APPEAL NO. 990719

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 16, 1999, a contested case hearing (CCH) was held. With respect to the five issues before her, the hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) claimant's employer had actual knowledge of claimant's injury and, therefore, appellant (carrier) is not relieved of liability under Section 409.002 for failure to timely give notice to the employer; (3) the claimant's time for filing a claim was tolled by the employer's failure to file an Employer's First Report of Injury or Illness (TWCC-1) pursuant to Section 409.005; (4) claimant had disability from November 18 through 24, 1996, and from August 5, 1998, continuing to the date of the CCH; and (5) the compensable _____, injury is a producing cause of claimant's diagnosed avascular necrosis (AVN) of the left hip.

Carrier appeals all of the adverse findings, contending that the accident of _____, does not constitute a compensable injury, that whatever notice the employer had does not constitute actual notice of an injury, that there was no tolling as to the filing requirement for the claimant, that adequate expert evidence is needed to establish causation of the claimed AVN to the alleged injury of _____, and that the expert medical evidence was tainted by an incorrect history. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant was employed as a farmhand on employer's ranch. Claimant testified that on _____, while separating some cattle, a cow kicked him "in the left groin area," knocking him to his knees. The ranch foreman, BB, saw the incident and WS, a former ranch foreman, who was apparently an advisor/ supervisor, and who was claimant's uncle, was in the area. Claimant said that he did not immediately have problems but that the next morning, Saturday, (day after the date of injury), he had leg pain and his left testicle "had went up on the inside." Claimant helped BB on some light work Saturday and Sunday, but Monday, (3 days after the date of injury), he "couldn't work, because [he] couldn't walk." Claimant told BB that he was going to the hospital emergency room (ER). The ER report will be discussed below with the medical evidence. Claimant testified that the ER doctor took him off work for seven days and gave claimant an off-work slip. Claimant said that he gave the off-work slip to one of the ranch owners (who was 86 years old) and went to stay with his parents during the time he was off. Claimant testified that BB called him "just about every day to see how I was getting along." After seven days claimant returned to work. Claimant said that when he got the hospital ER bill, he gave it to BB and "it was paid." Claimant continued to work for the employer, but testified that his leg and limp got progressively worse. Claimant continued working for the employer until October 1997, when he was laid off because of lack of work. Claimant subsequently applied for and received unemployment benefits until the first part of May 1998, at which time he went to work as a farmhand for another ranch. Claimant worked for the second employer until

August 5, 1998, when he was plowing and his "leg was hurting so bad, and [he] started throwing up blood." (The blood apparently was due to a bleeding ulcer caused by taking analgesics, but not claimed to be part of the injury under consideration in this case.) Claimant went to the hospital, was treated for the ulcer, eventually had surgery for the ulcer and developed a staph infection. Dr. J, the treating doctor, also considered claimant's leg and hip complaints but claimant said Dr. J said they had to treat the bleeding ulcer first. After the ulcer surgery, claimant was placed on crutches and diagnosed with AVN of the left hip. Claimant also testified that he is a recovering alcoholic, that he underwent rehabilitation for alcoholism in 1994 and now he occasionally has "one to two to three beers." Claimant had left hip replacement surgery on December 9, 1998, and started physical therapy shortly thereafter.

The medical evidence includes the ER report, which simply lists the diagnosis as "accident"; x-rays, which demonstrate "no evidence of fractures or subluxations" of the pelvis; and a note "DX kicked by cow." Nurses' notes indicate "pain to left hip & testicle tenderness from being kicked by calf [emphasis added]." The note indicates that claimant was given a "work release." No off-duty slip is in evidence. Claimant was seen in the hospital again on August 3, 1997, for a lacerated left finger and on October 6, 1997, for facial paralysis. No mention is made of the cow-kicking injury or left leg and/or hip complaints. (Claimant said that at the time he was more concerned with specific medical problems than the ongoing leg pain.)

Dr. J, in a report dated September 1, 1998, diagnoses the AVN, with an incorrect history of the cow-kicking incident "eleven months ago," comments that claimant's AVN "may well have been due to the trauma from the cow," and notes "a lot of crushing in the head [of the femoral bone] to suggest [AVN]. This may well have been traumatically caused by the cow kick." Dr. J recommended a total hip replacement. Dr. J had the 1996 x-rays read by a radiologist and compared to 1998 films, stating:

> He felt that in comparing that film with today's films, that the patient did have definite [AVN] at this time, that it was certainly compatible with the sequelae of a traumatic event in which he was struck by the cow. He felt the film done at [ER] did not show any [AVN] at that time.

Subsequently, Dr. J was advised of the correct date of the cow-kicking incident and, on a form dated November 30, 1998, checked "yes" to the question, "[i]n reasonable medical probability, did the injury suffered by [claimant] on _____ (kicked by a cow) result in his [AVN] of the left hip?" In another report, dated September 8, 1998, Dr. J commented that the AVN "is likely to have occurred secondary to trauma . . . received from the kick by a cow."

A record review was done by Dr. P for the carrier. In his report, dated January 9, 1999, he questions "exactly where [claimant] was kicked," noting if the kick was in the sacrum or abdomen, it was "medically improbable" that it caused the AVN. Dr. P also questions a comment that claimant ceased "alcohol intake" in 1994, pointing out that "chronic alcohol abuse" was a significant risk factor for AVN. Dr. P concludes:

> I do feel that it is certainly possible that this gentleman's [AVN] is directly related to the event in question in _____. Again, I bring up several points, including the fact that we have no clear information on exactly how this incident happened, and we have no information regarding this gentleman's risk factors or previous musculoskeletal history. This gentleman could have had a prior traumatic event to the hip, or even some type of injury following the 1996 event. I note that again, [Dr. J] indicates from his records that this incident happened some time in 1997 (indicating that he had been kicked by a cow eleven months prior to the office visit of September 1998), which again brings up a question on the etiology and certainly the timing.

Claimant filed an "Amended" Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on October 23, 1998, and carrier filed its TWCC-1 on October 30, 1998. The hearing officer, in her Statement of the Evidence, comments:

> Clearly, Claimant did not file a claim for compensation within one year of the claimed date of injury, in this case _____. In this case, however, the one-year statute of limitations provided for under Section 409.003 was tolled due to Employer's failure to file the TWCC-1 despite their actual knowledge of the injury as required by Section 409.005. The one-year period did not begin to run until October 30, 1998. Claimant filed his claim for compensation prior to that date. Carrier is not relieved from liability due to Claimant's failure to file a claim for compensation within one year from the date of his injury.

The hearing officer made the following appealed findings:

FINDINGS OF FACT

2. Claimant sustained an injury to his left groin area on _____, when kicked by a cow during the course and scope of his employment.

3. Claimant's Employer had actual knowledge of Claimant's _____ injury.

4. Employer filed a written report of injury with regard to the _____ injury on October 30, 1998.

5. Claimant made a claim for compensation for the _____ injury on October 23, 1998.

6. Claimant was unable to obtain or retain employment at wages equivalent to his preinjury wage beginning on (3 days after the date of injury), and continuing through November 24, 1996, and beginning again on August 5, 1998, and continuing through the date of this hearing.

7. Claimant's diagnosed [AVN] was, in a reasonable degree of medical probability, caused by the trauma he received when he was kicked by the cow on _____.

Carrier appeals the findings that claimant sustained an injury as defined by Section 401.011(26) citing authority that a "touching" or an incident or mere pain does not establish an injury and pointing to the ER records of (3 days after the date of injury), that there were no fractures, bruising or outward manifestations of an injury noted at that time. Nonetheless, the hearing officer could, and did, find an injury as a result of the undisputed cow kick, based on claimant's testimony and subsequent events. Because there are no immediate outward manifestations of an injury does not necessarily mean that no subsequent internal injury did not occur. Whether an employee sustained a compensable injury is a factual determination for the hearing officer to resolve. The hearing officer could find an injury based on claimant's testimony alone, if believed, as it was here. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

Carrier appeals the findings that the employer had actual notice of claimant's injury, citing authority that knowledge of the incident does not necessarily impart actual knowledge of an injury. Carrier argues that since claimant returned to work and continued to work for almost a year this does not support a finding of "actual notice." We distinguish the Appeals Panel decision cited by carrier, noting in this case not only did the supervisor (BB) see the incident in question, but, if the claimant is believed, as evidently the hearing officer did, BB was also aware that claimant went to the doctor on (3 days after the date of injury), that the doctor took claimant off work, that BB called the claimant "just about every day" to see how claimant was getting along and that the employer paid the medical bill. Taken together, and particularly considering that claimant missed seven days of work and that BB called to see how he was getting along, this was sufficient evidence to support the hearing officer's determinations that the employer had actual notice of an injury. We would also note that Section 409.005(a)(1) requires the employer to file a written report to the Texas Workers' Compensation Commission and carrier if an injury results in the absence of an employee from work for more than one day. In this case, according to claimant, he missed seven days of work and the employer, through BB, knew about the absence and inquired of claimant's well-being without making the required report. We reject carrier's contentions that the employer did not know an injury had occurred and that it was related to the job, especially when the foreman saw it happen, the claimant missed seven days of work and the employer had paid the medical bill. Also in evidence is a statement by WS that he was aware of the accident and injury. Section 409.008 provides that if an employer has knowledge of an injury and fails or neglects to file the report under Section 409.005, "the period for filing a claim for compensation under [Section] 409.003 . . . does not begin to run against the claim of an injured employee . . . until the day on which the report required under Section 409.005 has been furnished," which, in this case, would be October 30, 1998. We hold that the hearing officer's findings on these issues to be supported by the evidence.

Whether the compensable kicking injury of _____, extends to include or was a producing cause of the AVN is a closer question. The claimant had the burden of proving

that his AVN was caused by his original injury or medical treatment of that injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993. Because causation of this condition is not within common knowledge and due to the late onset of the condition, some 21 months after the original injury, expert medical evidence to a reasonable degree of medical probability was required in this case to meet the claimant's burden of proof. Pegues, *supra*. Whether the AVN was caused by the original compensable injury was a question of fact for the hearing officer to decide, Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994, and her findings in this regard are subject to reversal only if so against the great weight and preponderance of the evidence as to be clearly erroneous and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Carrier attacks Dr. J's reports on the basis that either claimant gave an incorrect history of the date of the original injury or that Dr. J misunderstood the original date of injury. In either event, Dr. J was advised of the correct date of injury by letter dated November 20, 1998, with Dr. J's November 30, 1998, response establishing causation within a reasonable medical probability. Similarly, Dr. J was aware that claimant was or had been an alcoholic and referenced such in his report. We find other portions of carrier's brief generalizations not directly germane to the issue at hand. In Texas Workers' Compensation Commission Appeal No. 970083, decided February 28, 1997, a similar case involving AVN of the right hip diagnosed three years after a fall, the Appeals Panel suggested a standard in reviewing the medical evidence, stating:

> In evaluating expert testimony, a fact finder is advised to look to the substance of that testimony, including the reasons given for the conclusions reached by the expert and the plausibility of that expert's position in light of all the other evidence, as well as to the credentials of that expert, rather than to the expert's use of simple conclusory phrases to establish his or her position. *See* Texas Workers' Compensation Commission Appeal No. 950455, decided May 9, 1995.

Applying some of the criteria in Appeal No. 970083, *supra*, we note that the medical evidence in this case is rather sparse and the best analysis comes from Dr. P's peer review. First, Dr. P questions "exactly" where claimant was kicked. At this point in time, that is difficult to determine; however, the hearing officer made findings that claimant was kicked in the left groin area. The nurse's ER notes indicate complaints of pain in the left hip. As Dr. P notes, x-rays of the pelvis are not the same as the hip. The hearing officer's acceptance of claimant's testimony and the medical evidence, especially the nurse's note, sufficiently supports that the cow's kick could have included the hip. Next, Dr. P questions claimant's alcohol use, indicating that was a "significant risk factor." Dr. J was aware of claimant's alcohol use because claimant testified that he was a recovering alcoholic since going into rehabilitation in 1994. Claimant testified that he continues to occasionally consume a few beers. Both Dr. J and the hearing officer had this information in making their decisions. We cannot say that the opinion expressed by Dr. J or the hearing officer's findings were against the great weight and preponderance of the evidence. The matter of

when the accident occurred and Dr. J's initial listing of a 1997 accident was clarified in the November 1998 letter from Dr. J. All that said, even Dr. P believes "that it is certainly possible that [claimant's] [AVN] is directly related to the event in question in _____." The hearing officer found it so and we cannot say that it is wrong as either a matter of law or against the great weight of the evidence. *See also* Texas Workers' Compensation Commission Appeal No. 951495, decided October 13, 1995.

Unlike the situation in Appeal No. 970083, *supra,* in this case there is a specific theory of causation, supported by medical evidence and which even the carrier's doctor states to be "certainly possible." While the 21-month delay between _____ and August 1998 is not specifically addressed, the hearing officer obviously found claimant's testimony of a progressively worsening hip condition credible. The hearing officer apparently gave little or no weight to the fact that claimant did not mention his hip and leg pain while being seen for a cut finger and facial paralysis. That was within the hearing officer's prerogative as the sole judge of the weight and credibility to be given to the evidence.

Carrier's appeal of the findings of disability are premised on the proposition that "if there is no compensable injury, there can be no disability." Having affirmed the hearing officer's determination that there was a compensable injury, we likewise affirm the hearing officer's decision on disability as being supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge