

APPEAL NO. 94076

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 22, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented for resolution were:

1. What is the date of injury, pursuant to Section 408.007, the date the employee knew or should have known the disease may be related to the employment;
2. Did the Claimant report an injury to the Employer on or before the 30th day of the injury, and if not, does good cause exist for failing to report the injury timely;
3. Did the Claimant sustain a compensable injury in the form of an occupational disease on or about (month, year); and,
4. Did the Claimant have disability resulting from the injury sustained on or about (month, year), entitling her to temporary income benefits [TIBS], and if so, for what periods?

The hearing officer determined that the date of claimant's alleged injury to be (date of injury); that claimant did not timely report the alleged injury to the employer nor did she provide good cause for her failure to do so; that claimant did not sustain a compensable injury in the form of an occupational disease on or about (month, year) and, that claimant consequently had no disability.

Appellant, claimant herein, appealed the decision of the hearing officer asking that we reverse the hearing officer's decision and render a decision in her 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.

It is undisputed, and stipulated, that claimant was employed as a nurses' aide with (employer), employer herein, since July 1966. The medical records indicate that over the years claimant had significant medical problems, including diabetes and other injuries. Claimant testified, and it is stipulated, that she first noticed a pain in her right knee in (month year). Claimant testified that (Dr. H) was treating her for diabetes and was her family physician. In a medical report dated October 11, 1990, addressed to Dr. H, by (Dr. K), Dr. K noted claimant was seen for an electrodiagnostic study of both lower extremities due to complaints of numbness and tingling. Dr. K found the electrodiagnostic study to be "abnormal" and attributed the findings to "generalized severe peripheral neuropathy in both

lower extremities." Claimant testified that Dr. H told her that her problems with her legs were due to her diabetes. Claimant testified she tried to ignore the pain and continued working but ultimately consulted several other doctors beginning in April 1992. Although not entirely clear from claimant's testimony or the medical records, claimant saw or was referred to (Dr. S) regarding the pain in her legs and right knee. A handwritten progress note dated April 30, 1992, by Dr. S notes claimant has numbness in her right leg, and "[e]nlarged swollen [right] knee subpatellar tenderness med. lat & centrally." A May 7, 1992, note indicates continued numbness in her right leg. An office visit note of May 26, 1992, indicates "[right] knee tender & swollen medially." Other notes of June 19, 1992 show "swelling lower [right] leg," of July 15, 1992, "swelling right knee" and August 10, 1992, "pain in the right leg."

Again, exactly how claimant got to (Dr. KZ) is not clear but nonetheless Dr. KZ examined claimant toward the end of September 1992. An examination form dated September 28, 1992, showed right knee pain, ordered an x-ray and prescribed physical therapy. The x-ray study requested by Dr. KZ dated September 30, 1992, noted as "[i]mpression: swelling of the infrapatella ligament, otherwise negative right knee." Subsequent progress notes by Dr. KZ dated October 10, 1992, and November 2, 1992, recorded continued knee pain "with no relief noted from PT."

Claimant next saw (Dr. T) who records a "8/26/90" date of injury for claimant on all his medical reports. In a report dated October 19, 1992, Dr. T records a history that claimant ". . . has had right knee pain since May 1992. She denies traumatic injury, and states that one morning she woke up and had some pain and swelling in the knee, which has been progressive in nature and has not resolved." Dr. T's impression is "[p]atellar tendinitis right knee." In a November 18, 1992, note Dr. T stated claimant continued to have right knee pain and ordered an MRI. An MRI was performed on November 25, 1992, and Dr. T notes in a December 3, 1992, note that the MRI ". . . demonstrates a grade III signal in the posterior and mid zones of the medial meniscus consistent with a horizontal cleavage tear." Dr. T states he reviewed the findings with claimant and that claimant was concerned about missing work in that all her vacation and sick leave had been used. Arthroscopic evaluation was delayed "until the beginning of the year." A January 6, 1993, progress note records claimant still has "a significant amount of right knee pain" and discusses the possibility of a light duty status during recovery from arthroscopic surgery. Surgery was performed in early February 1993 and "[a]rthroscopically we found a posterior horn tear with degenerative changes of the medial and lateral joint."

Post-operatively, Dr. T noted in a March 5, 1993, progress note that claimant continued to have "intermittent discomfort along the medial aspect of the knee . . ." and that claimant would be speaking with her supervisor, (Ms. F) to return to duty around March 15, 1993. By progress noted dated April 21, 1993, Dr. T noted claimant is "still having some intermittent discomfort with the knee" and that the employer did "not have a light duty status, and [claimant] feels that they will abandon her since they did not accommodate her." Dr. T notes "[claimant] currently is applying for disability" and that claimant has given Dr. T "a

disability form for us to fill out." In a June 2, 1993, note claimant is noted as still having "discomfort" in her knee and that "[s]he is currently applying for disability."

Claimant testified that she requested light duty pursuant to a restricted work release limiting claimant to six hours walking or standing a day, as early as October 1992, but was told employer had no light duty available for her. Ms. F, claimant's supervisor, testified she was aware of some of claimant's medical problems, including problems with her knee, but that neither she nor anyone else knew that claimant was claiming that her knee problems were due to work or work related until August 23, 1993. Claimant subsequently filed an Employer's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41). The TWCC-41 is dated "9-29-93," shows a date of injury of "(date)" and noted claimant had "[r]eported inj - to [Ms. F] [had surgery]." Claimant on the TWCC-41 gave "2-2-93 surgery on this day" as when she first knew the disease was work related. The accident is described as "[l]ifting, kneeling." Claimant testified she told Ms. F that her knee condition was work related several times before August 1993, but is unable to pinpoint a particular event or date. Ms. F concedes she spoke with claimant about her condition generally, but did not specifically inquire as to when, how or the details of claimant's knee injury. Ms. F states unequivocally that claimant never asserted her knee condition was work related until August 23, 1993.

The hearing officer was obviously very sympathetic with claimant as evidenced by the following comment in the statement of evidence:

Notwithstanding the callousness of the Employer for refusing to accommodate the medical needs of an employee with over twenty (20) years of faithful service, particularly an Employer in the business of administering to the needs of the ill and inform (sic), and despite the fact that the Claimant's supervisor, a registered nurse, was aware of the Claimant's condition and did nothing to alleviate the Claimant's difficulties, and, in her vocational capacity, must have been aware that the Claimant could suffer significant problems if the Claimant continued to work in her assigned tasks, the requirements of the law are that causation must be proven and that the Claimant must report an injury to her supervisor within thirty (30) days that she knew or should have known that the injury or disease was work-related or have a good cause for her failure to do so.

The hearing officer determined that the claimant's "date of injury was (date of injury)," as the date that claimant knew or should have known that the pain in her knee was indicative of a serious condition, that she was told on December 3, 1992, about the extent of the problems present in her right knee and that surgery was needed to correct the problems. The hearing officer further found that claimant did not report her injury to her employer "within 30 days of December 3, 1992," and that there was no good cause for claimant's failure to timely report her alleged injury. The hearing officer determined, as fact, that claimant did not tell her employer that she was claiming a work-related knee injury until August 23, 1993.

Claimant, in her appeal, states she "did not know my right knee was in serious condition until I was told (date)." The hearing officer substantially found this allegation as fact. Claimant also alleges "I told my employer as soon as I found out my knee needed surgery . . . maybe she don't remember."

Claimant's appeal fails on several grounds. Although claimant's duties were generally described, there was very little testimony or evidence of how, specifically, claimant's duties, even if assumed to be repetitive in nature, would have caused claimant's medial meniscus tear of the right knee. The hearing officer correctly notes that "[t]here is no proof of causation in the evidence presented. . . ." The definition of occupational disease (Section 401.011(34) means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. Repetitive trauma injury, in turn, is defined in Section 401.011(36) as meaning damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Section 401.011(34) provides that an occupational disease does not include an ordinary disease of life. To be compensable, the claimant must link the injury to an event at the work place and establish a causal relationship between the injury and the employment. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. Merely having pain at work does not necessarily constitute a compensable injury. Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992. The hearing officer was correct in stating there was virtually no evidence of how the repetitive trauma, if any, of being a nurses' aide caused a tear in the medial meniscus of the right knee and consequently there was no compensable injury.

Even if the above hurdle were overcome, Section 409.001(a)(2) provides that if the injury is an occupational disease, claimant must report the injury or disease within 30 days after the date on which ". . . the employee knew or should have known that the injury may be related to the employment." Claimant appears to concede in her appeal, and by her testimony at the CCH, that she knew her knee condition was serious and may be work related when she discussed the results of the MRI with Dr. T on (date). Although generally claimant says that she reported that she told her employer "as soon as I found out my knee needed surgery" the hearing officer apparently believed she may have told the employer she needed surgery on her knee as soon as she found out, but that claimant did not tell her employer the knee injury was work related until August 23, 1993. Whether the claimant told employer that she sustained a work-related knee injury within 30 days of (date), is a factual determination for the trier of fact, who is the hearing officer. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. Claimant's testimony was only that she told Ms. F of her injury but she cannot remember exactly when or exactly what she told the employer, or that it was work related. On the other hand, Ms. F's testimony is unequivocal that she knew about claimant's general medical condition, knew claimant was having surgery in February 1993, but that she was not told that claimant was alleging the knee injury was somehow work related until August 23, 1993. The trier of fact may believe all, part or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The hearing officer's determination that claimant did not tell her employer that she injured her knee at work until August 23, 1993, is supported by the testimony of Ms. F, and as such, on this point, is supported by sufficient evidence.

Claimant contends that she "did not know what was going on because I was being told the problem was by Diabetes." That contention was supported in the early history of the disease and Dr. H's records would indicate that to be the situation in latter 1991 and perhaps early 1992. However, clearly by October 1992, as found by the hearing officer, claimant knew or should have known that her condition was something other than the effects of diabetes. By December 3, 1992, claimant was told precisely what the problem was and that surgery would be needed. Claimant's contention that she did not know what was going on is not supported by the evidence for events after December 1992 and is not sufficient to establish good cause for failing to report a work-related injury for more than 30 days after December 3, 1992.

In that there is ample evidence to support the hearing officer's determination that claimant did not sustain a compensable injury, claimant does not have disability which is defined as the inability "because of a compensable injury to obtain and retain employment . . ." Section 401.011(16). Claimant did not have a compensable injury and therefore does not have disability.

An appeals level body is not normally a fact finder and when reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such a decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find.

Finding there is sufficient evidence to support the determinations of the hearing officer and applying the cited standard of appellate review, the decision and order of the hearing officer are 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