APPEAL NO. 990179

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 11, 1999, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that the respondent (claimant) had sustained a compensable (right knee) injury on _____ (all dates are 1998 unless otherwise stated), that claimant gave timely notice to the employer and that claimant had disability from July 24th through the date of the CCH. The parties stipulated that claimant timely reported a work-related injury to the employer and the alleged date of injury was _____.

Appellant's (carrier) appeal centers on its contention that claimant was not at work on _____, that claimant's last dat at work was July 19th and that since claimant was not at work on _____, she could not have sustained a compensable injury on that date. Carrier also complained that it had no knowledge of claimant's January 4, 1999, surgery and attached medical records dated December 15th and 22nd and January 4 and 12, 1999, to its appeal asking us to consider those records as newly discovered evidence. Carrier requested that we reverse the hearing officer's decision and either remand the case or render a decision favorable to it. The file does not contain a response from the claimant.

DECISION

Affirmed.

At the outset, we note that the testimony and evidence is greatly in conflict and the case revolves around whether claimant was at work on _____ or whether claimant's last day of work was July 19th. Claimant was a 16-year-old high school student employed as an "order taker and cashier" at a delicatessen (employer). Claimant testified that at about 2:30 p.m. on _____ as she was going to take an order she slipped on a greasy spot on the floor and fell to her right knee. Claimant said the fall was witnessed by Ms. AT and another coworker whose name she did not know. Claimant testified that she felt pain and immediately reported the injury to the general manager, Mr. MK. Claimant also said that shortly thereafter, she told another coworker, Mr. WB, about her injury and showed him her knee, which claimant said was swollen and bruised. Claimant also offered into evidence a statement signed by Mr. WB stating claimant was working at the employer's restaurant on _____ but that he had not witnessed the accident. A similar statement from another coworker is in evidence. Claimant said that she told the second coworker about the incident after work on _____. After she reported the injury to them, claimant testified that Mr. MK and an assistant manager told her to "walk it off" and go bus some tables. Claimant testified that she finished her shift working until 4:00 p.m. on _____, and worked six hours on (a day after date of injury) and (two days after date of injury). Claimant testified that initially she thought her injury "was no big deal" but that her knee got progressively worse over the two days after her fall.

Contrary to claimant's testimony, both Mr. MK and the assistant manager denied that claimant reported an injury or accident to them on _____. Mr. MK testified that he was working on _____ and claimant was not, that claimant's last day at work was July 19th and that he was not sure which other workers were at the restaurant that day. Ms. AT, in a one-line written statement, said she "did not witness an accident involving [claimant]." Carrier produced notes and memos that claimant's last day at work was July 19th. In evidence is a pay stub showing 18 hours work with a beginning and ending date of July 20th. Claimant said that was the beginning date of the pay period. Mr. MK said it was the ending date of the pay period. Mr. MK testified that he did not have a time card for claimant for _____ and was first notified of claimant's alleged injury by his district manager in August.

Apparently claimant's mother had considerable involvement in this case. It is undisputed that claimant's mother called the employer's human resources department several times and that on or about July 24th claimant was offered some options including working at another restaurant or quitting and receiving a week's severance pay. Claimant testified that she was unable to work, that her knee was getting worse and that she elected to quit and get a week's severance pay, which was never paid, apparently because of some miscommunication about how the check would be delivered.

Claimant first sought medical treatment for her knee on August 6th at a hospital emergency room (ER). An ER report dated August 7th indicates claimant has "an injury to the knee joint," and prescribed rest and medication. A similar form report dated August 20th repeats the same information. Claimant was subsequently referred to the (clinic), where she saw Dr. R on September 16th. In an Initial Medical Report (TWCC-61) of that date, Dr. R notes the fall on _____, diagnoses a contusion of the knee, takes claimant off work and prescribes physical therapy. In a clinic report of October 7th, right knee swelling and tenderness is noted. The report continued claimant off work. Claimant was referred to Dr. B for an orthopedic evaluation. Dr. B, in a report dated October 7th, has an impression of "injury of the right knee," claimant is encouraged to continue exercises, and if claimant fails to show improvement, she "should have an orthopedic surgical referral for surgical consideration."

The hearing officer found that claimant slipped on a grease spot on the floor, fell and injured her right knee. The hearing officer specifically found that claimant was a credible witness and adopted the claimant's version of events, including the _____ date of injury. Carrier acknowledges that the hearing officer "is the sole judge of the credibility of the witnesses and the weight to be given the evidence" citing Section 410.165; however, carrier contends that the hearing officer's decision is against the great weight and preponderance of the evidence, citing evidence and testimony which would indicate that claimant was not at work on _____ and so "could not have sustained an injury to her knee as claimed." As the carrier acknowledges, 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 as well as the weight and credibility that is to be given 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 Company 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).. In this case, the hearing officer accepted claimant's version rather than Mr. MK's testimony and supporting documentation. Our review of the record does not demonstrate that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, no sound basis exists for reversing it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Although another fact finder may have drawn different inferences from the evidence, which could have supported a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Claimant, at the CCH on January 11, 1999, apparently, for the first time, testified that she had had knee surgery on January 4, 1999, by Dr. S. Carrier, on appeal, submits medical reports dated December 15th and 22nd and January 12, 1999, regarding Dr. S's treatment and knee surgery and requests that we "consider these records in its appeal or remand the case" to the hearing officer for further consideration. As a general rule, the Appeals Panel does not consider new evidence on appeal. Texas Workers' Compensation Commission Appeal No. 93682, decided September 20, 1993. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to an appellant's knowledge after the CCH, whether it is cumulative in nature, whether it was through lack of diligence that it was not offered at the CCH, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case, the medical reports of claimant's recent surgery would appear to meet all the requirements of newly discovered evidence except that those records are unlikely to produce a different result. Carrier defended this case on the basis that claimant had quit her job on July 19th, was not at work on _____, and, therefore, could not have sustained a compensable injury on _____. The medical evidence admitted at the CCH establishes that claimant has some type of knee injury, whether it be a contusion, or other "injury" or "inflammation in the knee with synovitis." We do not read the proffered reports to say there was no injury and therefore we find that those records are unlikely to produce a different result. We find no reason to remand the case for the hearing officer to consider the newly discovered and generated medical records.

Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge