

APPEAL NO. 990171

Following a contested case hearing held on January 5, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by finding that the appellant (claimant) did not sustain an injury within the course and scope of his employment with (employer) on _____, and that although he has been unable to obtain and retain employment at wages equivalent to the wage he was earning prior to that date, his inability in this respect is not the result of an injury for which workers' compensation benefits are payable. Based on these findings, the hearing officer concluded that claimant did not sustain a compensable injury on _____, and did not have disability. Claimant has appealed these findings and conclusions, asserting that the discrepancies in the evidence concerning which knee he injured, mentioned by the hearing officer in her discussion, were explainable and not a basis to find against him. He also complains that the hearing officer was biased and unprofessional, that she said she wanted a short hearing, and that a case she cited as analogous is not analogous. The respondent (carrier) filed a response, urging the sufficiency of the evidence to support the challenged findings and conclusions and the absence of any reversible error in the record.

DECISION

Affirmed.

Claimant testified that on September 17, 1998 (all dates are in 1998 unless otherwise stated), he commenced working for the employer as a journeyman millwright; that he passed the preemployment physical and was not having any swelling, pain or other problems with his left knee at that time, though conceding he had been treated for left leg phlebitis by Dr. R; and that just before commencing this employment, he had worked for three and one-half years as a prison guard. He stated that while at work on _____, he was sitting, beneath scaffolding, on a five-gallon bucket to be lowered to the ground to read indicators on pumps, that he stood up, grabbed the scaffolding bar, and slid out from underneath it, and that as he did so he felt pain in his left knee. He said he finished his shift and went home limping; that the next morning his knee was swollen and he could hardly walk; that he called the employer, spoke to Ms. B in the safety office, and advised that his knee was hurt and he would not be coming to work; that on the following day he did go to work; that he told his foreman, Mr. W, about getting up from the bucket and feeling knee pain, asked for light duty, and conceded that he did not know for sure then if the knee injury was work related; that Mr. W took him to the safety office where he saw Mr. R, the project safety director, and told him about getting up from the bucket; that Mr. R sent him to the employer's first aid office for ice and had him read technical manuals and sit down and clean parts; that he went to Dr. R, his "HMO doctor" with whom he had been treating for about three years while he worked at the prison; and that later, Mr. R took him to see Dr. C, a doctor used by the employer, who told him he did not believe the injury history claimant related. Dr. C's October 6th record relates that claimant said he was sitting on a bucket and that when he stood up, he felt his right knee pop and that he has had swelling for the

past six days. Dr. C further stated that claimant has some pain to palpation of his left knee; that there is a very large bruise on the left knee about one and one-half to two weeks old; and that claimant "could not possibly get this injury just standing up, there had to be some trauma, however, he denies any trauma to his knee." The October 6th x-ray report states "mild degenerative changes, no evidence of acute bony trauma or masses."

Claimant further testified that when he saw Dr. R, on October 1st, he did not tell Dr. R about his knee injury because he knew his previous health insurance had expired and he did not want Dr. R involved in a workers' compensation injury because he did not consider Dr. R to be a workers' compensation doctor. He said that Dr. R neither examined the knee nor took a history of the injury. Claimant also said he gave a recorded statement to the carrier's investigator, Mr. P. In that statement, claimant was asked if he gave Dr. R a history of an on-the-job injury and claimant responded, "I told him basically what I told you, it just started hurting the day before." He also told Mr. P that Dr. R examined the knee and told him he thought it was "probably something stressed or tore, but my insurance had lapsed so I took some pain medicine and went home," explaining that Dr. R gave him some prescriptions. According to Dr. R's records, Dr. R diagnosed phlebitis in claimant's left leg on June 16th. Dr. R's record of October 1st states that claimant complained of pain behind the right knee which goes away after he walks a couple of miles but returns the next morning and Dr. R's diagnosis is "internal derangement right knee, possible meniscal tear."

In evidence is the statement of Mr. M, written on "10-[illegible]-98," stating that he was called to the employer's field safety office on October 2nd, that claimant was present with a swollen knee and a yellow bruise on a knee, that he asked claimant how his knee had become swollen, that claimant said it started hurting while he was in the unit a couple of days before, and that he had gone to his own doctor and had been told that since he did not have insurance, there was not much he could do for claimant.

Claimant further testified that he commenced treatment for his knee injury with Dr. T and that Dr. T told him that he had a torn meniscus and that these injuries are usually caused by a twisting. In his handwritten statement of October 4th, claimant stated that he was sitting, aligning a motor to the pump, "and when I stood up I felt a sharp pain in my right knee." However, in his December 18th answers to the carrier's Interrogatories Nos. 3 and 6, claimant states, respectively, "while standing up from a crouched position, claimant twisted knee" and "while the claimant attempted to rise from a crouched sitting position, claimant twisted and injured his knee." Claimant conceded that he had not used the word "twisting" in relating his injury but believes he twisted it in the process of getting up from the bucket and out from under the scaffolding. He further stated that Dr. T took him off work and has kept him off work pending the proposed arthroscopic surgery. On November 19th, claimant's assistant wrote Dr. T asking if he felt in all reasonable medical probability that claimant's injury could have occurred from merely standing up from his seated position and Dr. T responded, "Yes" and "twisting of knee with a torn meniscus." Claimant further testified that he was laid off by the employer on October 9th, that he has been drawing unemployment compensation benefits, and that he does not believe he can return to millwright work.

In an employer's accident/incident report dated October 2nd, Mr. W stated that claimant was absent on October 1st, that on October 2nd he stated that he hurt his knee at home or at work, and that he was seen at the end of the shift on _____ and did not mention or say anything about his knee hurting. In his written statement of October 7th, Mr. R stated that when claimant came to the safety office on October 7th, he stated that he did not remember hurting the knee either at home or at work. In her statement of the same date, Ms. B stated that claimant told Mr. R he hurt his knee but did not know where, at home or work; that he went to his doctor and was told he might need surgery; and that when his doctor found out he did not have insurance, he did not want to talk anymore. Mr. R testified that he saw claimant in the safety office on October 2nd and, having years of experience as a medic, looked at both of claimant's knees; that he saw the remnant (yellowing) of a large bruise on the left knee and swelling of the right knee; that claimant told him he did not even know he had bruised the left knee and that it was his right knee that was hurting. Mr. R stated that he thought it was the right knee that was injured, and so stated in the Employer's First Report of Injury or Illness (TWCC-1), because claimant told him that when he had stood up, he felt pain in the right knee. He also said he talked to Dr. C about the claimed injury because reports were referring to the left knee and that Dr. C said he saw the bruise and talked to claimant about it. Mr. R also stated that while it is not unusual to see a millwright sitting on a bucket, he had not heard of claimant's having been sitting beneath scaffolding prior to the hearing. There is no mention of claimant's sliding out from beneath scaffolding in his Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), in his recorded statement, or in the history portions of the records of Dr. C, Dr. R, and Dr. T. In his recorded statement of October 7th, claimant told Mr. P that he had been sitting there lining up pumps "and I stood up and I felt a sharp pain in my right knee." He later corrected that to the left knee.

Claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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).

As the hearing officer indicates in her discussion of the evidence, she took note of the various conflicts and inconsistencies in claimant's evidence and did not find his evidence persuasive that he actually injured his left knee at the time and in the manner he contended. That another fact finder may have drawn different inferences from the evidence does not provide us with a basis to disturb this hearing officer's findings. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

In his appeal, claimant mentions that in her discussion the hearing officer cites Texas Workers' Compensation Commission Appeal No. 972235, decided December 17, 1997, and he distinguishes his manner of injury from that in Appeal No. 972235. In that case, the Appeals Panel reversed and rendered a new decision that the employee, who merely rolled her chair back from her desk, stood up, and felt back pain, did not sustain a compensable back injury. As claimant says, his knee injury occurred, according to his testimony, when he rose from a crouched position in a confined area under scaffolding. However, since the hearing officer did not reach her decision on the basis of claimant's injury circumstances being sufficiently analogous to those in Appeal No. 972235, we need not further discuss the differences. The hearing officer may not have found claimant's testimony about having somehow twisted his knee credible.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge