

APPEAL NO. 990918

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 10, 1999, a hearing was held. She determined that when the respondent (claimant) compensably injured his left knee on _____, he also compensably injured his right knee and low back. She also found that the appellant (carrier) waived the right to dispute injury to the low back by failing to dispute compensability within 60 days of adequate written notice thereof. Carrier asserts, in regard to the waiver determination, that it is not supported by the evidence; in regard to the evidence of injury to the right knee and back, carrier cites medical evidence which it says shows that claimant only injured his left knee. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) for 20 years as a welder when, on _____, he testified, he tripped over a two-inch hose and fell, landing on his knees and hands. He fractured the patella of his left knee. Claimant speaks Spanish and testified through an interpreter. He said that his left knee hurt "a lot." He said that, as he tried to get up after the fall, his back hurt. He added that he complained of the right knee, too, but was told that the left knee needed treatment first and later the right knee would be treated. He also said that he was given pain medication for the left knee which may have kept the right knee and the back from hurting so much.

Claimant stated that in April he had surgery to his left knee and that, while in the hospital, he complained about his low back and right knee. The initial medical report of _____, states that claimant fell on his knees, although it stated that claimant complained of pain to the left knee. The discharge summary of April 17, 1998 (surgery to the left knee was performed on April 14, 1998), states that claimant had pain in the right knee and complained of numbness in his thigh for which an MRI of the low back was done; the MRI showed a herniation at L2-3, with another herniation thought to be at L1-2. The right knee pain was "presumed arthritis."

Claimant's left knee was treated by Dr. B, who stated on December 2, 1998, that claimant has complained of his right knee since he first saw claimant on March 20, 1998, but Dr. B's record of March 20, 1998, does not reflect an entry to that effect. Dr. B had provided a letter to carrier in November 1998 in which he said that the injury to the left knee plus "subsequent" surgery and "subsequent" recovery from that surgery (total knee replacement) has put strain on the right knee and exacerbated his osteoarthritis. On July 20, 1998, Dr. B had written that he is now seeing claimant for his right knee pain. Dr. B injected the right knee.

Claimant's low back was first mentioned after the April hospitalization, by Dr. W nurse, NF, on August 25, 1998, when she faxed to carrier a message that claimant had been seen by Dr. W on August 18, 1998, at which time claimant complained of low back pain. She added, "[w]e are seeking authorization to continue seeing patient and to treat his back complaints. This pain is related to his original injury of _____." This fax gave claimant's name, his social security number, and the claim number. Dr. W's report of August 18, 1998, also said that the back injury was related to the initial injury; this report carries a received date of August 24, 1998, by carrier.

Dr. B on December 3, 1998, swore to a statement in which he said, "[t]here is no indication that [claimant] injured his lumbar spine on _____. Please note the attached TWCC 64 [Specific and Subsequent Medical Report] of July 29, 1998, and the narrative dated November 9, 1998, relating to the right knee." (Neither of the two documents cited mentions the low back.)

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. When a question arises as to whether or not a part of the body was injured in a compensable injury that was not initially treated, the determination of that is a question of fact for the hearing officer to make. See Texas Workers' Compensation Commission Appeal No. 93086, decided March 17, 1993. The hearing officer, in determining whether such an injury is compensable when not originally complained of and not originally treated, could also consider the severity of the injury complained of and the treatment it received in determining whether the other injury(s) were present but deferred, especially, as stated, by claimant, when pain medication was given for the apparently more serious injury for an extended period of time.

While Dr. B indicates that some of claimant's right knee problem is associated with the rehabilitation provided to the left knee through surgery and rehabilitation, Dr. B also refers to claimant's complaining of the right knee in the month prior to surgery; in addition, the hospital note also refers to right knee pain three days after surgery, while claimant was still hospitalized.

The hearing officer found that the carrier did not dispute the back injury until December 1, 1998. She also found that the carrier received Dr. W's August 18, 1998, report on August 24, 1998; on appeal, carrier did not state that it did not receive the report by that date, but only quoted the finding of fact and said it was not supported by the evidence. The determination that carrier waived its right to dispute the back injury is sufficiently supported by the evidence.

The determination that claimant's right knee is part of the compensable injury is sufficiently supported by the claimant's testimony about the fall, the swelling of the right knee, the initial medical report showing a fall onto the right knee in addition to the left knee, and Dr. B's request for authorization to treat the right knee as part of the compensable injury. The determination that the low back is part of the compensable injury is sufficiently supported by the claimant's testimony of pain from the time he tried to get up from the fall and Dr. W's opinion relating the low back to the _____, fall.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge