APPEAL NO. 980039

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 2, 1997. With respect to the issue reported out of the benefit review conference (BRC), the hearing officer determined that appellant (claimant) had not sustained a compensable right knee injury, in addition to other compensable injuries, on _____ (all dates are 1995 unless otherwise noted). Early on at the CCH, claimant requested that an issue of timely contest of compensability by the respondent (carrier) be added as an issue. Carrier objected to the addition of that issue and the hearing officer stated that she would defer ruling on the issue until she issued her decision. Evidence and argument on this issue was presented by both parties over the objection of carrier. The hearing officer addressed that issue in her Statement of the Evidence and determined that claimant did not have good cause for adding an issue of timely contest of compensability of the right knee injury at the CCH.

Claimant has appealed a number of the 18 factual determinations including that she did not have good cause for raising carriers "failure to timely dispute compensability" of the right knee injury and attacks carriers handling of the case. We will consider this to be a dispute of the sufficiency of the evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds that claimant appears to be appealing some undisputed, or even stipulated to factual determinations, but otherwise urges affirmance.

DECISION

Affirmed.

At the outset, we note that claimant has had several other workers' compensation claims and injuries, has seen a substantial number of physicians, has had a staph infection which is not at issue here, and has non-work-related lupus and diabetes. Claimant is 54 years old and testified that she was employed as an EMT (emergency medical technician) was a "record keeper for OSHA," did first aid, performed "physicals for people who were hired" and completed workers' compensation forms for injured workers on behalf of the employer, a garment manufacturer. The parties stipulated that claimant sustained compensable injuries to her right hip, right and left ankles and left big toe when she slipped and fell on _____. It is undisputed that claimant immediately reported the injury and on September 20th, completed an "Employee Interview Sheet" which reported injury to the "R. ankle & R. hip - L - left ankle & L toe." No mention is made of the right knee. Claimant testified that the interview sheet offered into evidence was not complete and had additional pages.

Claimant apparently first saw a doctor for this injury when she saw (Dr. P) on October 19th. (Claimant testified that she saw Dr. P "a week or two" after the injury but as the hearing officer notes that testimony is not supported by the medical records.) A form claimant filled out for Dr. P does list the "Rt knee." Dr. P, in an Initial Medical Report (TWCC-61) apparently dated November 3rd, referencing a visit of October 19th, notes a history of a fall "causing pain to the right hip, ankle and knee." It is undisputed that Dr. P's main concern at the time was treatment and surgery (joint replacement) for the left toe injury. Other Specific and Subsequent Medical Reports (TWCC-64) between November 14th and October 10, 1996, make no reference to a knee injury. A TWCC-64 dated July 17, 1996, states that claimant is close to reaching maximum medical improvement (MMI). A TWCC-64 dated December 9, 1996, referring to a visit of December 5, 1996, states "Continues w/knee problems[,] continues with knee pain" and has a referral "MRI of Right knee and Injection w/ Dr. W." In a brief narrative dated February 5, 1997, attached to a Report of Medical Evaluation (TWCC-69) of the same date, Dr. P, while certifying MMI on November 26, 1996, with a four percent impairment rating (IR) also states, "[h]owever she continues with multiple problems to the knee . . . . an MRI of the right knee has been ordered to rule out further pathology." A report dated March 7, 1997, references an MRI "to rule out meniscal tear . . . ." In a report dated August 7, 1997, Dr. P explains that "[t]he reason the toe was treated first was that the patient had severe pain of the foot. After the toe had been treated, we were going to treat the knee but this was denied by the insurance company."

As the hearing officer notes, a work-hardening program in February 1996, noted only toe complaints and had kneeling exercises where claimant only complained of toe pain. The hearing officer also determined (and it was not specifically appealed), that claimant was not diagnosed with a right knee injury until March 7, 1997, "18 months after the alleged date of injury." The hearing officer commented in the Statement of the Evidence:

> Claimant was not actually diagnosed with a right knee injury until approximately 18 months after the date of injury alleged. Claimant's testimony was not credible, as she often confused specific information provided by her testimony and was shown to be contradicted by the documentary evidence.

We have many times stated that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer determined that claimant's testimony on the

extent of injury was not persuasive and we will not reverse that decision unless it is so against the great weight and preponderance of the evidence as to be manifestly unjust. We do not so find and affirm the hearing officer's determinations on the extent of injury issue.

At the beginning of the CCH claimant, in essence, moved to add the issue of timely contest of compensability by the carrier, referring to her response to the BRC report which stated:

> I disagree with the recommendations on the 60 day rule issue of Insurance Carrier's refusal.
>
> I understand that I did not bring out the information at BRC about the 60 day rule but I had not been informed that it could be an issue. I read and learned information that Carrier had 60 days to refuse medical evaluation but did not.

Carrier timely objected to the addition of this issue and correctly pointed out that the benefit review officer (BRO) had not made any recommendations on the "60 day rule." The hearing officer heard argument from both sides, with carrier citing some Appeals Panel decisions. The hearing officer then stated that the parties "should be prepared to address this issue today," that she would review the cited Appeals Panel decisions and that she would write her decision "and when you see the decision, you will now how I ruled." On the issue of written notice to carrier, claimant contends that Dr. P's report dated November 3rd of the October 19th visit, which mentioned the right knee gave a written notice of a knee injury as well as a progress note dated October 2nd by (Dr. N), where Dr. N notes "tenderness about the knees . . . intact reflexes at the knees . . . ." There was no evidence if or when carrier may have received these reports. Carrier filed Payment of Compensation or Notice of Refused or Disputed Claims (TWCC-21) dated July 10, 1996, August 5, 1996, September 17, 1996, and December 18, 1996. All the TWCC-21s accept liability for "the right hip, right ankle, left ankle and left great toe." Only the December 19th TWCC-21 specifically disputes the right knee. Carrier contends that there were BRCs on March 12, July 2 and September 18, 1997, on this case and claimant never raised the issue of timely contest of compensability. Claimant replied that she had not done so because she was unaware of the "60 day rule" or that she could raise the issue that carrier had not timely contested compensability of the right knee injury. The hearing officer, citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)), commented that:

> Claimant's claimed ignorance of the possibility of this being raised as an issue was not credible. Nevertheless, even were she to be believed, her basis for failing to raise this issue before was her ignorance of the law, which the Appeals Panel has held fails to constitute good cause.

The hearing officer in Finding of Fact No. 5 held:

5. Claimant did not have good cause for adding an issue at the CCH of whether Carrier failed to timely dispute compensability of her right knee injury.

Without any specific ruling, the hearing officer apparently determined that claimant's response to the BRC report, quoted above, "seemed to request the addition of an issue of carrier's failure to dispute compensability of the right knee injury. . . ." It would have been preferable to have specifically addressed claimant's response to the BRC report, however, the hearing officer did specifically hold that claimant did not have good cause to add the issue in Finding of Fact No. 5. The hearing officer determined that claimant did not have good cause to add the issue at the CCH because the good cause was that claimant was unaware that she could raise that issue. Texas Workers' Compensation Commission Appeal No. 951225, decided September 11, 1995, a case having similar facts on the waiver issue (an injured employee claimed he was unaware of a potential issue), commented that "[i]t has been held that ignorance of the law does not constitute good cause for failure to comply with its terms [citation omitted] and that a party who seeks to come within the good cause exception to a provision of Rule 142.7(e) has the burden to prove that good cause exists in his or her particular case. Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992." *See also* Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993, citing Applegate v. Home Indemnity Company, 705 S.W.2d 157 (Tex. App.-Texarkana 1985, writ dism'd).

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm the decision and order of the hearing officer.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O=Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge