APPEAL NO. 991338

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 27, 1999, a contested case hearing (CCH) was held. The issues at the CCH were:

1. Did the Claimant [respondent] sustain a compensable injury to his right knee on _____?

2. Is the Carrier [appellant] relieved of liability under Section 409.002 of the Act because the Claimant failed to timely notify the Employer of an injury pursuant to Section 409.001 of the Act?

3. Did the Claimant have disability resulting from a compensable injury, and if so, for what period of time?

The hearing officer resolved those issues in favor of claimant, finding that claimant sustained a compensable right knee injury "on (alleged date of injury)," that claimant gave timely notice to the employer and that claimant "had disability which began on April 1, 1998 and had not ended as of the date of this hearing." (All dates are 1998 unless otherwise indicated.)

Carrier appeals all the issues, pointing out some obvious typographical errors on dates, asserting that a carrier "was entitled to terminate a claimant's TIBS [temporary income benefits] benefits once a doctor . . . certifies that the claimant has reached MMI [maximum medical improvement] . . . " attaching a 66-page opinion by the State Office of Administrative Hearings (SOAH), urging that the findings that claimant reported his work-related injuries either to the foreman or the owner were incorrect "as a matter of law" and contending that claimant's injury did not occur during the course and scope of his employment. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed, as reformed.

First, we will note that one of the issues is disability, which is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. The issue before the hearing officer had nothing to do with the payment of TIBS or whether TIBS can be terminated by a doctor's certification of MMI. While we understand that the bottom line for the carrier is the amount of money it is required to pay, the payment of TIBS and the end of MMI are not the same as disability. Disability may have ended long before the employee reaches MMI and vice-versa; theoretically, an employee may continue to have disability even after MMI has been reached, although the employee would not be eligible for TIBS. *See* Section 408.101.

Secondly, our standard of review on factual issues is whether the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or 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).

We do note that most of the facts, including even the date of injury, are less than clear and subject to different interpretations. Claimant was employed as a ranch hand by the employer and, by most accounts, on the morning of (alleged date of injury), was working with three other ranch hands stringing some barbed wire fencing. Claimant testified that at about 8:00 or 8:30 a.m., as he was walking from a pickup truck to where the other hands were working, he tripped on a root or some wire and fell forward, hitting his right knee on a rock. Two of the coworkers testified through a translator, and, although they both said that they did not actually see claimant fall, they did see him on the ground and helped him get up. In evidence are affidavits from the three coworkers stating that claimant "hurt his right knee when he fell while working erecting a fence." Claimant testified that an hour or two later, around 10:00 or 10:30 a.m., the ranch foreman, Mr. TC, came to where the crew was working. Claimant testified that he reported his injury to Mr. TC at that time but exactly what was said is not clear (whether he reported a work injury or only that his leg hurt) and the coworkers did not remember that claimant reported a work injury. Mr. TC did not testify and no statement from him was in evidence. Claimant testified that Mr. TC told them that he needed some help shearing sheep and had them go to the sheep-shearing pens. What was said and what happened there is subject to differing versions. The hearing officer, in his Statement of the Evidence, summarizes:

> Reconciling all the evidence, this Hearing Officer is convinced that the following account occurred. With all the sheep in the pens, the noise level was high. When the foreman started to assign the four fence-builders, who were also veteran sheep shearers, the Claimant again told the foreman he had hurt his knee. This time he told the foreman, as overhead by Mr. L [Mr. L, one of the fence crew], who is bilingual, that he had tripped over some wire that morning at the fence and hurt his leg [sic]. The foreman then assigned him to marking the shorn sheep with a special "paint," which was a light job. The foreman's lady [identified as Ms. C and Mr. TC's wife] and occasional employee of the ranch was on the pen fence nearby. She also heard what the Claimant said, and then climbed over the fence to go tell the owner. He was standing by his pick-up truck some 10-20 yards away.

There was no evidence what Ms. C told the owner, Mr. BC, but Mr. BC, by some accounts, called back to claimant and asked what happened and claimant yelled back (over the din of the sheep noise) that he hurt his leg. Mr. BC generally denies this and says that the sheep shearing was on Monday. Mr. BC testified that he was not aware of claimant's work-related injury until April 30th or May 1st. It is undisputed that claimant continued to work on Tuesday, (alleged date of injury), and Wednesday. Claimant testified that by late afternoon on Wednesday, he was unable to continue working and he left the ranch and went home to (City 1) to see his family doctor, Dr. M.

There are no reports from Dr. M in evidence, but apparently, based on a statement in evidence, Dr. M thought claimant might need "hospitalization" and referred claimant to Dr. B. Dr. B's progress notes beginning April 23rd give a history of the fall, Dr. M ordering an MRI and Dr. B's confirmation of a need for right knee surgery. Claimant had the first surgery on May 8th for a partial meniscectomy, lateral release and chondroplasty; a second surgery on June 25th for arthroscopy for debridement; and a third surgery on October 7th for a total right knee replacement, all by Dr. B. (Claimant, who is 68 years old, paid for the medical treatment though Medicare.) Claimant testified, and the medical evidence supports, that claimant has been unable to work since April 2nd. Claimant eventually was seen by Dr. P, apparently a referral doctor, who certified claimant at MMI on March 30, 1999, with a 10% impairment rating.

In the meantime, Mr. BC testified, on either April 30th or May 1st he was called by Mr. LL, who was identified as claimant's brother-in-law and who reported claimant's work-related injury. There is a good deal of conflicting testimony and evidence when this call was actually made and what was said. An affidavit from Mr. LL is in evidence and the hearing officer commented that putting all the evidence together it "tended to show the call was made by April 23, when the Claimant saw [Dr. B] on referral." The hearing officer, in the findings of fact, found that claimant had reported a work-related injury to the foreman, Mr. TC, "on (alleged date of injury)."

Carrier cites as points of error the hearing officer's findings on the three issues. On the injury issue, carrier argues that the fall was unwitnessed and that Dr. B's progress notes do "not state that the Claimant informed his doctor that the injury occurred at work." As summarized, while the three coworkers may not have actually seen claimant fall, there is ample evidence that claimant did, in fact, fall. Further, carrier's statement that claimant did not give a history of a work-related fall to Dr. B is just plain wrong. Dr. B stated in his April 23rd note:

> HISTORY: This man hurt his right knee at work. He was building a fence, tripped over a root, twisted his knee and has had pain and swelling since that time.

There is ample evidence to support the hearing officer's decision on this issue.

On the notice issue, Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. The hearing officer found claimant gave notice to Mr. TC on "(alleged date of injury)." We agree with carrier that the (alleged date of injury), date is wrong and should be 1998. Otherwise, we only note that there was conflicting evidence of exactly what claimant reported to Mr. TC at the sheep-shearing pen on (alleged date of injury). Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the

hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer could, and apparently did, believe claimant's testimony that he reported a work-related injury to Mr. TC while they were working at the sheep pens. The fact that other evidence indicates that claimant only reported that his leg hurt is not sufficient to warrant a reversal.

Lastly, regarding disability, as we discussed at the outset, whether or not claimant is at MMI was not an issue before the hearing officer and, consequently, the cited SOAH decision would not be applicable in this case in any event. The medical evidence of three surgeries and claimant's testimony adequately support the finding of disability (i.e., the inability to obtain and retain employment at the preinjury wage). We do, however, agree with the carrier that the hearing officer's Conclusion of Law No. 4 that claimant "had disability which began on April 1, 1998" to be at odds with Finding of Fact No. 6 which found that claimant had disability from "April 2, 1998 through the date of his hearing . . . ." The accepted evidence would indicate that claimant worked most of April 1st before going home to see his doctor, consequently, we agree that disability began on April 2nd and the hearing officer's decision is reformed to read that the "resulting disability began April 2, 1998, which had not ended . . . ."

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, as reformed, are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Judy L. Stephens
Appeals Judge