

APPEAL NO. 991044

Following a contested case hearing (CCH) held on March 9, 1999, with the record closing on April 19, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that on _____, the respondent (claimant) sustained a right knee injury in addition to a right shoulder injury and that, based on the report of the designated doctor, her impairment rating (IR) is 21%. The appellant (self-insured) requests review, urging that the great weight of the evidence shows that claimant's right knee was not injured along with her right shoulder when she was mugged on _____, and that, accordingly, her IR should be the 13% assigned by the designated doctor for her right shoulder impairment. Claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The parties stipulated, among other things, that on _____, claimant sustained a compensable injury; that Dr. R was initially appointed as a designated doctor shortly before April 1, 1996; that Dr. R found maximum medical improvement (MMI) as of April 1, 1996, and assessed an IR of 26%; that Dr. R did not include any impairment for the right knee in those calculations; that on November 15, 1996, Dr. R rescinded his certification of MMI and the IR; that claimant reached statutory MMI on February 14, 1997; that in August 1997, Dr. R was no longer on the Texas Workers' Compensation Commission (Commission) list of approved designated doctors; and that on October 23, 1997, Dr. P was appointed as a designated doctor by the Commission.

Claimant testified that on _____, while employed by the self-insured as a secretary, she was authorized to go to a drug store to purchase supplies for the retirement party of a professor and that when she exited the store, holding onto her grandson's hand with her left hand, a man grabbed her purse, jerked it away from her, and she fell onto her knees and elbows and face. She said that both her knees were scraped, as were her elbows and cheeks, that her nose was injured by the nosepiece of her glasses, and that her major and by far most painful injury was a dislocated right shoulder joint. Claimant said she was taken by ambulance to a hospital emergency room; that the doctor relocated her right shoulder joint and salve was put on the areas of her face, elbows and knees where the skin was scraped; and that she followed up with her primary care doctor of some eight years, Dr. L, whom she told about her knees as well as her shoulder, and that he looked at her knees at that time. She indicated that Dr. L had moved and her records were in storage but that Dr. L remembered her because he had been her primary care physician for about eight years and her husband performed the maintenance on the building in which Dr. L practiced before moving. Claimant further testified that when the physical therapy prescribed by Dr.

L did not improve her shoulder, she was referred to Dr. D, an orthopedic surgeon, who twice operated on her right shoulder.

Claimant further stated that her right knee was hurt worse than her left knee and that it became progressively worse; that she told Dr. D about her knees being injured in addition to her right shoulder and that she was having some problems with walking; that the areas of scraped skin on her face, elbows, and knees were healed by that time; that Dr. D "got serious" about her right knee in the Summer of 1996, although they had discussed it on previous visits; and that in December 1996 Dr. D performed arthroscopic surgery on her right knee. She denied having any other trauma to her knee in addition to the mugging event. Claimant also stated that she was examined by Dr. S for the self-insured, by Dr. R, the first designated doctor, and by Dr. P, the second designated doctor. In her May 4, 1995, recorded statement taken by the adjuster, claimant was asked what parts of her body were injured in the mugging and she responded, "just my arm, my face, my left cheek and left side of my nose."

Dr. D on October 17, 1996, reported that claimant had "an insidious onset of right knee pain"; that she has had it for a long time now and it has increased over the last month; and that she does not admit to any past trauma except for the mugging at which time she had a dislocated shoulder and fell on the knee and hip at that time. Dr. D wrote on September 11, 1998, that claimant was referred by Dr. L for her shoulder injury; that she also injured her knee during the same injury; that he first evaluated her right knee on October 17, 1996, and felt claimant had a significant tear of the medial meniscus with some post-traumatic knee arthritis; and that claimant indicated that the knee pain started at the time of the mugging but was "put on the side" secondary to the fracture dislocation and brachial plexopathy of the right shoulder and the multiple surgeries for that extremity. Dr. D further stated that he feels that the trauma claimant sustained during the mugging "could easily be the mechanism of injury to her knee pain as she was taken down to the ground and fell on her shoulder and bruised and contused her knees." Dr. D's December 6, 1996, operative report, which reflected that claimant was then 65 years of age, stated the post-operative diagnosis as "[d]enerative tear of the medial meniscus of the right knee with Grade IV chondromalacia of the tibial plateau, Grade II chondromalacia of the medial femoral condyle and lateral tear of the meniscus."

Dr. L wrote on July 8, 1998, that claimant's chart with her 1995 visits cannot be located due to a change in his practice; that, when he saw claimant in _____ following the mugging, she had sustained a dislocated shoulder; and that she also had trauma to the knees which were skinned up and had considerable bruising. Dr. L's Initial Medical Report (TWCC-61) dated April 10, 1995, reflected only a shoulder diagnosis.

In a March 19, 1999, letter to the hearing officer, Dr. P stated that after seeing claimant on November 3, 1997, for a designated doctor exam, he assigned a 13% IR for the upper extremity and allowed an additional three percent for the right lower extremity/knee injury but questioned whether the knee had been accepted as a compensable injury. Dr. P further stated that he has since reviewed Dr. D's operative

report of December 6, 1996, and that, assuming the compensability of both the shoulder and right knee, claimant's IR is 21% consisting of 13% for the shoulder and nine percent for the knee. Dr. P went on to say that his assignment of the 21% IR should not "insinuate" that the knee should be considered compensable; that just because claimant "is 66 years of age and has degenerative knee problems which necessitated an arthroscopy" does not in and of itself indicate that any of her problems were caused by the actual fall; and that he realizes that the compensability issue is deferred to the Commission.

Claimant had the burden of proving that her compensable injury of _____, extended to her right knee. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). This issue presented the hearing officer with a question of fact to resolve and it is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will reverse a factual determination only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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 conclude from claimant's testimony describing the mechanism of the injury and the immediate injuries to her knee, and from the records of Dr. D and the opinion of Dr. L, that she indeed sustained the claimed right knee injury from the mugging incident. While the opinion of Dr. P as to her IR is entitled to presumptive weight, his opinion on the compensability of the knee injury is not so entitled though it may be considered. Texas Workers' Compensation Commission Appeal No. 950335, decided April 17, 1995.

Since the only basis for the self-insured's appeal of Dr. P's IR is the inclusion of the right knee in the rating and since we affirm the determination that the right knee injury is part of the compensable injury, we also affirm the IR determination.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge