APPEAL NO. 991186

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 5, 1999, a contested case hearing (CCH) was held. The issues (and points of appeal relate to whether these issues were properly changed) concerned, in substance, the extent of an undisputed knee injury that occurred on _____, whether the appellant/cross-respondent (claimant) had disability relating to that injury, and whether the respondent/cross-appellant (carrier) had timely moved to dispute various diagnoses rendered as to that knee injury. The carrier-disputed issue was phrased in terms of whether the carrier had disputed within 60 days a left patellofemoral incongruity and Grade III chondromalacia. Reference to an intervening automobile accident occurring in October 1998, which had been part of the issue reported from the benefit review conference (BRC), was amended out of that issue.

At the CCH, the carrier stated that it would stipulate that the claimant sustained a compensable injury on _____, "in the form of a left leg and knee strain." The hearing officer found that the claimant sustained a patellofemoral incongruity in his left knee as a result of his compensable injury, but did not sustain chondromalacial changes in his knee due to the compensable injury. She further held that the carrier filed a timely dispute to these two varying diagnoses of a _____, knee injury on March 26, 1999, and did so by indicating that the claimant had not met the burden of proof to show when the carrier received written notice of these diagnoses. She held that the claimant did not have disability as the result of the injury sustained on or about _____.

The carrier has appealed the finding that the claimant had a patellofemoral incongruity resulting from the _____, injury. A detail of the decision not going to the essence of compensability is appealed--the recitation in the decision that a particular doctor was the carrier's choice. Finally, the carrier argues that it should have been allowed by the hearing officer to depose the current treating doctor on written questions, arguing that it had no obligation to do so until the doctor rendered an opinion on causal connection of the injuries in dispute. The claimant's appeal is almost entirely focused on matters relating to procedural defects perceived in the process, including a remand back to the benefit review officer (BRO) and the recasting of issues raised or denial of issues that he tried to raise. However, the claimant also appeals, by reference, the findings of fact and conclusions of law that have to do with the scope of his injury, a timely dispute of those injuries by the carrier, and the determination that he did not have disability from his injury. The carrier responds to this appeal by characterizing procedural arguments as "outlandish" and noting that any defects in the BRC process are not matters that the Appeals Panel can address. The carrier argues that factual determinations as to the chondromalacia and timely dispute by the carrier cannot be second guessed by the Appeals Panel. The carrier also impugns the claimant personally in its response to his appeal.

DECISION

Affirmed, there being no reversible error.

This is a case where, it appears to us, a focus of minute details has nearly overcome the greater forest of the issues between the parties. As we see it, the case involved additional conditions said to relate to a knee injury, the compensability of which was not disputed initially by the carrier within 60 days of the receipt of the Employer's First Report of Injury or Illness (TWCC-1). The carrier eventually filed two Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms in response to various diagnoses just under a year after the accident occurred. There was an intervening automobile accident alluded to by the carrier in one TWCC-21, but taken out of the issue reported from the BRC and not addressed by the hearing officer in her decision. In addition, there is a related decision issued by the Appeals Panel, Texas Workers' Compensation Commission Appeal No. 990831, decided June 3, 1999, resulting from a decision in the first CCH that was set in the controversy, in which the Appeals Panel held that the remand by the hearing officer of issues back to a BRC was beyond the hearing officer's authority. This earlier decision held that another CCH proceeding could serve the purpose of the remand ordered in that Appeals Panel decision. The decision on appeal here resulted from a new CCH on the outstanding issues between the parties relating to the extent of the claimant's knee injury, dispute thereof, and disability.

The claimant was employed as a carpenter on _____, by (employer), when he slipped and fell on some loose pipe while carrying some boxes. He said he struck his left knee. The claimant continued to work in increasing pain, and sought a referral by his employer for medical treatment; he was referred to a clinic on April 7, 1998. The claimant said his initial assessment at this clinic was made by Dr. G and he was told that he had a strained knee. The employer filed a TWCC-1 on April 8, 1998; this stated that the claimant injured his left knee and described the injury as a "knee strain." It appears that the employer notified the adjuster on April 8, 1998, that the claimant did not report an injury until he gave notice that he was going to quit and was then informed that he would not be paid for the previous two weeks in which he was alleged not to have performed any work. There is no evidence that a TWCC-21 was filed by the carrier within 60 days after receipt of the TWCC-1.

The Initial Medical Report (TWCC-61) filed by Dr. G on April 17, 1998, indicated a diagnosis of leg and knee strain, but also "knee pain." The doctor noted limited extension of that knee; physical therapy and medication were prescribed. The claimant additionally said he was required to wear a brace. We note that the claimant had been given a clearance on April 7, 1998, by Dr. G to return to work with restrictions. The claimant said he sought to change his treating doctor from Dr. G because he felt the employer was interfering with his medical treatment. The claimant also moved to a different part of the state. The claimant asserted at the CCH that disability began on December 31, 1998, and he has had only odd jobs since that date which did not pay wages equivalent to his preinjury average weekly wage.

The claimant said that he next sought treatment from his family doctor, Dr. B. He denied that he had abandoned medical treatment, although he agreed he did not treat with a doctor for his knee anytime between April and August 1998. Notes from Dr. B are in evidence which are dated August 18, 1998. Dr. B stated that the claimant had a motor vehicle accident five days before, and pain began the next day. He noted that the claimant had tenderness in his low back, and that his knee was "locking up." Dr. B also noted that the claimant had sustained a knee injury five months before. On September 29, 1998, Dr. B treated the claimant for his back and knee, noting that the knee injury was "chronic." A month later, Dr. B noted that the claimant's left knee was "a little sore." He stated that an MRI showed the presence of a Baker's cyst, after an October 1, 1998, MRI of the knee in which the cyst was found but no meniscal tear or other internal derangement was noted.

It appears that at the end of December 1998 (the date is not entirely legible), the claimant sought treatment from Dr. K. The claimant explained that this visit was preapproved by the adjuster for the carrier, Ms. F. On December 30, 1998, Ms. F wrote to Dr. K and specifically requested information as to the claimant's current complaints, diagnosis, the causal relationship to his work activities, ability to work, maximum medical improvement, and his treatment plan. The adjuster also asked for an assessment of preexisting injuries. The letter indicates that Ms. F was under the impression that the claimant was last treated in April 1998. However, on December 16, 1998, Ms. F, with a signed authorization from the claimant, had contacted Dr. B to obtain medical records regarding the treatment of the claimant's left knee.

A January 8, 1999, file memorandum was made by Dr. K, who indicated he sent a copy to the carrier. Ms. F's name and telephone number are included in the identifying information on this memo. Dr. K stated that the claimant was involved in an automobile accident which aggravated his knee, but that the pain had never resolved after the initial _____ injury, although he worked through it. Dr. K stated that the October MRI scan, which the claimant brought to him, indicated to him "fairly significant patellofemoral incongruity as well as probably some Grade III chondromalacial changes." Dr. K found these changes as consistent with the injury the claimant described. He suggested that the claimant be restricted from climbing, squatting, and kneeling. The claimant filed a request to change his treating doctor to Dr. L later in January 1999; the Dispute Resolution Information System (DRIS) notes indicate that Dr. K would not agree to serve as the claimant's treating doctor after the first visit.

Dr. L wrote on April 16, 1999 (a letter admitted over objection from the carrier that it was not timely exchanged), that the claimant's patellofemoral incongruity and Grade III chondromalacial changes made him unable to perform his construction work duties. Dr. L referred to Dr. K's January 8, 1999, report. The claimant, in answer to the carrier's objection to this exhibit, explained that part of the reason for the delay was that the carrier had been denying payment for medical treatment of his knee and April 16th was the first he was able to get an appointment with Dr. L. The claimant said he also told Dr. L about the automobile accident. The DRIS notes verify that after initially agreeing that it would not

dispute compensability around the time of Dr. K's examination, the carrier filed a TWCC-21 in early February and declined further payment of benefits.

The carrier filed this TWCC-21 with the Texas Workers' Compensation Commission (Commission) on February 4, 1999; this TWCC-21 disputed a Baker's cyst as an ordinary disease of life, asserted that any disability was related to an intervening injury (the nature of which was not described in this TWCC-21), and disputed any work-related injury to the back. Ms. F's name is shown as the adjuster. The date of written notice of injury is set forth as "4/8/98." The carrier's exhibits include a second TWCC-21, filed with the Commission on March 26, 1999, in which the carrier specifically enumerates various diagnoses beyond the claimant's left knee sprain ("including, but not limited to . . . ") and states that they are "not related to" the initial compensable injury. The basis for this contention is not described beyond this. Ms. F submitted an affidavit in which she contended that Dr. K's January 8, 1999, report was received by her on February 8, 1999. (The hearing officer's decision listed this exhibit as "withdrawn" but it was only the second affidavit from Ms. F that was part of this exhibit that was withdrawn.)

At the CCH, the claimant raised the point (consistent with his Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41)) that he was also asserting injury to his knee due to repetitive trauma. However, the issue was stated (and evidence presented) only with reference to a specific injury of _____, and none of the other documents in the case aside from the TWCC-41 assert repetitive trauma.

On the matter of disability, the claimant said he had not worked in construction since December 31, 1998, and only has had odd jobs since then. He said that odd jobs he performed did not amount to more than $500.00 total in earnings. He stated that he earned $11.50 per hour at the time of his injury. A videotape was presented, made February 28, 1999, that showed the claimant walking around normally, carrying a water heater with another man, climbing, squatting, and working on home repairs; the claimant said he was doing work to tolerance on his own home and that Dr. L was aware of this activity. The claimant agreed he had been incarcerated some of the time after December 31, 1998, although he asserted it had only been for four or five days. The carrier, over objection, brought out that the claimant had been previously convicted, when a teenager, of unauthorized use of a motor vehicle and of assault in January 1998.

The carrier argued at the beginning of the CCH that a continuance was in order to allow it to depose Dr. L on written questions. The carrier agreed that it knew Dr. L was the treating doctor in January 1999, but essentially argued that it did not have the obligation to seek additional information from Dr. L until it received the April 16, 1999, letter. The hearing officer denied the request for deposition. The DRIS notes record that the carrier had already been given a continuance in conjunction with the first CCH.

We note at the outset that allegations that impugn a claimant on a personal level are unnecessary to considering the issues and are ultimately unpersuasive and, in this case,

have not played any part in our decision here. We observe also that the claimant's contention that the hearing officer should not have remanded the matter back to a BRC was upheld in Appeal No. 990831, *supra;* that decision indicated that the hearing officer could consider the matters remanded in that decision as part of any CCH already set, which in this case was the May 5, 1999, proceeding under appeal here. We agree that the case has not been procedurally the most orderly case, but it appears that the fact that the claimant was pro se, and the fact that the carrier framed issues relating to various diagnoses as if they were each discrete injuries, as opposed to one large issue of the extent of the claimant's injury, added to the confusion. The carrier filed two TWCC-21s after initially accepting compensability of the knee injury, and the claimant, for a time, sought medical treatment from a doctor who was not actively filing claims with the carrier (Dr. B). Given all this, the hearing officer appears to have acted out of the desire to get all threads of the issues in controversy before her, rather than, as the claimant argued, to limit those matters. In a few instances at the beginning of the CCH, the claimant appeared to agree to rewording issues, although he now complains about this. In any case, the hearing system created under the 1989 Act is not of the sort where perceived "technical violations" will necessarily command reversal of substantive decisions. In cases where a BRO may be said to have departed from prescribed procedures, the effect of that is essentially canceled out by what transpires in a CCH. In any case, the claimant requests as his remedy that this matter be sent back for another CCH. It does not appear to us that the parties or the record will benefit from going over essentially the same evidence yet another time, or by rephrasing and recasting the essential issues in this case having to do with the scope of the claimant's knee injury, the extent to which that injury has progressed, and the existence of disability. We do not agree that the procedural history of this case has given rise to any reversible error. *See* Texas Workers' Compensation Commission Appeal No. 931186, decided February 8, 1994.

We find no error in the denial of the 11th hour deposition of Dr. L sought by the carrier. Although the carrier argued that it had no reason to depose Dr. L until an opinion was rendered as to the causal connection of the injuries, it agreed that it had known she was the treating doctor since January 1999. The hearing officer correctly determined that the carrier's obligation to develop evidence on matters relating to compensability of the injury and disability arose well in advance of receipt of Dr. L's April 1999 letter. Whether Dr. K was or was not a doctor for the carrier had little to do in this case with the weight to be accorded to his opinion, and we do not believe that reversible error resulted.

Concerning the waiver issue, the hearing officer could choose to believe that Dr. K's report was first received by the carrier on February 8, 1999, and that its dispute was thus timely filed to dispute the extent of the claimant's knee injury. We must emphasize, however, that whether a claimant has disability from a compensable injury is not a dispute to "compensability" that must be raised in a TWCC-21, and a carrier may always join issue over this matter. We find the hearing officer's determination that the claimant's _____, knee injury did not result in the inability to obtain and retain wages equivalent to his preinjury wage as sufficiently supported by the record in this case. The

claimant has the burden to prove disability. There was clearly conflicting evidence to be resolved. In this case, we cannot agree that the hearing officer's determination on disability is against the great weight and preponderance of the evidence because there is evidence to support her decision and, consequently, affirm this part of her decision.

We likewise affirm her determination regarding the extent of injury in this case. While there is medical evidence that supports the claimant's contention that both patellofemoral incongruity and chondromalacia are related to his _____, injury, we note that general medical evidence in the record describing these conditions substantiates that chondromalacia can be a degenerative condition, while the patellofemoral incongruity would appear to be more nearly traumatic in origin. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case with the decision here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge