APPEAL NO. 93920

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S. 8308-1.01 *et seq.*). On September 13, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined at the CCH were: "1. Whether the Claimant injured his left knee while walking through the airport on (date of injury); 2. Whether the Claimant timely reported his left knee injury to his Employer; and 3. Whether the Claimant has disability as a result of a left knee injury of (date of injury)." The hearing officer determined that the appellant, claimant herein, did not sustain an injury to his left knee in the course and scope of his employment, that claimant did not timely report his alleged left knee injury to his employer and that claimant's alleged left knee injury has not caused disability.

Claimant contends that the hearing officer's decision was "not based upon a preponderance of the evidence . . .," submits additional attachments, and requests that we reverse the hearing officer's decision and render a decision in claimant's favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was a regional director for franchise operations for Computerland Corporation, employer herein. Claimant testified that he had put together some information, on (date of injury), and was hurrying to the (city). As he was "sprinting" toward the entry from his car he "hyperextended" his left knee, which caused him to fall. Claimant states that he got up, gathered the information and "hobbled" back to his car. Claimant testified he rested his knee over the holidays and "shortly after the new year" called the employer's home office risk management section to report the injury. (Ms. LS) stated that she is the employer's risk manager and normally reports of injury would be made to her. Claimant testified he was unable to speak with Ms. LS and instead spoke with her administrative assistant (Ms. VB). Although Ms. LS testified (by telephone) that Ms. VB was not in management nor did she hold a supervisory position, claimant appears to contend that notice of injury to Ms. VB would suffice to meet the reporting requirements of the 1989 Act.

The situation is confused in that claimant had a prior 1988 elbow injury which appears to still receive some treatment, a hip injury of May 1990, and a right knee injury at an airport in December 1990. All of these injuries were or are being treated by (Dr. H). Both the May 1990 hip injury and the December 1990 right knee injury happened while claimant was at the airport on business. Dr. H, in a report dated December 28, 1990, regarding the right knee injury comments "yet again walking in airports turned out to be a problem for him."

After claimant's alleged call to Ms. VB, shortly after the new year, claimant testified

he used remedies learned in treating his right knee on his left knee. It is undisputed that claimant did not see a doctor for the left knee injury until March 4, 1992, when Dr. H reported claimant had "multiple problems" and he conducted some comparison studies of claimant's knees, including the left knee. In a report dated March 29, 1993, Dr. H stated that claimant:

> was seen on 4 March, 1992, for complaints of his right knee as well as other skeletal problems. The left knee was examined as well as the right knee and at that time there were difficulties with the left knee consisting of tenderness to direct palpation at the joint line as well as pain with forced flexion. At the time he told me that he had been having difficulties with his left knee. The first record that I have of his having a primary complaint of symptoms with the left knee is on 15 of July, 1992. At that time, he stated
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> that he was continuing to have trouble with his left knee and I commented that he had done little, or no, therapy and that his left knee was still symptomatic for him.

Claimant failed to produce any medical bills dated before July 29, 1992, regarding his left knee injury.

On June 30, 1992, claimant was terminated from employer's employment for poor job performance. Claimant contends the poor job performance was caused by his lack of mobility due to the left knee injury, and consequently he has disability.

A transcription of a recorded interview with Ms. VB was admitted into evidence. We would note that statement is both confusing as to dates, what is being said, and appears incomplete as well. The first sentence of the statement begins by Ms. VB stating "Um, what was I saying?" There was no evidence regarding the nature of the preceding conversation. That the statement is confusing is exemplified in that both parties cite portions of the statement as supporting their respective positions. It would appear that Ms. VB is talking about a conversation she had with claimant some time after she came back to work on December 16, 1991. Claimant contends he was injured on (date of injury) and reported the alleged injury to Ms. VB shortly after the new year.

The hearing officer determined that claimant had not injured his left knee in the course and scope of employment on (date of injury), that claimant had not timely notified his employer of the alleged injury and the left knee injury had not caused any disability. Claimant appealed and argues the hearing officer's determinations should be reversed because they "were not based upon a preponderance of the evidence." In support of his position, claimant submits additional documentation labeled "Attachments" A through E. Claimant concedes in his appeal that Attachments A and B were generated before the CCH, but alleges the other attachments "were . . . not within the possession or control of claimant at the time of the CCH and therefore could not have been disclosed by Claimant at the CCH."

First, addressing the additional submissions (attachments) offered by claimant, we have, on a number of occasions, held that as a general rule the Appeals Panel considers only the record developed below at the CCH, the request for review and the response thereto. Section 410.203(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992; Texas Workers' compensation Commission Appeal No. 92417, decided May 29, 1992. Thus we have refused to consider new evidence on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We have held that in determining whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 92111, decided March 29, 1992; Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). *See* Texas Workers' Compensation Commission Appeal No. 93463, decided July 19, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 93530, decided August 10, 1993. Claimant concedes Attachments A and B, being an exchange of memos between claimant and his supervisor in February 1992, were in existence and available to claimant well before the CCH, and therefore they will not be considered. The cover letter of Attachment C is dated September 22, 1993, (some nine days after the CCH) but contains billing data for the December and May 1990 injuries and therefore certainly appears to have been available to claimant in the exercise of due diligence. Attachment D consists of handwritten forms completed July 7, 1993, and earlier. We believe these forms would have been available to the claimant with due diligence and are not so material that they would probably produce a different result. Attachment E consists of Dr. H's billing statement for treatment to the right knee, several reports already in evidence and a billing statement for treatment to the left knee beginning 9/22/92 with one visit on 7/15/92. We believe this attachment to be cumulative as to reports already in evidence, not relevant for treatment and billings after the CCH, and not so material to probably produce a different result. Consequently claimant's attachments will not be considered for the reasons stated and we do not consider them to require this case to be remanded.

Claimant contends that the record "is replete with evidence and testimony supporting Claimant's contention that he was injured in the course and scope . . . ." To this end claimant cites Dr. H's report of March 29, 1993, which according to claimant "clearly established that [Dr. H] treated Claimant's left knee initially on March 4, 1992." We note that same report, quoted earlier in this decision, also stated that the first record Dr. H had of claimant's "having a primary complaint of symptoms with the left knee is on 15 of July, 1992." (Emphasis added.) We had also earlier noted that there does not appear to be any billing for the left knee injury before July 1992. Carrier points out that even when claimant did see Dr. H for the left knee injury, Dr. H did not appear to take a history or comment on yet another airport injury as he had done on the previous right knee injury. Claimant also contends "[t]he single consistent fact that is supported by the recorded statement of [Ms. VB] . . . is that [Ms. VB] recalls having a conversation with claimant shortly after December 16, 1991."

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant attempts to meet this burden based principally on his own testimony and those portions of Ms. VB's statement that he believes support his position. That an injured party is the only witness to an injury does not defeat an otherwise valid claim and a claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, when the claimant's testimony is that of an interested party, his testimony only raises an issue of fact for the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer, as the trier of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer heard claimant's testimony and observed his demeanor as well as listened to the parties' interpretation of Ms. VB's statement. Both parties agree that there is confusion regarding Ms. VB's statement, when she had her conversation with claimant, and which injury they were talking about. It is the duty of the hearing officer, as the trier of fact, to resolve conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 552 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 565 S.W.2d 550 (Tex. App.- Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. The hearing officer heard the testimony and the parties' interpretation of the evidence, and obviously was not convinced by claimant's version of the events.

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1985); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find.

Finding no reversible error and the evidence sufficient to support the findings and conclusions, the decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Gary L. Kilgore
Appeals Judge