announced that the parties had agreed there was a disputed issue concerning claimant's having provided timely notice of her injury to employer and no objection was taken by claimant to that announcement. The hearing was continued and on May 22, 1993, the hearing officer signed an order which stated in part: "Upon representations of the parties and review of the [BRC] report, it appears there is good cause to supplement the statement of disputes, pursuant to 28 T.A.C. § 142.7 to include the following issue: Did the Claimant timely notify her Employer of her injury?" There is no evidence that the claimant objected to that order. When the hearing reconvened on July 9, 1993, the hearing officer stated that both issues were before her for consideration and no objection was taken. Accordingly, claimant's assertion on appeal that the timely notice of injury issue was not properly before the hearing officer is without merit.

Claimant testified that in late May 1992, after about six months of employment with employer as a bank teller whose duties required her to periodically stoop and bend down to place and retrieve coins from the teller's floor vault, she began to experience pain in her left knee which became increasingly severe. She said she frequently advised her supervisor,

(Ms. B), the head teller, that her knee would swell and bother her when she moved up and down to use the vault. She said she only told Ms. B that "when I bent down I was having trouble getting up." Claimant said that notwithstanding that she only had the pain at work when she had to bend up and down to use the floor vault, that she knew of no event unassociated with her work that could account for her knee pain, and that she could only relate her knee pain to her job activities, she did not know it was work related until much later. She also said she thought she had arthritis. She went to (Dr. G) and told him that whenever she bent down to get coins her knee hurt. According to a letter in evidence from Dr. G, however, when he first saw claimant on May 18th, she gave a history of pain in her left knee for four days but made no mention of its being work related. She testified, variously, that Dr. G told her it was arthritis and fluid on the knee and that he twice took her off work. Her knee did not thereafter improve and on (date of injury), claimant underwent arthroscopic surgery by (Dr. D) who repaired a tear in the medial meniscus and reported there was no further observable damage to the meniscus.

Claimant stated on a patient information sheet, dated July 22, 1992, that she did not know how her left knee had become painful and swollen and that it was not an injury. However, Dr. D's notes of that date relate that claimant gave a history of pain in the process of repetitive squatting on the job to obtain coins. Dr. D's notes indicate that an MRI revealed a tear of the posterior horn of the medial meniscus and his postoperative report stated claimant had a tear flap of the medial meniscus and that after repair "the rest of the joint was inspected and found to be free of any pathology."

Claimant returned to work on August 13th (all dates are in 1992 unless otherwise stated) and said her knee continued to bother her and that Ms. B allowed her to frequently sit while working. She conceded that on a weekend in August she mowed her grass and was seen doing so by a neighbor, but denied hurting or aggravating or injuring her knee at that time. She said the neighbor, a bank customer, later came to the bank and mentioned seeing her mow the grass and that Ms. B, then working in an adjoining teller's station, heard the conversation and told claimant that she would not be sympathetic to further complaints about the knee. On or about September 1st, claimant went to (Ms. C), who was Ms. B's supervisor, and told her she needed to see a doctor about her knee and about Ms. B's having remonstrated with her after hearing about the lawn mowing incident. Claimant said that Ms. C asked her how she hurt her knee and claimant replied that it was from the bending and stooping at her teller's window. Claimant denied having told either Ms. B or Ms. C about mowing the grass and hurting her knee.

Claimant further testified that on a Monday morning in late September, a coworker, (Ms. L), directed her to pull a cart bearing bags from the night depository across the street and that while doing so, in the presence of Ms. L and another coworker, the cart became stuck and she injured her left knee at that time. She said she did not mention the injury to Ms. L but went straight to Ms. B and told her about hurting her knee pulling the cart. Ms. L

testified she was "positive" she did not tell claimant to retrieve the night deposits on the Monday morning testified to by the claimant, that claimant and two other employees walked with Ms. L over to get the deposit bags, and that claimant told her that morning that she had been mowing her lawn the preceding evening and injured her knee and that Ms. B had not been sympathetic about it.

Claimant said she returned to Dr. D in October and told him her knee hurt from pulling the cart. According to Dr. D's notes of October 14th, claimant related she was dragging some items and noted severe knee pain. Claimant said she stopped working on (date of injury) and returned to Dr. D who obtained another MRI on October 28th. She said Dr. D had discussed needing authorization from a carrier for the MRI. Her prior surgery and medical bills had been paid by employer's group health insurance carrier and claimant said she knew the difference between that insurance and workers' compensation insurance. Claimant stated, variously, that Dr. D, and Dr. D's nurse, told her Dr. D thought claimant had a workers' compensation claim and that that was her "first inkling" that her knee injury was work related and compensable. Dr. D performed arthroscopic surgery on the left knee on November 9th. His postoperative report stated in part: "The patient did have a small flap tear of the very posterior horn, probably not impinging. More importantly she did have an undersurface tear of the posterior 1/3 of the medial meniscus, not felt to have been present during the first arthroscopic event."

According to claimant, Dr. D told her the latter tear was present at the time of the first operation but was "covered up." Claimant said she called Ms. B from the hospital and told her "it was from pulling the cart that time." She said she subsequently discussed a workers' compensation claim with her husband and son and that her husband called Ms. C sometime between November 9th and 12th and was told to have claimant write a letter. Claimant said she wrote a letter to employer about her injury which was mailed on November 20th. She said she called Ms. C on November 25th and was told the letter had been received and would be forwarded to carrier but that it would not do claimant any good. Claimant seemed to postulate, both at the hearing and on appeal, that the second tear was part of the original injury, unseen at the time of the first operation, or in the alternative was an aggravation of the first injury or a new injury caused by the pulling on the cart in late September and therefore that her notice of injury, given to Ms. C by her husband's phone call and her subsequent letter, was timely. Carrier's position was that claimant sustained a new noncompensable injury mowing the lawn in August after her first operation and that she failed to provide timely notice of either injury.

According to Ms. B's testimony, when claimant initially began to complain of her left knee pain Ms. B asked her how it happened and claimant responded that she did not know. Ms. B said that at no time prior to December 1992, including the period after claimant returned to work following her first operation, did claimant or any other employee tell Ms. B claimant had hurt her knee at work or that she considered her knee pain or problem work

related. Ms. B said that following her first operation, claimant's knee pain seemed to be improving but that sometime after returning to work, claimant called Ms. B at her home and told her she had mowed the yard and was very sore from doing so. Ms. B said she became upset with claimant and told her she should not have done that so soon after surgery. Claimant also told Ms. B that a neighbor had seen her mowing the yard and had also told her she should not be doing it. After that incident, Ms. B said that claimant's knee was sore and swollen and that she could not walk very long. Ms. B further testified that neither claimant nor any other person ever told her claimant hurt her knee pulling a cart with night deposits. After claimant had her second operation she would call Ms. B periodically to update her on her status and once related that Dr. D thought she had a workers' compensation claim. However, Ms. B said that claimant never indicated her knee injury was work related and that she, Ms. B, did not learn of claimant's contention until sometime in December when Ms. C advised her that claimant had filed a claim.

Ms. C testified that she was a vice-president and the cashier and operations officer, that she had little knowledge of the first operation as claimant never discussed it with her. Sometime after claimant returned from her first operation Ms. C said she stopped by claimant's area and asked how she was doing and claimant never indicated how she had hurt her knee. She said she spoke with claimant quite a few times between May and December and that claimant never indicated that her knee problem was work related nor did anyone else. According to Ms. C, sometime in September or October, claimant told her that Ms. B had become upset with her for mowing her lawn and hurting her knee. Ms. C said she asked claimant if she had checked with her doctor about doing that kind of work and she replied she had not. Ms. C further testified that sometime later claimant told Ms. C she had hurt her knee mowing the grass and was going to call a doctor in (city). On or about December 7th, after claimant's second operation, Ms. C said that claimant's husband called her to advise that he and claimant had talked the matter over and had decided claimant hurt her knee at work. Ms. C said this was her first indication that claimant considered her knee problem to be work related and that she subsequently initiated an investigation and obtained statements from Ms. B and Ms. L which the carrier introduced into evidence along with Ms. C's own statement of December 28th. She recalled receiving claimant's letter which claimant said was mailed on November 20th. In that letter to Ms. C claimant related her account of her knee problem stemming from the squatting and bending in May. She stated that when she was operated on by Dr. D in July, he thought she "was on workmans comp" but that she was not because she had been treated for arthritis for months and because she "didn't want to cause any problems at work," and that if "applying for workmans comp after all this time is going to cause hard feelings between any of us [she] would rather not do it." Ms. C said claimant still had a job whenever she obtained a release to return to work.

The hearing officer found, in part, that claimant tore the posterior horn of the medial meniscus in her left knee stooping and squatting in the teller's cage; that it was operated on

and diagnosed on (date of injury); that she did not report such injury to anyone in a supervisory position within 30 days of (date of injury); that she did not push a cart containing night deposit bags on a Monday in September causing further injury to her knee; that as a result of mowing her lawn in August or September she reinjured her knee sustaining an undersurface tear of the posterior 1/3 of the medial meniscus, a tear not present during the surgery of (date of injury), and was told of the diagnosis on (date of injury); that claimant learned from Dr. D on (date of injury) that both knee tears might be work related and did not report them to employer within 30 days; that claimant failed to report her alleged work-related injuries within 30 days of becoming aware of them because she did not know that workers' compensation benefits were available to her; that claimant's spouse contacted employer on December 7th to report her injuries as work related; and that employer, while aware that claimant had knee problems, did not have actual knowledge of their work relatedness. Based on these and other findings, the hearing officer concluded that while claimant did prove a compensable injury of (date of injury), she failed to provide employer with notice timely pursuant to Section 409.001 (1989 Act), failed to prove she sustained a compensable injury on (date of injury), and further failed to provide employer with timely notice of the second injury. Section 409.002 provides that failure to notify an employer as required by Section 409.001(b) relieves the employer and the employer's insurance carrier of liability unless the employer has actual knowledge of the injury or unless good cause exists for the failure to provide timely notice.

We are satisfied that the evidence is sufficient to support the challenged conclusions. Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. Claimant had the burden to prove by a preponderance of the evidence that she sustained an injury or injuries in the course and scope of her employment. Johnson v. Employer Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). She had the further burden to prove she timely notified her employer. 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.). The hearing officer could disbelieve a portion of claimant's testimony if she saw fit to do so. Johnson *supra* at 939. 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 decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge