

APPEAL NO. 990247

On December 16, 1998, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the compensable injury sustained on \_\_\_\_\_, is a producing cause of the left knee condition; (2) whether the respondent (carrier) waived the right to contest compensability of the left knee condition by not contesting compensability within 60 days of being notified of the injury under Section 409.021; and (3) whether the appellant (claimant) has had disability, and if so, for what period. The claimant requests reversal of the hearing officer's decision that: (1) the compensable injury sustained on \_\_\_\_\_, is not a producing cause of claimant's left knee condition; (2) carrier timely contested compensability of the left knee condition within 60 days of being notified of the alleged injury to the left knee and has not waived its right to contest compensability of the left knee condition; and (3) claimant had disability from February 16, 1998, through April 19, 1998, as a result of the compensable injury to the right knee on \_\_\_\_\_. A response was not received from the carrier.

DECISION

Affirmed.

On \_\_\_\_\_, claimant was working as a security guard for the employer. It is not disputed that on that date she fell into a ditch or hole at work while walking to a guard house at about 6:00 a.m. when it was dark outside. The ditch was immediately in front of the door of the guard house and was dug for electrical lines. She said that both of her legs went into the ditch, that her whole body went into the ditch, that the ditch was about to the middle of her thighs, and that her whole body was jarred from her feet up. She said she pulled herself out of the ditch. She said CL, a security guard, was walking behind her when she fell into the ditch. CL had no recollection of the incident but said that he was not saying that it did not happen. Claimant notified her supervisor, CW, of the accident on the day it occurred. CW testified that the ditch was about three feet wide, four feet long, and 18 inches to two feet deep, that claimant told him she fell into the ditch, and that claimant did not really indicate that she was hurt. CW left employment with the employer about a year before the CCH. CW said that on some unspecified date before he left the employer, claimant complained that her "leg" was hurting and that he advised claimant to see a doctor. CW also said that at the time claimant complained to him she said that her injury was to her knees, but then said that she complained about the right knee at first and that he did not recall her mentioning her left knee. However, he later testified that she had complained about both knees, but more particularly the right knee.

Claimant continued to work on \_\_\_\_\_ and she said that by the end of her shift her legs, back, and arms were getting sore from the fall. She said that she continued to work for the employer but that her legs would "catch" and that in December 1997 she went to Dr. BU. Claimant said that she talked to Dr. BU about both of her knees. In a report dated December 9, 1997, Dr. BU noted that claimant had "knee pain," without specifying left,

right, or both, and ordered x-rays of both knees. Dr. M reported that the x-rays taken on December 12, 1997, showed "no significant abnormal bony, joint or soft tissue changes, both knees" and recommended "MRI of the knees." Claimant said that she then went to Dr. Q and Dr. Q ordered an MRI of her right knee. Reports from Dr. Q are not in evidence. Claimant said that when she asked Dr. Q about her left knee, Dr. Q said that the right knee would have to be taken care of first. Claimant said she was having more problems with her right knee than with her left knee at that time, but was still having some problems with her left knee.

Claimant said Dr. Q referred her to Dr. B, an orthopedic surgeon, whom she first saw on February 9, 1998. Claimant said that she talked to Dr. B about both knees. Claimant's daughter, Ms. P, said that she went with claimant to appointments with Dr. B and that at almost all of the appointments claimant mentioned her left knee and that Dr. B had said that the right knee had to be worked on first. Dr. B's chart note of February 9, 1998, states that claimant was 49 years of age at that time, that she severely twisted her right knee when she stepped into an unmarked hole at work on \_\_\_\_\_, that x-rays were unremarkable, that an MRI showed a tear of the medial meniscus, and he recommended arthroscopic surgery of the right knee, which claimant underwent on February 16, 1998. Claimant saw Dr. B again on February 25 and April 14, 1998, and he released claimant to light-duty work on April 19, 1998. Claimant said she was released after her physical therapy. Claimant said that she returned to work on light duty at her regular hours and her regular pay, that her right knee continued to hurt, she had a limp of the right knee, and that her left knee was getting worse and swelling. Claimant returned to Dr. B on July 16, 1998, and in a chart note of that date Dr. B noted that claimant had a workers' compensation right knee injury, that she underwent surgery on the right knee, that she had persistent swelling of the right knee, that she had a limp, that he had given her injections in the right knee, and that he recommended additional therapy.

On August 18, 1998, carrier took claimant's recorded statement, the transcription of which was in evidence. In that statement, claimant said that she injured both knees when she fell in the ditch on \_\_\_\_\_; that her right knee injury had caused her to limp causing damage to her left knee; and that on or about August 4, 1998, she was walking down a slight incline at work to get to her car when she twisted her left knee and felt it catch and damaged it some at that time. She said that she had swelling in her left knee after that incident but that she had had swelling in her left knee before that incident and after she fell into the ditch on \_\_\_\_\_.

Claimant went to Dr. B on August 19, 1998, and in a chart note of that date Dr. B wrote that the right knee had developed medial compartment degenerative disease and that claimant had developed a similar condition of the left knee, along with pain, catching, locking, and giving way. This is the first mention about complaints of the left knee in Dr. B's chart notes. Dr. B took x-rays of the left knee and wrote that he thinks claimant has a degenerative or torn medial meniscus, that claimant was going to develop medial compartment degenerative joint disease, that debriding would buy her some time, and that in the long run claimant will probably require an osteotomy or a total knee replacement. In

a chart note of September 11, 1998, Dr. B wrote that claimant sustained an injury to her left knee in October 1997 when she stepped into a hole and twisted both knees, that she had been having catching, locking, and giving way of the left knee for almost a year, and that he was scheduling claimant for an arthroscopy of the left knee. Dr. B noted that claimant may not return to work until after her left knee surgery.

The claims administrator for the carrier gave written notification to Dr. B on September 17, 1998, that the left knee arthroscopy had been recommended as medically necessary, but stated that preauthorization did not guarantee payment and that the employer or claims administrator should be contacted regarding compensability. Claimant said carrier canceled her left knee surgery and that she has not had that surgery. Claimant said she has not returned to work since Dr. B took her off work for her left knee surgery because Dr. B told her to not return to work until after her left knee surgery and because she cannot walk or stand very well.

In a letter dated September 24, 1998, Dr. B wrote that claimant had presented to his office on February 9, 1998, after an injury of \_\_\_\_\_, in which she stepped in a hole injuring both knees; that the right knee was the major problem at that time; that the meniscal tear was treated; that she went on to develop similar problems in the left knee, which he stated, was related to the original injury; that claimant has a torn meniscus of the left knee for which he recommended surgery; that she may eventually require total knee replacements; that it was clear in her description of her injury that both knees were injured at the time of her fall; that he felt claimant was having pain in the right knee and never really tested the left knee; that when claimant returned to full activity her left knee became symptomatic; and that arthroscopy is appropriate for the left knee.

In a letter dated December 2, 1998, Dr. B wrote that when he saw claimant originally, her complaints were exclusively of her right knee; that she had recovered from that and returned to see him on August 19, 1998, with pain and discomfort of the left knee; that it was his feeling that she had a torn meniscus on the left and needed debridement; that he recollects that at that time claimant said that her left knee was injured at the same time her right knee was injured when she fell but her left knee did not bother her significantly until the right knee recovered; and that she noticed gradually increasing limitation and discomfort of the left knee. Dr. B added that claimant's left knee had been bothering her significantly since August 19, 1998.

It is undisputed that claimant sustained an injury to her right knee on \_\_\_\_\_. With regard to the issue of the left knee injury, claimant had the burden to prove the extent of her injury. The hearing officer decided that the compensable injury of \_\_\_\_\_, is not a producing cause of claimant's left knee condition. In doing so he made numerous fact findings, including, among others, that claimant fell into a ditch at work on \_\_\_\_\_; that she had surgery for her right knee in February 1998; that in early August 1998 she twisted her left knee while walking; and that on August 19, 1998, Dr. B noted that claimant had developed medial compartment degenerative disease in both knees. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the

trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision on the extent of injury issue is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

With regard to the disability issue, the hearing officer found that claimant was unable to work because of her right knee condition from February 16, 1998, through April 19, 1998, when she was released to return to work, and he concluded that claimant had disability from February 16, 1998, through April 19, 1998, as a result of the compensable injury to the right knee on \_\_\_\_\_. Claimant contends that she also had disability from August 19, 1998, to the present because Dr. B took her off work until she has left knee surgery. The hearing officer found that claimant has not worked from August 19, 1998, to the date of the CCH because of her left knee problem. He did not find disability for that period of time because he did not find that the left knee condition is part of the compensable injury. "Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Because we are affirming the hearing officer's decision on the extent-of-injury issue, we also affirm the hearing officer's decision on the issue of disability.

With regard to the waiver issue, the Employer's First Report of Injury or Illness (TWCC-1) dated December 10, 1997, states that claimant injured her "knee," without specifying which knee, on \_\_\_\_\_, and that document was received by the carrier's claims administrator on December 15, 1997. Two other employer reports the carrier's claims administrator received on December 15, 1997, also refer to an "injured knee" and "her knee" without specifying which knee. As previously noted, in his chart note of February 9, 1998, Dr. B noted that claimant had twisted her right knee on \_\_\_\_\_, and claimant had right knee surgery for her injury of \_\_\_\_\_ on February 16, 1998. In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated February 11, 1998, which is date stamped as received by the Texas Workers' Compensation Commission (Commission) on February 17, 1998, claimant wrote that, with regard to her injury of \_\_\_\_\_, the body parts affected are "right knee possible left knee." No carrier or carrier claims administrator date received stamp is on that document. Claimant said she filed the TWCC-41 with the Commission and that she does not know when the Commission sent the TWCC-41 to the carrier.

The carrier's representative identified its third exhibit as a facsimile cover sheet from the Commission to the carrier dated October 22, 1998, with the claimant's TWCC-41 attached and represented that that was when carrier first received claimant's TWCC-41. Carrier's Exhibit No. 3 contains a facsimile cover sheet dated October 22, 1998, from the Commission to (ST), with claimant identified as the subject and stating "here's the TWCC-41 claimant filed on 2-17-98 showing both knees" and attached to that sheet is the

claimant's TWCC-41. As previously noted, on August 18, 1998, carrier took claimant's recorded statement and in that statement claimant claimed injury to both knees in the accident of \_\_\_\_\_. In a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), which is date stamped as having been received by the Commission on September 2, 1998, carrier disputed the compensability of the claimant's left knee problems, contending that the left knee is not related to the \_\_\_\_\_, date of injury where claimant injured her right knee, and that claimant did not injure her left knee in the course and scope of her employment.

The hearing officer found that carrier's first written notice that claimant was alleging a work-related injury to the left knee was on August 18, 1998, when it took claimant's statement (that statement was transcribed); that carrier filed its TWCC-21 with the Commission on September 2, 1998, disputing the left knee problems as not being related to the \_\_\_\_\_, injury; and he concluded that carrier did contest compensability of the left knee condition within 60 days of being notified of that alleged injury and had not waived its right to contest compensability of the left knee condition. Section 409.021(c). Claimant contends that the carrier was given notice of the left knee injury in her TWCC-41 of February 11, 1998, which was received by the Commission on February 17, 1998; however, claimant did not show that the Commission sent the TWCC-41 to the carrier earlier than the October 22, 1998, facsimile transmittal. We conclude that the hearing officer's decision on the waiver issue is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge