APPEAL NO. 990614

A contested case hearing was held in Corpus Christi, Texas, on March 2, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with the hearing officer, to consider the sole disputed issue, to wit: Did the respondent (claimant) have disability resulting from her left knee injury sustained on _____, from February 22 through August 25, 1998. The hearing officer resolved the issue by concluding that claimant had disability beginning on February 23, 1998, and continuing through August 25, 1998. The appellant (carrier) has appealed this conclusion and two of the factual findings, asserting that the appealed findings and conclusion are against the great weight of the evidence because claimant's testimony was not credible, was refuted by the carrier's witnesses, and was not supported by the medical evidence. Claimant's response urges the sufficiency of the evidence to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable left knee injury on _____ (all dates are in 1998 unless otherwise stated).

Claimant testified that on _____, while working as a helper for the employer, who was performing a "turn around" maintenance job at a refinery, she struck her left knee against a scaffold bolt as she descended a scaffold and tried to avoid a wheelbarrow. She said that she immediately went to the safety office nearby where her knee was examined, ice was applied, and she was advised not to do anything about the injury because an injury would threaten safety bonuses; that she continued to work and finished her shift but that her knee was painful and became swollen; that she self-medicated at home with aspirin, alternating applications of ice and heat, and the use of a soft knee brace; that when she returned to work the next day, she was given light duty at her usual wage rate; and that she continued to work at such light duty until the morning of February 23rd when she was told at the plant gate by a person wearing one of the employer's gray hats that she was laid off. Claimant said that it was common for the employer to hire, lay off, and rehire and lay off employees used for "turn around" jobs at refineries and plants, a statement confirmed by the carrier's witnesses, Ms. M, the safety director's secretary, and Mr. S, a safety supervisor. However, these witnesses also indicated that only the "hands" wore gray hats, while the employer's supervisors wore either blue or white hats. The apparent implication of this testimony was that claimant was either not told she was laid off or was told by a person without the authority to do so. Ms. M also testified that she reviewed the employer's payroll records before coming to the hearing and that these records reflected that claimant's last day of work was on February 27th and that she was not laid off but rather quit voluntarily. Mr. S denied that claimant was discouraged from pursuing treatment or doing anything else about her injury so as to avoid losing safety bonuses.

Claimant further testified that she had not had any previous injury to her left knee; that she had not had other trauma or injury to the left knee after _____; that she did not obtain medical attention for her knee until she was seen on August 26th by Dr. B, after obtaining the assistance of her attorney, because she had no insurance or money to pay doctors' bills, her husband was disabled, and she was unfamiliar with workers' compensation; and that she was referred to Dr. B by her attorney. Claimant, who underwent knee surgery on the morning of the hearing but felt competent to testify, also said that she did not work or seek work after being laid off on February 23rd and that in April or May she inquired of the employer about her safety bonus and was told she would not receive a bonus because she had quit her job. She conceded having been referred by the employer at that time to Dr. M and not seeing him, but explained that she wanted to see a doctor of her own choosing, and that Dr. M had a reputation for telling employees that there was nothing wrong with them. Ms. M indicated that Dr. M was one of the doctors to whom the employer referred employees.

The Initial Medical Report (TWCC-61) of Dr. B, a chiropractor, reflects that on August 26th he diagnosed meniscal tears, felt that diagnostic testing was indicated, and referred claimant to Dr. G, an orthopedic surgeon; and that the dates claimant could return to either limited or full-time work were "undetermined." The January 13, 1999, MRI report stated the impression as small joint effusion, minimal degenerative joint disease, attenuated displacement of the medial meniscus, and a tear of the anterior horn of the lateral meniscus. Another record of Dr. B, dated August 26th, states that claimant needs to be excused from work from "8/26/98 to new notice."

Dr. G's TWCC-61 dated September 8th reflects that two clinical tests of the knee were positive, that claimant's knee had effusion, and that Dr. G ordered an MRI.

The December 11th report of Dr. W, whom the parties indicated was appointed by the Texas Workers' Compensation Commission to perform a required medical examination of claimant's knee following a benefit review conference, states that claimant said there was a twisting component to the knee injury she sustained when she slipped while stepping down from a scaffold and struck the anterior lateral aspect of her knee against a bolt; that the knee became painful; that claimant reported the injury to her supervisor and did not seek medical attention; that she reported that she "was unable to continue working and as of today she has not worked since the injury of _____"; that because of increasing problems with her knee about five months later, she saw Dr. B who referred her to Dr. G; that Dr. G felt there was a possible internal derangement and requested x-rays and an MRI which have not yet been authorized; and that claimant continues to be symptomatic, continues to be unable to work, and continues to treat herself. Dr. W further stated that claimant does have disability to her left knee which limits her ability to be on her feet for long periods and that "[s]he is unable to kneel or squat and thus, unable to work"; that she definitely shows chondromalacia of the patella and possible internal derangement with either a torn medial meniscus or torn lateral meniscus or both; and that she will require arthroscopic surgery.

The carrier appeals findings that claimant's last day of work was February 22nd and that she was laid off on February 23rd, and that due to the claimed injury she was unable "to obtain or [sic] retain" employment at wages equivalent to her preinjury wage beginning on February 23rd and continuing through August 25th.

Claimant had the burden to prove her period or periods of disability by a preponderance of the evidence. 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). The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee (Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992); that objective medical evidence is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992); that pain can be considered to the extent that it prevents the performance of work (Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991); and that disability "is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured, but it is the inability to obtain and retain 'employment' at wages equivalent to the preinjury wage because of a compensable injury" (Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992). For purposes of assessing qualification for temporary income benefits, the Appeals Panel has also stated that the 1989 Act "does not impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his training, experience and qualifications," and also, that the 1989 Act "is not intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, 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)). As an appellate reviewing tribunal, the Appeals Panel will not disturb 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). The hearing officer could credit claimant's testimony concerning her being laid off on February 23rd, her explanation for not seeking medical treatment for her knee until August 26th, and could reasonably infer from the medical records that the pain and physical limitations she suffered from the left knee injury resulted in her having disability during the period found by the hearing officer.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge