APPEAL NO. 950095
FILED FEBRUARY 27, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 7, 1994, a contested case hearing (CCH) was held. The issues presented for consideration were: (1) whether claimant's left knee injury related to his _____, compensable back injury; (2) whether the carrier timely disputed compensability of the claimed left knee injury or waived its right to dispute; (3) whether the carrier specifically contested compensability; (4) whether claimant's anxiety and stress were a condition part of the compensable injury; (5) the date claimant reached maximum medical improvement (MMI); and (6) his impairment rating (IR).

The hearing officer determined that claimant's contended left knee injury was not causally related to his compensable back injury, that the carrier had timely and sufficiently disputed compensability of the claimed knee injury, that claimant reached MMI on September 9, 1993 (at the point of 104 weeks after the date his income benefits accrued), that his IR was 14% in accordance with the report of the designated doctor, and that claimant's stress and anxiety were caused by various factors in his life and was not traceable to a definite time, place, and event, and therefore not part of the compensable injury.

The claimant filed a timely appeal of the hearing officer's determination that his left knee injury was not causally connected to his compensable back injury, and the findings and conclusions that the carrier timely and sufficiently contested compensability of the knee injury. Although the claimant identifies an objection with the finding concerning the relationship of stress to his injury, the explanation of his apparent disagreement has to do with the knee injury. Claimant also appears to argue that the date of MMI determined by the hearing officer is wrong because his treating doctor has specified a later date. The carrier responded by detailing the evidence in support of the decision. The claimant thereafter filed a further appeal, but as it is untimely it will not be considered.

DECISION

We affirm the hearing officer's decision.

The evidence shall be briefly summarized. Claimant was employed at a bakery, (employer). Claimant said very late at night on _____, as he turned with a stack of muffin trays held over his head, he felt a tremendous pain on the left side of his back. Claimant said he went down, landing on his left knee. Claimant was off work beginning September 2, 1991.

Claimant was treated after his injury by (Dr. RS), for lumbar strain and radiculopathy, and certified to be at MMI with a zero percent IR on September 30, 1991. He said he went back to work on September 30th because he was feeling better, but fell again on an unspecified date and then went to see Dr. RA on November 19, 1991. He thereafter was treated by (Dr. S). Claimant initially filed a claim for injury to his lower back and left leg, but later amended the claim on March 20, 1992, for lower back. The parties stipulated that claimant had a compensable lower back injury.

To summarize several records, claimant was treated for spinal stenosis at L4-5 and pain which radiated down his left leg, and left radiculopathy and sciatica. Claimant testified that his knee remained swollen during his treatment by Dr. S, but such is not noted in the several examination reports generated by Dr. S. He was treated conservatively for several months and when there was no improvement, Dr. S ordered a myelogram which indicated nerve compression in the back. In June 1992, the carrier asked that claimant be examined by (Dr. GR) to determine extent of injury and if claimant had reached MMI. Dr. GR noted that claimant had trouble walking any significant distance, and that he complained primarily of back pain with some symptoms going down his legs.

Claimant had back surgery on November 10, 1992. Dr. S prescribed exercises for claimant's back, and also recommended walking. Dr. S noted complaints of pain in both legs, feet, and across the pelvis when he examined claimant on August 18, 1993. Claimant's legs were reported to be feeling better on January 19, 1994. Mild "radiating" pain down claimant's left leg was noted by Dr. S on May 11, 1994. Because claimant was reaching the point of 104 weeks following the date his income benefits accrued (statutory MMI), Dr. S was asked to assess IR, and he gave claimant a 16% IR with a January 19, 1994, MMI date.

There is no mention of a discrete knee injury by any doctor until May 18, 1994, when (Dr. G) in a report of that date stated that he suspected "possible tendinitis versus meniscal tear of left knee." On May 23, 1994, Dr. G stated that claimant had a possible meniscal tear and recommended arthroscopic surgery. These reports are called Specific and Subsequent Medical Reports but are on Dr. G's stationery rather than a TWCC form. There was no testimony if, and when, the carrier received any copies of these reports.

The benefit review officer (BRO) contacted Dr. S to ask about a causal connection of the knee to claimant's back injury and Dr. S replied on September 11, 1994, that it was possible that claimant injured his knee originally and his symptoms were masked by the back injury.

Claimant's testimony was somewhat contradictory on this issue: he stated that because the carrier sought to have him examined by Dr. GR as to the extent of his injury, this meant the carrier knew he was claiming injury to his knee. On the other hand,

claimant contended that his awareness of his knee condition was "masked" by other pain and medication, as suggested by Dr. S.

The carrier contended that it first was aware of a claimed meniscus tear to the knee at a benefit review conference (BRC) held on July 8, 1994, and it filed a TWCC-21 disputing this injury on July 14, 1994. A letter from the BRO to Dr. S indicates that it "was discovered" at the BRC that claimant had a possible meniscal tear of the left knee. The text of the carrier's July 14th TWCC-21 states:

> Carrier is disputing the alleged left knee injury based on the findings of the designated doctor . . . he states the knee pain stemmed from the back. Carrier contends that the left knee complaints are caused by non-occupational conditions and/or intervening injuries or illnesses unrelated to the original low back injury.

The Texas Workers' Compensation Commission (Commission) appointed a designated doctor, (Dr. C), to evaluate claimant's IR and, notwithstanding that claimant had reached "statutory" MMI, his MMI status. Dr. C certified that claimant reached MMI on January 19, 1994, with a 14% IR, derived from his specific back condition plus a small increment for range of motion (ROM) limitations. Claimant stated that he never discussed his leg injury with Dr. C. On May 17, 1994, the BRO asked Dr. C if claimant's left leg pain was due to an injury in his left leg, or to his back. Dr. C responded on May 23, 1994, that he believed claimant's leg pain was due to his back, but noted that no IR was given for this as claimant did not have objective neurological deficits to support a rating.

The Commission also asked (Dr. TS) in July 1994 to examine claimant to determine any relationship of the knee condition to the _____, injury. Dr. TS also opined that claimant's knee condition could have occurred with his injury and could have been masked by prescription drugs.

As to mental stress, claimant said he had begun treatment in 1994 for anxiety and stress related to being off work and lowered financial resources for his family, as well as disagreement with the carrier over benefits. He noted in his testimony that the approaching holidays were adding to his stress as well.

DATE OF MMI

As to the appeal of the date of MMI, we note that Section 401.011(30) provides that MMI is the earlier of the expiration of 104 weeks following the date income benefits accrued, or when further material recovery or lasting improvement from an injury can no longer be anticipated. According to the date that the hearing officer ascertained that income benefits accrued, claimant reached MMI according to this definition on September 9, 1993. Although the hearing officer found that the designated doctor's MMI date was not

entitled to presumptive weight, he need not have determined this, as the "statutory" date supersedes any opinions as to a later date of MMI.

WHETHER THE HEARING OFFICER ERRED IN HOLDING THAT CLAIMANT'S KNEE INJURY OR HIS STRESS WAS NOT CAUSALLY CONNECTED TO HIS BACK

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza, cited above. This is equally true of medical evidence. Texas Employers Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level 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, even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

As to whether claimant's knee condition occurred when claimant fell on _____, we would note that there was conflicting evidence. There was considerable evidence in support of a conclusion that claimant's leg pains prior to 1994 were related to radiculopathy, nerve compression and back injury. Claimant's leg pains following his surgery were observed bilaterally on occasion. There was no notation in the medical records to support claimant's contention that he had been complaining of swelling or that Dr. S observed this. The hearing officer could have concluded that, notwithstanding the opinions that any knee condition was masked, a torn meniscus would have caused functional problems separate and apart from pain. There is sufficient evidence to support the hearing officer's finding.

Concerning stress and anxiety, it was clear from claimant's testimony that this condition did not occur on _____, but arose thereafter due to various stressors relating to the claim. There is no doubt that stress can and often does arise from injury. However, this does not mean that such conditions are part of the injury itself. The hearing officer's decision was supported by sufficient evidence.

WHETHER THE HEARING OFFICER ERRED BY DETERMINING THAT THE CARRIER SUFFICIENTLY AND TIMELY DISPUTED THE COMPENSABILITY OF THE KNEE INJURY WITHIN 60 DAYS

First, we agree with the hearing officer that the TWCC-21 filed by the carrier on July 14, 1994, adequately disputes the connection of the knee injury to the earlier compensable back injury. We note that neither during the hearing, nor on appeal, has claimant specified in what manner he believes the statement was not adequate.

As to whether the carrier timely disputed the knee injury, we note that a carrier is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). A carrier may reopen inquiry into compensability if there is a finding of evidence that could not reasonably have been discovered earlier. Section 409.021(d).

Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) makes clear that a carrier that has begun payment of benefits must file its dispute on or before the 60th day after it receives "written notice of injury."

Rule 124.1 defines written notice of injury:

(1) Written notice of injury . . . consists of the insurance carrier's earliest receipt of:

(2) the employer's first report of injury;

(3) the notification provided by the commission under subsection (c) of this section; or

(4) any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability. [Emphasis added.]

The Appeals Panel has held that notices which claim injury to additional parts of the body not previously claimed will start a new 60-day time period for contesting compensability for those particular parts of the body. Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. We note that in this case, although the claimant argued that the carrier's 1992 request for a medical examination order as to the extent of claimant's injury necessarily meant that it knew a knee injury was claimed, no proof of any written notice, within Rule 124.1, was made that would have given the requisite knowledge to carrier. (The May 18, 1994, letter of Dr. G may have met the requirements of a written notice, but we note that even if received by the carrier the date it was written, the TWCC-21 dated July 14, 1994, would still be within 60 days.) There was no evidence that carrier received Dr. G's letter. The hearing officer's decision that carrier first received written notice of a knee injury at the July 8, 1994, BRC is sufficiently supported by the evidence.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge