APPEAL NO. 93878

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq*. (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On September 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) did not show that she injured her knee on the job, did not give timely notice and did not show good cause for delay, and did not have disability. Claimant raised several questions on appeal; the appeal will be considered to be an attack upon the sufficiency of the evidence to uphold the decision. Carrier responded by addressing the questions of claimant and requesting affirmance.

DECISION

We affirm.

At the hearing the parties agreed that the issues were whether claimant sustained an occupational disease through repetitious physical trauma to her knee on (date of injury), whether proper notice was given, and whether disability resulted therefrom.

Section 410.204(a) states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal the claimant asserts that four statements and a computer printout were not admitted into evidence. She also commented about the opinion of the benefit review officer. Next, she points out that the ombudsman felt some witnesses would not be helpful. She questioned why her supervisor, (Mr. T), did not testify. She commented about what another ombudsman thought. Claimant then states that she realized the steam press caused the injury after talking to Mr. T, who said other employees had been hurt by it. She did not report the injury sooner because she was afraid she would be terminated. Claimant did obtain a light duty slip from her doctor's office on (date of injury). She states that her doctor said she had no knee problems prior to November 1992. She points out again that Mr. T was not present, saying that is an admission. Finally, she says that the hearing officer was talking to the attorney for carrier during a break.

The appeals panel determines:

That the findings of fact and conclusions of law are sufficiently supported by the evidence.

Claimant began work at (employer) on May 13, 1992, as a seamstress. She described her job as involving sewing. Until approximately November 1992 after clothes were altered, they were ironed with a hand iron. The supervisor, Mr. T, in approximately November 1992 told the seamstresses that they had to use a steam press. (The testimony referred to using the press in regard to suit pants, not in regard to coats or other apparel.) The press was described as having a handle that one pulls down upon to bring the top part of the press down onto the garment and the bottom part of the press. As the top portion is

brought down that motion lowers a foot pedal which the operator then applies pressure upon in order to lock the press and cause steam to flow. Claimant asserted in her claim that the pressure of pushing the pedal began to hurt her right knee in December. She stated that the pain was significant.

Claimant also testified that walking up and down stairs hurt her knee during the same time period. She stated that she first related the press to her pain in the knee when Mr. T asked her if the press was hurting her on (date of injury). She could not state why Mr. T would be asking her if the press hurt her knee, but maintained that she had not complained about the press before. She stated that she gave notice of her injury to Mr. T on April 8, 1993.

(FW) testified that she began work for employer on August 12, 1992, as a seamstress. She said that claimant complained about using the stairs within a week or so of when she started work there. She added that claimant complained of pain from using the press almost immediately after they were told to use it. She said that it is not hard to press down on the pedal and estimates that it is used 15 to 20 times a day. She further added that most of their time in alterations is spent sitting down sewing (80%). FW's statement, admitted as a hearing officer exhibit, indicates that FW stated that claimant said the press was hurting her knee before she went to see the doctor.

The claimant introduced eight photographs of the workplace and four exhibits, all of which were doctor's records or reports. She testified that she only saw (Dr. C) for her problem with her knee. She stated that she saw him on March 2, 1992. On that date Dr. C recorded "swollen painful (right) knee on & off for 15 yrs . . . Pain (with) stair climbing. Fatigue from work schedule." He notes that an x-ray showed the medial joint compartment of her knee to have a "total loss of joint space." His next entry is dated March 9th, and shows a telephone call that her pain medication was ineffective; he also stated that a light duty slip was prepared to limit stair climbing. On March 19th, Dr. C notes that he gave her a different prescription. On March 30th, a note appears to indicate that claimant was seen for sinus problems. Claimant next saw Dr. C about her knee on April 21, 1993. Dr. C notes that claimant wishes to discuss workers' compensation. He then relates her history of climbing stairs and using "15-20 (pounds) leg . . . pressure on steam press which aggravated her arthritis to the point of continual pain. He notes that she reports no pain prior to November 1992. His impression was that her arthritis was "exacerbated" by stair climbing and using the steam press. He also said that the condition is aggravated by work but not caused by work.

Claimant was terminated from the job on April 19th; she testified that her last day at work was April 17th. (Mr. TU) is the manager of the store. He said that claimant was fired because of the low quality of her work and observed that she did not get along with other workers. Mr. TU said that he first heard of claimant's belief that the work injured her when he heard it from the carrier.

A statement by Mr. T was introduced as a hearing officer exhibit. Mr. T said that

claimant had mentioned her arthritis "flared up," but that she never mentioned anything about the press hurting her. He first heard of the claim from Mr. TU. He also said that she had brought in a doctor's note on March 30, 1993, calling for her to ride the elevator during arthritis flare-ups (there was a freight elevator to the floor where the seamstresses worked).

Claimant's appeal mentions documents that were not admitted. The record does not show that any document she mentions, statements by MR, RC, SS or BA and a computer printout were ever offered into evidence. The hearing officer is not required to give any weight to the comments of the benefit review officer; the benefit review conference is an informal, unrecorded conference set forth by the 1989 Act to determine whether a solution to the claim in question can be reached and to define the issues for the subsequent contested case hearing. Claimant's reference to the ombudsman not believing that two potential witnesses would be helpful does not set forth a basis for reversible error. Claimant's assertion that she had no knee pain prior to November 1992 was already before the hearing officer in the form of her history as recorded in her doctor's records. The ombudsman only assists; had claimant requested the ombudsman to call the two witnesses in question, there is no indication that the ombudsman would not have attempted to do so. Claimant could have called Mr. T to testify or sought a subpoena to have him appear. The record does not show any attempt to do either. The opinion of another ombudsman about the evidence is not relevant to this proceeding. Mr. T's statement does not indicate anything about the press hurting any other employee. Claimant's assertion that she did not report the injury earlier because she was afraid she might lose her job was not considered sufficient to excuse her failure to give timely notice. This question is one for the hearing officer as trier of fact to decide. *See* Texas Workers' Compensation Commission Appeal No. 92125, decided May 4, 1992. The hearing officer did not misapply the law in regard to the question of notice or whether good cause was shown for failure to timely notify. Claimant's statement about when she got a note from her doctor is not disputed. Dr. C reported claimant's history that she said she had no pain prior to November; he also reported her 15-year history of pain and the absence of cartilage in an area of the knee. The use of a statement by Mr. T, rather than personal testimony is not an admission. Finally, claimant asserts that the hearing officer talked to the attorney for carrier during a break. She adds that the hearing officer stated that the conversation had nothing to do with this case. Claimant provides no information that would contradict the hearing officer's statement.

The hearing officer repeatedly asked claimant to describe how often she used the press pedal with her right foot. She could not provide an estimated number; she did not indicate that the press was used on more garments than testified to by others, i.e., primarily on altered trousers. She did not dispute that her main job was to alter clothes sold, not to press clothes, except as was incidental to the alteration tasks. The evidence was sufficient to support the hearing officer's findings that claimant did not show a level of activity sufficient to cause injury and did not show that the incidence of such motions was greater in her workplace than that incurred by others.

The hearing officer commented about the credibility of claimant's testimony regarding Mr. T asking about whether the press hurt her knee when she said she had not complained

about the knee before. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In addition, the hearing officer could consider the evidence of FW who referred to claimant's complaints of knee pain by the press before she saw the doctor on March 2nd. (Claimant also saw the doctor on April 21st, but by that time, she no longer worked with FW.) Even if claimant told Mr. T on April 8th of her problem, the testimony and statement of FW provide sufficient basis for the hearing officer to conclude that claimant should have known that the work may be related to the injury prior to 30 days before April 8th. *See* Section 409.001 which provides for notice to the employer not later than 30 days after the claimant knew or should have known that the injury may be related to the job. The claimant maintained that at this time her pain was severe; there was sufficient evidence to support the hearing officer's finding that claimant did not show good cause for her delay in giving timely notice. Finally, with no compensable injury found, there is no basis upon which to find disability. The definition of disability depends upon a compensable injury. *See* Section 401.011(16).

The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge