

APPEAL NO. 951038
FILED AUGUST 4, 1995

Following a contested case hearing held on May 15, 1995, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the two disputed issues by concluding that the appellant's (claimant) left knee problems "are not a naturally flowing effect of his compensable injury of _____," and that the respondent (carrier) "timely disputed the compensability of claimant's alleged left knee injury after receiving written notice that it was being claimed to be compensable." Claimant's appeal specifically challenges the sufficiency of the evidence to support three findings of fact and these conclusions "plus everything else." Claimant also complains of the unfairness of the hearing officer, the exclusion from evidence of a tape from Dr. C, the carrier's not having exchanged information as it should have, and his inability to provide documents to the carrier before the hearing. The carrier's response urges the sufficiency of the evidence and the absence of reversible error.

DECISION

Affirmed.

Claimant, the sole witness, testified that on _____, he fell backwards off the track of a bulldozer injuring his back, right arm and right knee. He said his left knee was not injured at that time and that he had no problems with his left knee prior to March 1993 when he climbed stairs in his residence, his right knee "buckled," and he "went down" and hurt his left knee. He saw his treating doctor, Dr. C, who obtained x-rays. Claimant further testified that in November 1993 his right knee cap "slipped sideways" and buckled while he was in a grocery store and he fell and again went to Dr. C who obtained x-rays. Claimant also stated that he had undergone three operations on his right knee, had commuted his impairment income benefits, and had not returned to work. He further testified that he was first aware of carrier's denial of the compensability of his left knee injury in March 1995.

Dr. C's records contained a March 18, 1993, entry stating that claimant fell on March 13, 1993, and that x-rays of his left knee and left elbow were negative. An entry of November 11, 1993, stated a history of claimant's right knee cap slipping while he was walking on the previous day and of his knee giving out and his falling and hurting his left knee. While references to x-rays do not indicate which knee was studied the records do indicate that on November 16, 1993, claimant underwent a right knee revision and that the diagnosis was a dislocated right knee cap button. A knee brace was prescribed for his right knee to relieve his feeling of instability.

According to the documentary evidence, Dr. C certified on April 14, 1994, that claimant had reached maximum medical improvement (MMI) as of that date with a whole body impairment rating (IR) of 45% for his cervical, thoracic and lumbar spine regions, and his right upper and lower extremities. Dr. S certified on June 10, 1994,

that claimant had reached statutory MMI with an IR of 29% for the same body areas. An August 18, 1994, entry in Dr. C's records indicates that an x-ray of the left knee may have been ordered in connection with claimant's complaint of left knee pain. A November 8, 1994, record indicates that claimant was last seen on October 19, 1994, that his left knee x-rays were negative, that a "diagnostic scope" of the left knee was recommended to rule out "some possible arthritis," and that claimant may also have some patella chondromalacia on that side as well. A carrier letter of October 21, 1994, to Dr. C stated that the procedure was denied in that the clinical evidence did not support the request for a left knee scope or explain the left knee involvement with the compensable injury. On February 28, 1995, the carrier prepared a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) which stated: "The claimant is stating he has a left knee injury. This has never been reported from the claimant's Dr. and when asked, the Dr. states he does not relate." A March 7, 1995, entry in Dr. C's records stated that the left knee "scope" was denied by the carrier and a March 22, 1995, entry stated that "the left knee injury is due to instability of the right knee."

Claimant has challenged a finding that he "had surgery on his right knee at least once, on January 23, 1992," indicating he has had three operations on that knee. This claimed error is without merit in that the finding is plainly qualified by the words "at least" and does not therefore find that claimant had only one procedure.

Claimant also challenges the finding that he failed to establish within reasonable medical probability that his left knee injury was caused by his compensable injury of _____. Related to that finding are findings that claimant's left knee was not involved in his compensable injury of _____, that while at home on (Date of first Injury) and again while at a grocery store in (Date of Subsequent Injury), claimant fell and hurt his left knee when his right knee gave way, and that Dr. C "failed to establish a causal connection or a naturally flowing effect between the right and left knee injuries except for the bare conclusion that the left knee injury is due to the instability of the right knee."

Our close review of the record indicates that all of these findings are sufficiently supported by the evidence. The hearing officer could consider the passage of time from the _____, compensable injury, in which the left knee was not injured, to the two 1993 incidents of right knee buckling. Dr. C did opine that the left knee "injury" was due to right knee "instability." However, his opinion did not indicate the nature of the left knee injury and the left knee x-rays following both incidents were negative. Dr. C requested the diagnostic arthroscope to rule out possible arthritis and he also mentioned possible patellar chondromalacia. However, his opinion did not indicate whether he regarded those conditions, if present, as constituting the left knee injury and whether he was relating those possible conditions to right knee instability.

The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 941575, decided January 5, 1995, stated that "[t]he Appeals Panel has not endorsed a

blanket concept that brings within the ambit of compensable injury every consequence that arguably may not have occurred `but for' the compensable injury." In Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993, a case involving a compensable foot injury and an alleged follow-on back injury, the Appeals Panel summarized several cases and stated that "the issue of whether the subsequent injury was caused by the compensable injury or the proper and necessary treatment of it is one of fact." The carrier cites as analogous our decision in Texas Workers' Compensation Commission Appeal No. 92553, decided November 30, 1992. There we affirmed the hearing officer's decision that the employee's injuries to his wrist and thumb, sustained on two occasions at home when his surgically treated and compensably injured knee gave way while performing exercises (the wrist) and while walking around (the thumb), were not proven to have been compensable. We did not find error in findings that the injuries were not themselves sustained in the course and scope of employment in that the employee was not at the time engaged in activities that furthered the business of the employer and that the injuries did not result directly from medical treatment or from disease or infection that flowed naturally from the knee injury.

However, there was no indication of a medical opinion on causation being in evidence in that case. See *a/so* Texas Workers' Compensation Commission Appeal No. 94067, decided February 28, 1994, where we upheld the noncompensability of a subsequent back injury following a compensable knee injury; and Texas Workers' Compensation Commission Appeal No. 950524, decided May 19, 1995, where we reversed and rendered a new decision that an employee's subsequent neck and shoulder injuries following a compensable knee injury were not compensable.

We find more analogous our decision in Texas Workers' Compensation Commission Appeal No. 941383, decided November 28, 1994. There we affirmed the hearing officer's decision that the employee failed to prove that his left wrist injury (carpal tunnel syndrome) arose out of and resulted from his prior compensable right elbow and forearm injuries through his overuse in performing off-the-job tasks. There were conflicting medical opinions on causation. After citing to Appeal No. 94067, *supra*, and to Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993, for discussions of "follow-on injuries," the Appeals Panel noted the following general rules relating to expert medical evidence: "[t]he opinion evidence of expert medical witnesses is but evidentiary, and is never binding on the trier of fact" and "[t]he trier of fact may accept or reject such testimony in whole or in part." Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). We also observe that the Texas Supreme Court in Gregory v. Texas Employers Insurance Association, 530 S.W.2d 105, 107 (Tex. 1975) stated: "While the expert witness's testimony must be taken as true insofar as it establishes facts, the opinions of the expert as to deductions from those facts is never binding on the trier of facts, even though not contradicted by an opposing expert. [Citation omitted.]" The hearing officer in the case we consider was not bound by Dr. C's opinion.

Claimant further challenges the finding that the "[c]arriers' dispute was clearly within 60 days of the written request for preauthorization." In preceding findings the hearing officer found that the first written notice to the carrier of a left knee injury was a preauthorization request for diagnostic testing from Dr. C on or about October 19, 1994, and that the carrier denied the preauthorization request in writing on October 21, 1994, explaining that there was no explanation of left knee involvement in the compensable injury. In subsequent findings the hearing officer found that when Dr. C later submitted (sometime between February 23 and March 7, 1995) a request to perform arthroscopic surgery, the carrier issued a TWCC-21 dated February 28, 1995, again disputing a left knee injury, and that such dispute was clearly within 60 days of any request for preauthorization regarding the left knee. These findings are sufficiently supported by the carrier's documentary evidence and information in Dr. C's records.

We find no merit to any complaint of rulings concerning the exchange of documents and the admission of evidence. An initial carrier objection to the admission of claimant's medical records was not reasserted after a recess in the proceedings for apparent consultation and all of the evidence offered by claimant was admitted into evidence. Finally, our review of the record indicates no basis whatsoever for the assertion that the hearing officer was "unfair" in any respect in his conduct of the hearing.

We find no reversible error nor do we view the challenged findings and conclusions as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge