

APPEAL NO. 961396
FILED SEPTEMBER 3, 1996

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in _____, Texas, on May 17, 1996, with (hearing officer) presiding as hearing officer. To resolve the issues reported as unresolved at the benefit review conference, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the course and scope of her employment on [Date of Injury]; that the claimant reported her injury to the employer on or before the 30th day after the injury; that the claimant had disability on February 27 and 28, 1995, from March 6, 1995, through March 26, 1995, from May 9, 1995, through May 14, 1995, and from July 7, 1995, through the date of the hearing; and that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The appellant (self-insured) requested review, urging that the hearing officer erred in admitting an English translation of a medical record, that the evidence is not sufficient to support the above determinations, and that the hearing officer erred in determining that the claimant's average weekly wage (AWW) is \$359.17 because the issue was not before the hearing officer. The self-insured attached a document concerning the claimant's pay that was not offered at the hearing. The self-insured requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on the disputed issues, or in the alternative, reverse and remand the case to the hearing officer. The claimant responded, urging that the hearing officer did not commit error in admitting the English translation of the medical record, that the Appeals Panel not consider the document submitted with the self-insured's appeal, and that the evidence is sufficient to support the determinations of the hearing officer and requesting that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The claimant testified that she began working for the self-insured on February 8, 1995, and that on [Date of Injury], she injured her knee when she walked faster than usual to answer a telephone, went around a corner, felt her knee pop, and had sharp pain in her knee. She said that she told her supervisor, Ms. G, that her knee had popped and that she was in pain and that Ms. G did not ask her if she wanted to fill out a form. The claimant stated that Ms. B, a coworker, took her to the office of Dr. G, her family doctor, after work that day; that she told Dr. G that she hurt her knee at work; that Dr. G told her that her family has a history of arthritis and that it was arthritis, and that is what she told people at work. She testified that on [Date of Injury], she did not know the difference between health insurance and workers' compensation insurance, that she used the health insurance because she was told that she had it, that she was not told that she could file for workers' compensation, and that she did not know that she could file for workers' compensation until a doctor told her that she could. She was asked about two copies of a medical insurance claim form that she said that she signed. Section 15A asks whether the condition was related to the patient's employment and has a yes and a no block to check. The copy offered by the claimant does not have either block checked, and the claimant testified that she signed the form without completing block 15A and made a copy of the form as it was when she signed it. The claimant said that she went to Dr. CS in Mexico 11 days after she hurt her knee; that Dr. CS had x-rays taken; that he told her that she had torn medial meniscus in her right knee and that she needed surgery; that he asked her if she had insurance; that she went back to work, told Ms. G that she needed surgery, asked her if she had insurance; and that Ms. G told her that she did have insurance; and that she then filled out the medical insurance form. She denied hurting her knee at her sister's house and denied telling coworkers that she hurt her knee at her sister's house. The claimant said that she was off work from March 6 through March 26, 1995, that she was taken off work on July 7, 1995, by Dr. BS and has not returned to work.

Ms. B testified that she has known the claimant for about 14 years, that they both started working for the employer on February 8, 1995, that she was talking on the telephone when another telephone rang, that the claimant went to answer the telephone, that she did not see the claimant get hurt, but that the claimant said that her knee popped as she went around a corner, and that she could see that the claimant was in pain. Ms. B stated that Ms. G asked the claimant if she wanted to see a doctor, which the claimant did not immediately go to a doctor, but that at about 2:00 or 2:30 p.m. she took the claimant to Dr. G's office. Ms. B said that she was not sure when, but sometime after February 8, 1995, and before [Date of Injury], the claimant said that she

slipped at her sister's house and hurt her knee and that the claimant continued to limp after she told her that she hurt her knee at her sister's house.

Ms. C testified that she has been a laboratory technician for the self-insured for about three years, that a day or a few days before [Date of Injury], the claimant told coworkers that she had slipped at her sister's house hurting her knee, that for several days after that the claimant complained about pain in her knee, and that the claimant limped after she said that she hurt her knee at her sister's house. She said that on [Date of Injury], she went to the room where the claimant was, that the claimant told Ms. G that her knee popped when she made a sharp turn, that she could see that the claimant was in pain, that Ms. G asked the claimant if she wanted the incident to be reported, and that the claimant said that she did not.

Ms. G testified that she has worked for the self-insured for about 15 years, that she has been an office manager for about 10 years, and that if she does not witness an accident she lets the employee involved decide whether an incident report should be filed. She stated that on [Date of Injury], Ms. B called her; that when she arrived the claimant was seated, tilted forward, and holding her knee; that the claimant said that her knee popped, that she asked if the claimant was all right, that the claimant said that she was, that she asked the claimant if she wanted an incident report filled out, and that the claimant said that she did not. Ms. G said that the claimant asked if she had health insurance, that she told the claimant that she did, and that the claimant was content that she had medical insurance. Ms. G testified that she completed part of the medical insurance claim form and that the claimant completed part of the form; that the part she completed is in dark ink and the part the claimant completed is in light ink; that she, Ms. G, did not complete block 15A; and that the check in block 15A appears to be in dark ink. She stated that the first day that the claimant missed work was on February 27, 1995. Ms. G said that she did not hear the claimant say that she slipped at her sister's house and that she did not recall the claimant limping before [Date of Injury].

English translations of medical records from Dr. CS indicate that on February 27, 1995, he diagnosed a medial meniscus tear of the claimant's right knee, that he performed orthoscopic surgery on the claimant's knee on March 7, 1995, and that he returned her to work with restrictions on March 27, 1995. In a report dated July 18, 1995, Dr. BS stated that he had reviewed the records of Dr. CS and noted that Dr. CS had performed arthroscopic surgery to correct a partial medial meniscus tear and shaved the medial femoral condyle. On July 31, 1995, Dr. BS reported that an MRI indicated that the claimant did have orthoscopic surgery on the knee and that she needs additional surgery on the meniscus. In August 1995, Dr. BS noted that the claimant's

condition continued to worsen, in September 1995 recommended additional surgery, and in March 1996, Dr. BS commented the injury could have occurred at work as she described.

We first address the self-insured's contention that the English translations of reports in Spanish from Dr. CS should not have been admitted since they were not timely exchanged and because the translations are not sworn to as being true and correct. While it would have been preferable for the translations to have been authenticated and exchanged earlier, the hearing officer did not abuse her discretion in admitting the translations. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. The hearing officer said she would consider that the translations were not authenticated. In addition, a report from Dr. BS summarizes the contents of some of the reports of Dr. CS and is consistent with the translations of the reports of Dr. CS. The precise language used in the translations of the reports of Dr. CS are not necessary to establish the claim of the claimant. Even had it been error to admit the translations, it would not have been reversible error. Texas Workers' Compensation Commission Appeal No. 950399, decided April 26, 1995.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. On the issue of injury in the course and scope of employment, the self-insured contended that the evidence is not sufficient to support the determination of the hearing officer and argued that Dr. BS did not use the words reasonable medical probability in his report. The Appeals Panel has held that in a case where the subject of an injury is not so scientific or technical in nature as to require expert testimony lay testimony and circumstantial evidence may suffice to prove a claim, Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; that testimony of the claimant alone may be sufficient to prove a claim, Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991; and that the use of the magic words "reasonable medical probability" is not required, Texas Workers' Compensation Commission Appeal No. 961130, decided July 25, 1996. The carrier also cited cases concerning repetitive trauma and argued that an injury cannot result from walking. Those repetitive trauma cases do not apply to a specific injury resulting from an accident. Texas Workers' Compensation Commission Appeal No. 960307, decided March 25, 1996. The hearing officer stated that she found the testimony of the claimant to be credible and found against the self-insured on the issue on injury in

course and scope of employment. An appeals level body is not a fact finder, and it 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 Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determination on the issue of injury in the course and scope of employment is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The self-insured complained about the determination that the claimant had disability from July 7, 1995, through the date of the hearing, stating the record does not indicate that Dr. BS took the claimant off work. The hearing officer determined from the reports of Dr. BS and the testimony of the claimant that the claimant had disability from July 7, 1995, through the date of the hearing. The evidence is sufficient to support that determination.

The self-insured correctly stated that notice of an injury must include an injury and that it was work related. The hearing officer stated that she determined that the claimant gave notice of an injury on the day that it occurred and that it was work related no later than March 1, 1995, after Dr. CS diagnosed the seriousness of the injury and asked if she had insurance. Again, the hearing officer stated that she found the testimony of the claimant to be credible and found in her favor. The evidence is sufficient to support her determination.

The self-insured contended that it met its burden of proving that the claim should be barred because of an election of remedies by the claimant. The Texas Supreme Court in Bocanegra v. Atena Life Ins. Co., 605 S.W.2d 848 (Tex. 1980) wrote:

The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice.

The court also stated that a person's choice between inconsistent remedies or rights does not amount to an election of remedies 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. In the case before us, the evidence is sufficient to support the determination of the hearing officer that the claimant is not barred from receiving workers' compensation benefits because of an election to receive benefits under a group health insurance policy.

We finally address the hearing officer's determination that the claimant's AWW is \$359.17. The hearing officer stated that since the issue of disability was before her she would make a finding of the claimant's AWW. The claimant contended that she had disability because she did not work during certain periods, not that she worked for less than her preinjury wage, and the AWW was not needed to determine whether the claimant had disability. The amount of temporary income benefits was not before the hearing officer. As the self-insured indicated, the amount of the claimant's AWW was not fully litigated. The determination that the claimant's AWW is \$359.17 is surplusage and may be disregarded.

We note that the self-insured, in its brief, makes some statements of "facts" that are not substantiated in the record. Care should be exercised in the choice of words to assure that statements of fact in a request for review or a response to a request for review are accurate and supported by the record.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C Ernst
Appeals Judge