APPEAL NO. 94721

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 25, 1994, a contested case hearing was held. This case involves the issues of the extent of claimant's compensable injury and whether the carrier timely controverted the compensability of alleged later manifestations of the injury. With respect to those issues, the hearing officer determined that (1) respondent (carrier) did not timely contest compensability of the neck injury; (2) it did timely contest the alleged injuries to knees, wrist, and ankle; and (3) that appellant's (claimant) left knee chondromalacia and leg pain were related to the ___, injury but the right knee's medial meniscus tear, the carpal tunnel syndrome (CTS) and left ankle problems did not arise from the compensable injury or the treatment related thereto and accordingly, were not part of the compensable injury for which carrier is liable. Claimant's request for review, asserting 27 points of error (including suggested clarifications that have no effect on the decision), essentially challenges the sufficiency of the evidence to support the findings and conclusions that the ankle injury, the medial meniscus tear, and the CTS were not part of the compensable injury. The carrier argues that the decision of the hearing officer is supported by sufficient evidence and accordingly, should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The parties stipulated that on ___, claimant, a registered nurse employed by Employer, sustained a compensable injury to her back, while moving a patient in a radiation room of the oncology unit. Carrier has accepted liability for that injury. On September 16, 1991, Claimant filed a claim with the Texas Workers' Compensation Commission (Commission) related to the ___ injury. In her claim, claimant listed the nature of the injury as spinal stenosis, indicating that the parts of the body affected were her back and hip. Carrier never filed a contest as to the compensability of the neck injury in this case, asserting that it was not required to do so because claimant had not included it within her claim. The hearing officer determined that the carrier had notice that claimant was claiming a neck injury in December 1991, that it did not contest the compensability thereof within 60 days thereafter, and thus, that carrier has waived its ability to controvert the compensability of the neck injury. The carrier did not appeal that determination; thus, we will not further address the issue of the compensability of the neck injury.

Claimant was examined by several doctors who provided varying opinions as to whether her numerous medical problems are related to the compensable injury of ___, or the treatment thereof. We will address each of the alleged medical problems in turn, providing a brief summary of the medical evidence relating to the issue of its relatedness to the compensable injury.

Initially, we address claimant's assertion that her CTS is part of the compensable injury. In a progress note of March 31, 1992, claimant's treating doctor, (Dr. C), acknowledged claimant's complaints of hand and wrist pain, determining that he would send claimant for an EMG of her upper extremities to rule out CTS. An EMG of April 7, 1992, revealed mild left CTS. In a progress report of July 8, 1993, Dr. C opined that claimant's neck and upper extremity injuries were not work related. However, in another progress note of December 7, 1993, Dr. C indicated that after subsequent consultation with the claimant, he became aware that she had complained of neck and upper extremity pain related to the work injury to her first treating doctor; therefore, he recommended a reconsideration of the question of whether her upper extremity pain was work-related. Finally, in his answers to the Deposition on Written Questions, Dr. C stated that claimant's CTS was not related to the compensable injury.

With respect to claimant's assertion of an ankle injury and ankle pain, Dr. C notes in a progress note of December 7, 1993, that claimant has chronic S1 radiculopathy bilaterally and left L5 radiculopathy; thus, he opines that the ankle and thigh pain may be pain referrals. Physical therapy progress notes of December 7, 1992 to January 28, 1993, indicate that claimant had ankle, thigh and leg pain after using the treadmill in physical therapy. In a progress note of December 15, 1993, (Dr. O), to whom claimant was referred by Dr. C primarily to examine her knees, diagnosed claimant's left ankle pain, which had been ongoing since her participation in a work hardening program, as synovitis and tendinitis.

Finally, claimant asserts that her knee pain, the chondromalacia of the patella, and the right medial meniscus tear are related either to the compensable back injury or the treatment she received for that injury. An MRI of June 16, 1993, reveals a "focal abnormal signal seen involving the medial articular surface of the patella, which is consistent with the clinical diagnosis of chondromalacia of the patella." An electrodiagnostic report dated April 26, 1993, revealed chronic S1 radiculopathy bilaterally and evidence of resolving left L5 radiculopathy. In a progress note of December 10, 1992, Dr. C noted that the pain in claimant's knees "may be a post-operative residual situation . . . ." Thus, he referred claimant to Dr. O for an evaluation and to rule out other pathologies. Similarly, in a progress note of December 7, 1993, Dr. C attributed claimants ankle, thigh and knee pain to the S1 and L5 radiculopathy. Similarly, Dr. O opined that claimant's ongoing thigh, calf and knee pain resulted from the S1 radiculopathy, in a progress note of July 7, 1993. In addition, Dr. O stated in a letter of December 15, 1993, that "[t]he ongoing right knee pain may indeed be absolutely related to either the original injury or the subsequent rehabilitation of that original injury. Her ongoing chondromalacia patella is from aggressive quadriceps work in physical therapy." Finally, in his answers to the Deposition on Written Questions, Dr. O reiterated his opinion that the knee pain and the chondromalacia were related to the compensable injury but the right medial meniscus tear was not related to the ___ injury.

Under the 1989 Act, the claimant has the burden of proving the extent of her injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. A claimant's testimony is that of an interested party and only raises an issue of fact to be resolved by the hearing officer. Escamilla v. Liberty Mut. Ins. Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Under the 1989 Act, the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all, part, or none of any witness's testimony and judges the credibility of the witnesses and the weight to assign their testimony. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that claimant had not carried her burden of proving that the ankle injury, the torn medial meniscus, or the CTS arose out of the compensable injury or its treatment. In so doing, the hearing officer apparently discredited the evidence, including claimant's testimony, demonstrating a connection between those problems and either the compensable injury or the treatment related thereto. In addition, he resolved the inconsistencies in the evidence against the claimant. It was within the hearing officer's province as the finder of fact to so resolve the conflicts in the evidence. Nothing in our review of the record indicates that those determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Thus, there is no basis for disturbing the hearing officer's decision on appeal.

Finally, claimant challenges the hearing officer's finding and conclusion that the carrier's January 6, 1994, contest of compensability related to the alleged ankle, knee and wrist injuries was timely, because the carrier did not have notice that claimant was claiming a separate injury to the knees, ankle, and wrist, as opposed to pain associated with the diagnosed radiculopathy, until the December 1993 benefit review conference (BRC). Finding of Fact 19 provides:

FINDINGS OF FACT

19. The carrier first had notice that [claimant] may be claiming knee and ankle

> problems related to her ___injury in December 1993 at the Benefit Review Conference. Carrier filed a controversion on 6 January 1994 within 60 days after it first had notice that [claimant] claimed such injuries.

Section 409.021(c) establishes that a carrier must contest compensability of an injury on or before the 60th day after it is notified of the injury and not the date it has notice of a claim for the injury. Thus, for purposes of determining the timeliness of a contest of compensability, the critical date is the date the carrier had notice of the alleged injuries and not the date it had notice of a claim for those injuries. After reviewing the record, we believe that the hearing officer correctly determined that the carrier first had notice of the alleged injuries to the ankle, knees, and wrist, as opposed to pain therein, at the BRC, despite his use of language indicating that it was the first time the carrier had notice of the claim for those injuries. The medical evidence in this case was equivocal as to the existence of separate injuries in those areas of the body, as opposed to pain referrals in those areas. Thus, we cannot find that the determination that it was not until the issues were clarified at the BRC that the carrier first had notice of the alleged injuries to the ankle, knees, and wrist was so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The question of whether the carrier's contest of compensability is based on newly discovered evidence not reasonably available to it at an earlier date is a matter left to the discretion of the hearing officer. His determination will not be overturned on appeal in the absence of a showing that he abused that discretion. Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992. Generally, questions of reasonableness and ordinary prudence are factual determinations left to the hearing officer to resolve. Appeal No. 92218, *supra*. In this instance, the hearing officer determined that the carrier's contest of compensability, within a month after it first received an indication that claimant allegedly had separate injuries to her ankle, knees, and wrist, as opposed to pain related to the diagnosed radiculopathy, was based on newly discovered evidence. As more thoroughly discussed above, our review of the record indicates that the determination that the alleged existence of separate injures to those parts of the body was not clearly delineated until the BRC is supported by sufficient evidence. Therefore, under the circumstances of this case, we cannot conclude that the determination that the carrier's contest of compensability was timely was an abuse of discretion.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge