APPEAL NO. 991490

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 15, 1999, a contested case hearing (CCH) was held. At issue was whether the respondent, who is the claimant, sustained a compensable right knee injury in addition to his right ankle and foot injury, and whether the appellant (carrier) waived its right to contest compensability of the claimed injury by not disputing it within 60 days.

The hearing officer found that the claimant injured his right knee on _____. She further found that the carrier had written notice of the injury on August 25, 1997, but failed to dispute it within 60 days and, consequently, waived the right to dispute compensability.

The carrier appeals, arguing that the evidence is factually insufficient to support the causal connection of the knee to claimant's foot injury. The carrier further argues that if there was no knee injury, there was nothing to waive. The carrier argues that evidence that was not allowed and considered by the hearing officer should not have been excluded.

The carrier says that it believes the Texas Workers' Compensation Commission (Commission) "simply lost" the two pages that should have been attached to its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), but were not included with it in the claims file. Finally, the carrier argues that the claimant's claim for compensation, although it listed the knee as an "affected" body part, did not identify his knee as "injured" and, thus, was not a sufficient written notice of injury.

It argues that a finding of waiver by not disputing this claim within 60 days is erroneous. The claimant responds by reciting evidence in support of the decision, and argues that the carrier's contention that the claim filed by the claimant was not a notice of injury is specious.

DECISION

Affirmed.

On _____, the date of his injury, the claimant was employed by (employer) as a welder. He said he was walking in a narrow aisle past an improperly stacked pyramid of iron, which began to slide as he went by. He said that about 500 pounds of metal slid onto his right foot, mashing down his steel-toed boots and causing him to fall and twist. The claimant said it took several people to unpile the metal. The claimant ultimately had surgery sometime in November 1997 on his right foot to remove bone fragments around his ankle. He had another surgery in May 1998 to alleviate nerve problems in his toes where they had been compressed by the steel-toed boot. He said his knee felt like a sprain and did not resolve. The claimant contended he reported this sensation of sprain in his knee to every doctor. The claimant said his foot remained very swollen and he began using crutches, which he used for about one year and one-half. His injury to his foot is described

in the medical evidence as a "crushing" injury, and continued swelling and pain in his ankle and foot are consistently documented in the medical evidence.

The claimant said that when he began walking at his doctor's suggestion and using a cane instead of crutches, his knee kept popping out of place. In December 1998, the claimant said, the knee grew worse, and the more he walked, the worse it became. His doctor, Dr. S, recommended further testing through MRI.

Claimant had been referred to Dr. S in August 1997 by the first doctor that claimant had consulted after his injury, Dr. H. Claimant was emphatic that notwithstanding Dr. H's omission of any mention of the knee in his reports, he mentioned knee pain each time to Dr. H. He denied that he had ever been treated by Dr. M, notwithstanding medical reports filed by Dr. M. Claimant went through therapy at Dr. H's office for the last two weeks in April 1997. It appears from the medical records in evidence that Dr. M was in practice with Dr. H.

On April 7, 1997, the claimant filed a notice with his employer reporting the incident and contending he injured his foot and ankle. He identified the signature on this report as his. It was essentially undisputed that the claimant subsequently filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Commission, date-stamped by the carrier on August 25, 1997, in which he contended an injury to that affected right foot, ankle, knee "and other parts of my body." The claimant and the employer are identified on this form and a brief recitation of how the accident happened is also included. There was no dispute in the form of a TWCC-21 filed by the carrier to this report. (The carrier raised in argument that "we don't even know" if the claimant filed the TWCC-41, but the signature matches that on the report to the employer and the authenticity of the TWCC-41 was apparently not questioned prior to the CCH.)

The first TWCC-21 filed by the carrier was dated December 18, 1998, and it stated:

> CARRIER DISPUTES SEE ATTACHED REASON AND DR. S REPORT OF 12/04/98.

The claimant objected to the TWCC-21 with attachments being tendered into evidence, arguing that until the day before the CCH, the claimant had never seen the attachments, and they were not timely exchanged. A discussion ensued about a question that had come up at the benefit review conference (BRC) as to whether the referenced attachments were ever filed. The carrier's attorney agreed that her office had received these attachments from the adjuster only a few days before they had been exchanged; the facsimile transmission line on the attachments is dated June 9, 1999. The hearing officer stated that she would take official notice of the claims file and exclude the attachments if they were not in the claims file. Her decision recites that the attachments were not contained in the claims file along with the TWCC-21.

On March 16, 1998, in a letter to Dr. M, Dr. S noted that claimant walked with a limp and still had rather significant pain in his foot and ankle. Restrictions were put on his ability to work. On December 4, 1998, Dr. S wrote a brief note to the effect that claimant "apparently injured his knee" during the accident and that it was "either poorly reported or not reported at that time." His recommended MRI was denied, and Dr. S wrote another letter describing the knee problem further, noting that claimant's knee problems had increased as he resumed normal walking.

Claimant was examined by an independent medical examination doctor, Dr. C, on August 28, 1998. To greatly summarize the results of the examination, which appears to have been thorough and included claimant's spine as well as extremities, Dr. C found the claimant's range of motion in his knees to be normal. Dr. C noted that muscle testing with the exception of the right ankle was also normal. He stated that the claimant had not reached maximum medical improvement (MMI).

Claimant was examined by a designated doctor, Dr. SD, on February 17, 1999. He detailed claimant's course of treatment and continuing pain in his right leg and noted that an orthopedic surgeon who examined claimant on November 13, 1998, felt that reflex sympathetic dystrophy (RSD) was a possibility. Dr. SD found no evidence of RSD or peripheral nerve damage in his examination, however. Dr. SD examined the claimant's right knee; he found no crepitus, laxity, swelling, or effusion. He said that there was some peripatellar tenderness. Dr. SD, conceding he did not have all of claimant's medical records, stated that based upon current records and his understanding of the mechanism of injury, he did not believe that the right knee was involved as part of claimant's initial injury. Therefore, claimant's eight percent impairment rating was confined to his right foot and ankle, with MMI certified as of the date of Dr. SD's examination.

It is not clear why, given the clear evidence that the TWCC-41 plainly listed injury to the knee and contained all elements of a written notice of injury as that term is defined in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3)(Rule 124.1(a)(3)), the carrier nevertheless adopted a theory of defense that it received no written notice about the knee until a letter from Dr. S in December 1998. There can be no reasonable interpretation of a TWCC-41 as anything other than a contention that enumerated bodily areas were part of the "injury." Although Section 409.021(c) states that a carrier waives the right to contest compensability if it does not contest the injury on or before the 60th day after the date it is notified of an injury, the 1989 Act allows a "safety valve" of the ability to reopen the issue of compensability where evidence comes to the carrier's attention that could not have reasonably been discovered within the initial 60-day period. Section 409.021(d). The TWCC-41 triggered the carrier's obligation to investigate the nature and extent of the knee injury at that time. Assuming that it ascertained that any injury was transient (which would be a reasonable assessment of the medical reports in the course of this claim), it would not be without recourse in the case of a surprising turn of events with respect to the knee, or if subsequent injury developed due to "altered gait."

For whatever reason, only the defensive theory of timeliness of the December 1998 TWCC-21 was pursued by the carrier. The hearing officer's findings of fact and conclusions of law on the waiver issue are supported by the evidence, although we would note as an aside that the bare TWCC-21, without attachments, that was filed with the Commission may not have passed muster as a showing of "evidence" upon which to reopen the compensability of the knee injury.

The carrier did not deny that it failed to exchange the attachments to the TWCC-21 within 15 days after the BRC. We do not agree that it was an abuse of discretion for the hearing officer to exclude them when they were not within the Commission's claim file along with the TWCC-21. *See* Sections 410.160 and 410.161.

Turning to the appealed findings as to whether claimant's knee injury was related to his initial crush injury, there was conflicting evidence presented. The claimant had the burden to prove the extent of his compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. In Western Casualty & Surety Company v. Gonzales, 518 S.W.2d 524, 526 (Tex. 1975), the Texas Supreme Court noted that the site of the trauma and its immediate effects are not necessarily determinative of the nature and extent of the compensable injury, and that the full consequences of the original injury, together with the effects of its treatment upon the general health and body of the worker are to be considered. The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The decision and order of the hearing officer are sufficiently supported by the record and are hereby affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge