

APPEAL NO. 991381

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 3, 1999, a hearing was held. He determined that respondent (claimant) had disability from November 24, 1996, through November 20, 1997. Appellant (carrier) asserts that "claimant's treating doctor, Dr. S, never took claimant off of work nor restricted his work," that "the claimant chose not to seek treatment for his knee for an entire year," and that "when claimant was specifically asked if he felt that he was able to work from November 24, 1996, through November 20, 1997, as a result of the injury, he indicated yes." In addition, carrier states that a report dated "6/25/99" taking claimant off work was retroactive. Finally, carrier says that there were job opportunities with employer at sedentary or light duty had claimant inquired. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) when he struck his left knee while in a tree cutting branches. The parties stipulated that claimant sustained a compensable injury on _____. Disability was the only issue. There is no appeal of the hearing officer's determination to consider the disability issue as one involving the period from November 24, 1996, through November 20, 1997. The evidence at the hearing indicated that claimant received temporary income benefits (TIBS) for a period of time both preceding and succeeding the period of November 24, 1996, through November 20, 1997. We note that the carrier, in referring to statutory maximum medical improvement, said that a period of TIBS had been overpaid and stated that such payment was "our mistake."

Claimant testified that he had broken the same left leg earlier, in January 1996, but that he had worked as a laborer since then with no problem. He said that after the compensable _____ injury he was initially seen by a doctor the "company sent me to" on September 13, 1996. The record indicates agreement that this doctor took claimant off work. Thereafter, claimant saw Dr. S with Dr. S's first report in evidence dated September 20, 1996. In that report Dr. S states:

We will go ahead and MRI his knee and keep him off work and have him crutch ambulation [sic] until we see him back in follow-up.

Then on September 27, 1996, Dr. S stated that the need for "arthroscopic evaluation" had been explained to claimant and that claimant understands "we are not going to be able to make him have an absolutely normal knee"; Dr. S then said after discussing the planned surgery:

We are estimating that we will be able to get him back to work in three to four weeks.

Then on November 26, 1996, Dr. S said the surgery was "cancelled," referring to a "mess" with the payment of the claim. He added that claimant was still in pain. Dr. S stated:

I explained to him that he needs to continue nonweightbearing and that this will protect his knee until we are able to do this surgery. [Emphasis added.]

The records do not show that Dr. S saw the claimant again until November 21, 1997. At that time claimant returned; Dr. S noted that claimant said the surgery had been approved. Dr. S also noted continued pain, intermittent swelling and locking of the knee; reference was also made to claimant having been unable to do "his normal activities."

During his testimony at the hearing, claimant was asked, "[d]o you think that you were able to work from November 24, 1996, through November 20, 1997, as a result of your injury?" Carrier states that claimant answered "yes" to this question. That is true, but his answer contained a preceding clause. The answer given to the question was, "[i]f they had operated on me before, yes."

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The evidence summarized above provides sufficient support for the hearing officer to determine that Dr. S did take claimant off work, again and again; that claimant did not choose not to seek treatment for his knee; and that claimant did not say he was able to work in the period in question in the condition he was in.

In addition, carrier says that a report dated "June 25, 1999," did take claimant off work retroactively by relating back to September 20, 1996. No medical report of that date is found in the record. However, a form addressing work status is dated June 25, 1998, and in it Dr. S does say that claimant has a torn meniscus and has not been able to work since September 20, 1996, also indicating that surgery was to be scheduled. Thereafter, on April 2, 1999, Dr. S said (as his notes made at the time show) that he had recommended in _____ that claimant "be off work until his surgery was completed." Dr. S also referred to the surgery as being "cancelled" in November 1996. Dr. S did not say that claimant cancelled the surgery, and claimant testified that the carrier would not pay for it. Dr. S also said that surgery (which showed chondromalacia but no torn meniscus) showed that a "majority" of claimant's symptoms resulted from the earlier injury; however, he also said that the compensable injury "played some part" in claimant's condition.

Dr. K in June 1998 had thought that claimant's compensable injury caused a patellar subluxation but could not rule out a torn meniscus although he also thought the majority of claimant's problems were caused by the earlier January 1996 injury. He recommended surgery and said that claimant "will require" approximately six weeks of physical therapy thereafter. Dr. M, the designated doctor, in April 1999, noted that after surgery in November 1998, claimant was only "authorized" three weeks of physical therapy as opposed to the five weeks recommended by Dr. S. He found that claimant had an impairment rating of 15%.

While carrier states that claimant was taken off work retroactively, later medical reports are not Dr. S's initial assertions about claimant's inability to work during the period just before, and during, the time period in question. Dr. S's later reports merely call attention to that which he had done in his progress notes made at the time, in September and November 1996, and in November 1997.

Carrier also states that the employer could have provided claimant with a "sedentary or light duty" job "between November 24, 1996, and November 10, 1997" if claimant had requested such a job. There was no issue of bona fide offer of limited work and there was no evidence that employer made such an offer to claimant, either verbally or in writing, at the time. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5. There is no explanation as to why employer would have provided a light-duty job in view of carrier's assertion on appeal that "[Dr. S] never took claimant off of work nor restricted his work activities."

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:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge