APPEAL NO. 991394

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 14, 1999. With respect to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; that he did not have disability within the meaning of the 1989 Act; and that the claimant has not persisted in injurious practices, therefore, if the respondent/cross-appellant (self-insured) had been found liable for workers' compensation benefits, it would not be entitled to reduce or suspend compensation under Section 503.067. In his appeal, the claimant essentially argues that the injury and disability determinations are against the great weight of the evidence. In addition, the claimant asserts error in the hearing officer's denial of his request for a continuance and his request to take a deposition on written questions of Dr. MB. In its response, the self-insured urges affirmance. The self-insured also filed a cross-appeal asking that we reverse the hearing officer's determination that it had not sustained its burden of proving that the claimant had persisted in injurious practices such that it would be permitted to reduce or suspend benefits under Section 503.067 and render a decision in its favor on this issue.

DECISION

Affirmed.

The claimant testified that on _____, he was employed as a custodian for the self-insured. He stated that on that date, he had propped a door open with a 50-60 gallon garbage can and the can slipped away from the door and hit him on the back of his leg, causing him to hit his right knee on a wooden desk. The claimant testified that he reported his injury to Mr. H, shortly after it occurred and that he did not finish his shift because his knee was hurting. He stated that his knee problems continued and he sought medical treatment from Dr. B on March 5, 1999. Dr. B referred the claimant to Dr. MB. On March 10, 1999, the claimant underwent an MRI of his right knee, which revealed "several tears involving the mid pole and posterior horn of the medial meniscus . . . ." In an off-duty slip of March 19, 1999, Dr. MB stated that the claimant was to remain at home on conservative management for two weeks pending right knee surgery. In a letter of May 18, 1999, Dr. MB stated that the meniscal tears in the claimant's right knee needed to be surgically repaired. The claimant testified that he has not yet had knee surgery because the self-insured has refused payment for the surgery. On cross-examination, the claimant acknowledged that he had a prior right knee injury with the employer in September 1998, but he insisted that the pain in his right knee after the _____ incident was different in its nature and severity.

Ms. M testified on behalf of the self-insured at the hearing. Ms. M stated that she is also a custodian with the self-insured and that she is acquainted with the claimant. She testified that on March 24, 1999, she was at a dance and she saw the claimant country and western dancing. She stated that the claimant did not give any indication of having a right

knee injury and that he did not have any difficulty dancing. The claimant denied that he was at the dance or that he has danced anywhere since the date of injury.

Ms. T testified that she is an administrative assistant with the self-insured, who was responsible for keeping track of the claimant's leave. Ms. T stated that in November 1998 the claimant came to her inquiring about his leave balances because he was attempting to schedule a surgery. Ms. T testified that she did not recall the claimant's having told her what kind of surgery he was attempting to schedule at that time. Finally, Ms. T testified that she has seen the claimant at work on several occasions since the alleged right knee injury and he walked and climbed stairs normally without limping or giving any indication of pain. On cross-examination, Ms. T testified that prior to November 1998 the claimant had mentioned to her that he had a hernia that required surgical repair. She stated that she did not know in November 1998 what type of surgery the claimant was attempting to schedule. The claimant maintained that he was not considering right knee surgery in November 1998.

Ms. I, a physical plant supervisor for the self-insured, testified that she was present in Mr. H's office when the claimant reported his injury. She stated that the claimant asked to see a doctor on that date and that Mr. H agreed to let him do so. In addition, Ms. I testified that she had seen the claimant working on several occasions after the alleged injury and that she did not notice anything unusual about his manner or his ability to perform his work duties. The self-insured also introduced a surveillance video tape of March 26, 1999, which shows the claimant using a weed eater, carrying two buckets of water, bending, and walking, while tending his father's grave on the anniversary of his death.

The self-insured sent written questions to Dr. MB. In his responses to those questions, Dr. MB stated that it is possible that the claimant's right knee was injured in the incident at work, where the garbage can hit the back of his leg and knocked his right knee into a wooden desk. However, Dr. MB also opined that the claimant could have also had a preexisting condition that was aggravated in that incident and that usually meniscal tears are "caused by twisting injuries to the knee." Dr. MB also commented that he had reviewed a surveillance video tape of the claimant and that it demonstrated that the claimant was not suffering pain or discomfort from the knee injury, that he was not in compliance with Dr. MB's instruction as the treating doctor, and that he could return to full-duty work.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before her. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut.

Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant injured his right knee in an incident at work on _____. The hearing officer specifically stated that "[i]t is this Hearing Officer's finding the Claimant has not provided sufficient evidence to satisfy his burden and as such has failed to establish he sustained an injury while in the course and scope of his employment." In addition, the hearing officer noted that Dr. MB stated in response to questioning from the self-insured that meniscal tears such as the ones revealed on the claimant's MRI are usually the result of a twisting injury, which is not the type of injury described in this case. The hearing officer was acting within her province as the fact finder in deciding to reject the claimant's evidence. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co.,15 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse that determination on appeal.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The claimant asserts that the hearing officer erred in failing to grant a continuance so that he could forward cross-questions to Dr. MB. The hearing officer denied the request for a continuance and for leave to take a deposition on written questions of Dr. MB because the self-insured sent the questions and Dr. MB's responses to the claimant within 15 days of the benefit review conference. The hearing officer noted that the claimant had timely received the questions and answers and that he could and should have made an earlier attempt to ask Dr. MB, his treating doctor, whatever questions he wanted to ask. We find no abuse of discretion in the hearing officer's having denied either request. Nonetheless, we are somewhat troubled by the self-insured's actions in this case. In its first question to Dr. MB, the self-insured makes the representation that the claimant had asked about his vacation and sick leave balances in November 1998 to assist in scheduling knee surgery and then asks if it is possible that the claimant's need for surgery preexisted the alleged _____, injury at work. As noted above, Ms. T testified that the claimant had asked her about his leave balance in November 1998 because he needed to schedule surgery; however, Ms. T testified that she did not know the nature of the surgery the claimant was attempting to schedule and the claimant denied that he was contemplating or scheduling knee surgery at that time. Thus, there is no factual support for the representation that the

claimant needed and wanted surgery on his right knee in November 1998. The self-insured would be well advised to make representations to a doctor that find factual support in the record.

Finally, we briefly consider the self-insured's assertion that the hearing officer erred in finding that it had failed to carry its burden of proving that the claimant had persisted in injurious practices such that it would be able to reduce or suspend benefits under Section 503.067, if it had been found liable for workers' compensation benefits. The self-insured presented a surveillance video tape that showed the claimant's activity on a single day of maintaining his father's grave site on the anniversary of his death by operating a weed eater, carrying two buckets of water for a short distance, and bending. In addition, the self-insured introduced testimony and witness statements from some six coworkers stating that they had observed the claimant after the injury and that during those observations, the witnesses had seen the claimant walking, climbing stairs, and dancing on one occasion, with no apparent difficulty or pain. The hearing officer determined that the self-insured's evidence did not demonstrate that the claimant engaged in persistent injurious practices. Our review of the record demonstrates that that determination is well supported by the evidence of record. We find no merit in the assertion that the evidence presented by the self-insured of the alleged persistent injurious practices of the claimant even permits a determination in favor of the self-insured under Section 503.067 and it certainly does not rise to the level of compelling a reversal in favor of the self-insured on that issue.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge