APPEAL NO. 94189

On November 18 and December 16, 1993, a contested case hearing was held in (city) Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the respondent (claimant) sustained a compensable injury to the left knee on or about ; (2) whether the claimant gave timely notice of his claimed injury to her employer; (3) whether the claimant had disability from September 9, 1993, to October 4, 1993; and (4) whether the claimant made an election of remedies. The hearing officer determined that: (1) the claimant sustained a compensable injury to his left knee on (date of injury); (2) the claimant gave timely notice of injury to his employer; (3) the claimant had disability from September 16, 1993, to October 1, 1993; and (4) the claimant did not make an informed election to pursue his claim under a group health insurance program in lieu of a workers' compensation claim. The hearing officer ordered the appellant (carrier) to pay medical and income benefits to the claimant in accordance with his decision and the provisions of the 1989 Act. The carrier disagrees with the hearing officer's decision and requests that it be reversed and a decision be rendered in its favor.

DECISION

The hearing officer's decision and order are affirmed.

Regarding the date of injury, the claimant explained that at the benefit review conference (BRC) he was unsure about the date of injury but believed it occurred the week of , or the week before . He said he later determined that the injury had occurred on (date of injury).

On (date of injury), the claimant was working as a salesperson for the employer, (employer). On that day he said the general manager, (RW) reprimanded him for poor sales performance. About 10 minutes after his meeting with RW, the claimant said he was standing up in the computer room talking on the telephone to a customer when the customer put him on hold. The claimant said he grew tired of standing up while he was on hold so he squatted down. When he attempted to stand back up, the claimant said that his left leg "gave out." He said his left knee "pulled," and he felt immediate pain. The next day, the claimant said his left knee was swollen so he went to his family doctor, (Dr. G). Dr. G's records showed that the claimant visited him on August 20, 1993, for complaints of left knee pain. Dr. G gave the claimant an elastic bandage for his knee and a prescription for pain medication. The claimant said his knee continued to be swollen so he returned to Dr. G about a week later. Dr. G's records reflected that the claimant visited him on September 2, 1993, and that Dr. G referred the claimant to (Dr. A).

Dr. A's records revealed that he examined the claimant on September 8, 1993, and the claimant told him that he had been injured approximately five weeks before when he arose from a crouched position and his knee popped. Dr. A diagnosed a large tear of the posterior horn of the medial meniscus of the left knee and a surgery report indicated that

arthroscopic procedures were performed on September 16, 1993 (the claimant indicated that the arthroscopic procedures had been performed on September 20th). In a letter dated November 17, 1993, Dr. A stated that "if at that time that he was rising his knee was twisted somewhat it could cause the injury that was found at surgery." In a statement dated September 10, 1993, Dr. A indicated that the claimant would be unable to work from September 8, 1993, to October 11, 1993. In this same statement, Dr. A also stated that the claimant told him he injured his knee at work when he arose from a crouched position, his knee popped, and he felt severe pain.

(JH) testified that she is the claimant's common-law wife and that on the date of injury (she was not sure about the date) the claimant called her and told her that he had injured his knee when he "bent down and got up."

There was conflicting evidence as to whether the claimant had had prior knee problems. The claimant and JH denied that the claimant had ever had a knee problem prior to the incident at work and two coworkers who had known the claimant for two years and another person who had known the claimant for 20 years gave statements that the claimant did not have prior knee problems. On the other hand, there was testimony from several witnesses, including RW; (SC), who was the claimant's immediate supervisor; (JJ), a secretary; and VB), the employer's director of human resources, that the claimant had complained of knee pain on several occasions prior to (date of injury), and that on (date of injury), the claimant told them that his knee pain was from a prior injury. There was no medical record of any prior knee injury. The claimant testified that he had had prior back problems and that his complaints of pain had related to that problem. Dr. G's records showed that in July 1993, he had treated the claimant for a back problem. JJ testified that on (date of injury), she saw the claimant at work and he was leaning against a wall holding his knee and appeared to be in pain.

In regard to the issue of notice of injury to the employer, the claimant testified that on September 8, 1993, when he returned from Dr. A's office, he reported to VB that he had injured his knee on the job. VB acknowledged that on September 8, 1993, the claimant told her about the day he was in the office and he had hurt his leg; however, VB said that the claimant had not reported an accident and that he had previously indicated to her and to others at work that his knee pain pre-existed the incident at work.

In regard to the issue of disability, the claimant testified that he started working for another employer about September 10, 1993, that he worked for two or three days prior to his surgery, that the week after his surgery he could not walk, and that he was off work for more than a week. He also said that Dr. A did not release him to return to work until October 4, 1993.

Concerning the issue of election of remedies, there was evidence that the employer's group health insurer paid for the claimant's surgery. However, the claimant testified that he did not tell Dr. A to bill the group health insurer nor did he complete any forms related to that insurer. When the claimant was asked whether he understood that the group health

insurance was for non-job-related injuries and that workers' compensation insurance was for job-related injuries, the claimant responded that "I didn't understand anything before this, and I still don't understand a lot of it, I really don't." The claimant admitted filling out a form for short-term disability benefits but he denied ever receiving such benefits. VB said that the claimant did receive short-term disability checks. The claimant said that while he was off work he did receive some checks from the employer. He explained that the employer has a three week delay in paying commissions for sales and that the checks he received were for commissions he had earned prior to his injury. An accounts payable employee said that the claimant was owed money when he left work.

It was the carrier's position at the hearing that the claimant's workers' compensation claim was a "spite claim," that he fabricated the incident at work after being reprimanded, and that the claimant had an "old injury."

After making pertinent findings of fact, the hearing officer made the following conclusions of law which the carrier disagrees with on appeal:

CONCLUSIONS OF LAW

2.Claimant did notify his employer of a work-related injury not later than the 30th day after the date on which the injury occurred.

3.Claimant did sustain a compensable injury to his left knee on (date of injury).

4.Claimant had disability which began on September 16, 1993, and ended on October 1, 1993.

5.Claimant had not made an informed election to pursue his claim under the Group Health Insurance Program in lieu of a worker's compensation claim.

The claimant had the burden to prove that he sustained a compensable injury, that he gave timely notice of injury to his employer, and that he had disability as defined by the 1989 Act. Contrary to the carrier's assertion on appeal, we do not consider the nature of the claimed injury to be such as to require expert medical evidence to establish causation. *See* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). We note that in Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.), the court held that there was a causal connection between the injury and the employee's employment and that the employee's injury was compensable where the employee, while in a stooped position painting a water tank on the employer's premises, sustained a back injury when he turned in response to a person who spoke to him while walking behind him. The court noted that it has been held that strains and sprains due to unexpected, undesigned or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable. In regard to the election of remedies issue, The Supreme Court of Texas in articulating a test for election of remedies has stated that a person's choice between

inconsistent remedies or rights does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and to determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Having reviewed the record we conclude that there is sufficient evidence to support the hearing officer's findings of fact, conclusions of law, and decision, and that the findings, conclusions, and decision are not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Alan C. Ernst
Appeals Judge