

APPEAL NO. 991421

Following a contested case hearing held on June 15, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on _____; that she did not report the alleged injury to her employer within 30 days and did not have good cause for her failure to give timely notice thus relieving the respondent (carrier) of liability under Section 409.002; and that she did not have disability. Claimant has appealed these determinations, asserting her view of what the evidence established. The carrier's response sets forth in some detail the evidence it asserts as sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

Claimant testified that she was employed by the employer, identified in documents as (employer), as an office custodian; that on _____, while going up a staircase at work, her right foot slipped, she felt pain in her right knee, and she fell against a stair on her right knee; that her husband was called and took her to a hospital emergency room (ER); that she underwent arthroscopic surgery by Dr. S on July 1, 1998; that her wound was cleaned out in October 1998; that she could not put her full weight on the knee until April 1999; and that she feels she cannot work because she has to walk slowly. Claimant further stated that on two prior occasions (dates unspecified), she slipped and hit her knee at work but did not lose time from work; that she drove with her husband to (Country) for the Easter weekend, leaving on April 9 and returning on April 12, 1998; that her knee was "fine" when she went to state but was hurting when she returned; that the trip was a 12-hour drive each way and she thinks her knee pain was due to being seated for so long; and that she had been seeing Dr. S for arthritis in her right knee and saw him on April 9 and 21, 1998. She indicated that Dr. S was being paid by a health insurance carrier and that she was making copayments.

Mr. I, claimant's husband, testified that claimant's knee treatment, apparently before and after _____, was being paid for by his health insurance carrier; that he felt he could pay the \$200.00 deductible and did not know claimant would require surgery; and that when he got the bill for claimant's knee surgery in the amount of \$4,000.00, his health insurance carrier asked him to explain what happened to claimant. He said he felt that the employer should be responsible.

Mr. T, the employer's production manager, testified that claimant was not limping on April 9, 1998, before leaving for (Country); that on April 13, 1998, claimant had "a very noticeable limp" and told him, through Ms. R, her supervisor, who spoke Spanish, that she had sat in the car for a long time and had problems with arthritis in her knee; and that between April 13 and 27, 1998, claimant continued to limp and he was told that she wore an Ace bandage. He further stated that on _____, he was called to the conference

room where claimant had been taken from the stairs; that claimant was there with Ms. R; and that Ms. R stated that claimant's knee had "popped and give out and she couldn't walk" and she said nothing about claimant's having fallen on the stairs. He further stated that at no time did claimant state that she had fallen and hit her knee on the stair; that neither claimant nor anyone else told him claimant had a work-related injury; and that he had no notice that claimant was asserting a work-related injury to her knee until November 23, 1998, when he was told by Ms. B, who works in payroll and personnel, that she had been contacted by the carrier about filing a first report of injury. He also stated that when claimant returned to work on June 22, 1998, pursuant to the doctor's release, she declined to work at both her regular job, which did involve climbing stairs periodically, or a plant janitorial position, which involved only infrequent use of stairs, because she said she could not climb stairs. Mr. T further stated that he offered her two different jobs on the production line which did not require any stair climbing and that she also declined them. The carrier did not, however, contend that a bone fide offer of employment was extended to claimant. Dr. S's June 11, 1998, work slip reflects that claimant can return to regular duty on June 22, 1998. Dr. S's May 12, 1998, off-work slip had taken claimant off work until June 11, 1998.

Ms. R, who indicated that she was claimant's immediate supervisor and translated English for her, testified that in the January - February 1998 time period claimant was limping and said that her knee would "give out"; that between April 13 and 27, 1998, claimant complained of her knee hurting; and that on _____, when she saw claimant sitting on a stair, claimant said that her knee had "gone out" but did not say she had fallen.

Ms. B testified that after the Easter weekend, claimant came in limping and that Ms. R said that claimant said that she had ridden too long in the car. She stated that on _____, she saw claimant sitting on a stair, that she left to get Ms. R, and that Ms. R talked to claimant and claimant said that "her knee gave way." Ms. B testified that in May 1998 she prepared Family and Medical Leave Act paperwork which claimant signed and short-term disability paperwork which claimant did not sign and that she did so because she was unaware claimant was asserting a work-related injury. Ms. B also testified about being advised by the carrier in November 1998 that claimant had filed a claim. Claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) is dated "11-6-98."

In her recorded statement, Ms. F, a supervisor, stated that claimant was not limping before the Easter weekend; that when she returned, she was limping from her knee hurting and could barely stand or walk with it; and that claimant indicated she had previous problems with her knees and assumed the pain was probably from sitting in the car and having her knees folded in the same position for a long time.

The ER record of _____, states the complaint as right knee pain and the history as "was walking up stairs today and felt a pop." This record also reflects that claimant had seen Dr. S on April 21, 1998, for a "sore knee." Dr. S's July 1, 1998, report of operation reflects that claimant underwent arthroscopic surgery for chondromalacia, right medial femoral condyle and lateral tibial condyle. Dr. S reported on October 13, 1998, the date of

claimant's last visit with him, that her knee pain was slowly improving and that she rarely requires pain medication.

Dr. G report of May 28, 1998, states that claimant said that "while in state she had onset of right knee pain and swelling" and that "she had trouble walking and walked with a limp because of the swelling." Dr. G's diagnosis was mild arthralgias, mostly in the right knee.

Claimant contended that she had a preexisting right knee condition which was aggravated on _____, when she fell on the stairs at work. She further contended that the employer had actual knowledge of the injury given her being found on the stairs after her fall and the information provided to Ms. R and Mr. T soon thereafter. The carrier contended that claimant was merely walking up the stairs when her knee gave way and that this incident was not an on-the-job injury, whether it be argued as a new injury or the aggravation of a preexisting condition.

Claimant does not dispute findings that she returned to work on April 13, 1998, exhibited a noticeable limp in the right knee for the next two weeks, and saw Dr. S with right knee complaints on April 21, 1998. She does challenge findings that she experienced significant right knee symptoms prior to _____; that between April 8 and 13, 1998, she traveled to (Country) and suffered further injury to her right knee; that the evidence is insufficient to establish that a work-related incident on _____, caused damage or harm to her right knee; that claimant did not injure her right knee on _____, while working for the employer; that claimant did not report the alleged injury to the employer within 30 days of _____; that any statements made to the employer with 30 days of _____, were not sufficient to constitute notice of a work-related injury; that a reasonable person would have reported the alleged injury within 30 days; and that claimant's inability to work after _____, is not the result of a compensable injury.

Claimant had the burden to prove that she sustained the claimed injury, timely reported the claimed injury (Sections 409.001 and 409.002), and had disability as defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. While these issues can, generally, be established by the lay testimony of the claimant, (Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992), the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer indicates in his discussion of the evidence that he found the carrier's evidence more credible. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not

disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge