

APPEAL NO. 991197

On April 28, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) "did the claimant [appellant] sustain a compensable injury to her right knee, back, right hip, TMJ [temporalmandibular joint] and migraines on _____"; and (2) "did the claimant sustain disability from April 2, 1998 to date and continuing." The parties stipulated that "claimant did not suffer a compensable injury to her right hip, back, TMJ (jaw), or migraines on _____." Thus, the compensable injury issue was limited to the claimant's right knee. The hearing officer decided that claimant did not sustain a compensable injury to her right knee on _____, and that claimant has not had disability. Claimant requests that the hearing officer's decision that she did not sustain a compensable right knee injury on _____, and that she has not had disability be reversed and that a decision on those issues be rendered in her favor. Respondent (carrier) requests affirmance. There is no appeal of the hearing officer's decision that "the claimant did not sustain a compensable right hip, back, TMJ (jaw) or migraines injury on _____ per the parties' stipulation.

DECISION

Affirmed.

Claimant testified that on September 2, 1992, she was working as a school bus driver when she injured her right knee breaking up fight on the bus. An MRI done in September 1992 showed early degenerative changes of the right knee. Dr. S performed an arthroscopic procedure on claimant's right knee in December 1992, which consisted of the excision of an anteromedial plica. Claimant began seeing Dr. J in June 1993 for her right knee injury. An MRI done in July 1993 showed signs consistent with a chronic partial tear of the posterior cruciate ligament. Dr. J performed an arthroscopic procedure on claimant's right knee in September 1993 consisting of the excision of a remnant of the supratellar plica and abrasion chondroplasty patella. Following that surgery, claimant saw Dr. J on numerous occasions in 1993, 1994, and 1995 for complaints of right knee pain and Dr. J noted episodes where claimant reported that her right knee gave out. An MRI of claimant's right knee done in May 1995 showed no evidence of a Grade III meniscal tear of the medial or lateral meniscus, ligamentous injury, or fracture. However, in July 1995 Dr. J performed a third arthroscopic procedure on claimant's right knee and he wrote in his operative report that his findings were a lateral subluxation of the patella and a small tear of the anterior horn of the right medial meniscus and that the operation performed was a subtotal right medial meniscectomy and lateral retinacular release. Following this surgery, claimant underwent physical therapy for her right knee and continued to see Dr. J for complaints of right knee pain throughout 1995. Claimant continued to see Dr. J for complaints of right knee pain throughout 1996 and Dr. J noted that claimant complained of pain, swelling, grinding, and popping in her right knee and that claimant said that her knee had caved in, collapsed, or given out on several occasions. Dr. J saw claimant in March 1997 and noted

that claimant complained that she had pain in her right knee, that it was weak, and that it had a "collapse feeling." Dr. J saw claimant in June 1997 for her right knee.

Claimant testified that by _____, she had been working for (employer), for about a year as a clerk/receptionist. Claimant's job description included distributing the mail. Claimant testified that on _____, she was walking down the stairs at work to deliver employer's mail to the mailroom to be mailed out, that she was holding on to the railing with her right hand, that the mail was in her left hand, that her right knee "gave way," that she began to fall but did not fall to the ground because she dropped the mail and grabbed the railing with her left hand, and that she felt pain "following the fall." Claimant said that after that incident she reported it to WF, the employer's human resources administrator, on _____. Claimant also testified that she sustained a new injury to her right knee when her knee gave way on _____. She testified that between 1995 and _____, she had not had an incident similar in severity to what happened to her on _____, when her knee completely gave out. WF testified that claimant told her on _____, that she was walking down the stairs at work when her knee gave out. WF said that claimant's job duties included taking care of the mail.

Claimant went to Dr. J on March 17, 1998, and Dr. J noted that he saw claimant on that day for a follow-up visit for her right knee pain and that claimant told him that she "had episode of giving way of knee 5 days ago when going downstairs 'like it did couple of years ago.'" A radiologist reported that an MRI of claimant's right knee done on April 22, 1998, showed a full thickness meniscal tear of the posterior horn of the medial meniscus and a small joint effusion. Claimant said that Dr. J took her off work as of April 2, 1998, and that she was scheduled for knee surgery in June 1998 but that that surgery was denied when she went to the hospital to have it done. Dr. J wrote on May 29, 1998, that claimant must be off work until further notice and that surgery would be scheduled as soon as it is approved. Claimant said that she has not returned to work since April 2, 1998, because of problems with her right knee. Claimant continued to see Dr. J throughout 1998 for complaints of right knee pain. Dr. J noted on a physician's statement dated April 15, 1998, that claimant's knee buckled when going down the stairs on _____; that claimant had been disabled since April 2, 1998; and that her disability is due to an injury or sickness arising out of her employment.

Claimant began seeing Dr. F in January 1999 for treatment of her right knee and Dr. F's reports reflect that claimant told him that she injured her right knee at work on _____, when she fell off the stairs and that she had had three prior right knee surgeries. Dr. F noted that claimant is incapacitated. Dr. F referred claimant to Dr. SH for pain management and Dr. SH wrote on January 21, 1999, that claimant landed on her right knee after she fell at work on _____; that she started to complain about right knee pain after she fell; and that since claimant's last surgery she had had absolutely no complaint of pain. Dr. SH diagnosed claimant as having possible right knee reflex sympathetic dystrophy. In a report dated January 22, 1999, Dr. SH reported that claimant was injured at work on _____, when she fell down on the stairwell because her right

leg went down underneath her and that claimant reported that she landed on her right side. Dr. SH noted the MRI findings of April 1998 regarding a meniscal tear and wrote that claimant's chronic right knee pain (postsurgical) is considered injury related and recommended a pain management program.

At carrier's request, Dr. M reviewed claimant's medical records and diagnostic studies concerning her right knee, including, among others, the MRI of May 1995 and the MRI of April 1998, and he concluded that "the incident of _____ was not caused by the work environment as it was clearly a continuation of her previous injury/condition."

Claimant had the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). An "injury" means "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). In Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ), the court stated that an injury that aggravates a preexisting condition is compensable, provided that an accident arising out of employment contributed to the incapacity. In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel stated that an aggravation of a preexisting condition is an injury in its own right, citing INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist] 1988, no writ).

Despite carrier's contention to the contrary, there can be no serious question that, if claimant sustained an injury to her knee while walking down the stairs at work to deliver the mail to the mailroom in the course and scope of her employment, she would have sustained a compensable injury. See Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999, for a discussion of injury in the course and scope of employment. While the hearing officer states in her Statement of the Evidence that going up or down a small number of stairs is a daily activity of life and is not necessarily work related, we do not view her decision against claimant as being based on that statement. There can be no serious dispute in this case that the uncontradicted evidence reflects that claimant's activity of walking down the stairs was work related.

Claimant contends that she suffered a new injury to her right knee on _____, and states that at the very least she suffered an aggravation of a preexisting condition, which, as previously noted, can constitute a compensable injury. The hearing officer states in her discussion of the evidence that the claimant's right knee condition on and after _____, is a continuation of the effects of her September 1992 injury and that claimant did not meet her burden of proof to show that she sustained a right knee injury on _____. The hearing officer found that claimant did not sustain any new harm to her right knee on _____, while engaged in the course and scope of her employment

and she concluded that claimant did not sustain a compensable right knee injury on _____.

It is apparent from the hearing officer's Statement of the Evidence and finding of fact that she found that claimant had not proven that she had sustained an injury in the incident of _____. Claimant points to the MRI of May 1995 which did not show a medial meniscus tear and to the MRI of April 1998 which did show a medial meniscus tear to establish that an injury was sustained on _____. However, in July 1995, following the MRI of May 1995, Dr. J found a medial meniscus tear during an arthroscopic procedure, and while the operative report reflects that the tear was resected back to good meniscal tissue, and that the tear was to the anterior horn of the medial meniscus and not a tear of the posterior horn of the medial meniscus as was shown on the April 1998 MRI, there is evidence that following that procedure, and before the incident of _____, claimant's right knee had collapsed and given out on her on several occasions, and Dr. M opined that claimant's incident of _____, was a continuation of her previous injury/condition. Thus, the hearing officer was not compelled to find from the evidence that the tear to the medial meniscus shown on the April 1998 MRI was due to claimant's knee having given out on her on _____, while walking down the employer's stairs to deliver the mail to the mailroom.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Without a compensable injury, claimant would not have disability as defined by Section 401.011(16). Thus, the hearing officer did not err in deciding that claimant did not have disability from the claimed injury of _____.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge