APPEAL NO. 991537

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 16, 1999, a hearing was held. She (hearing officer) determined that respondent (claimant) injured her left, and her right, knee in the course and scope of employment on _____. Appellant (college) asserts that claimant did not injure her right knee; that claimant had injuries before and after _____, that affected her condition; and that claimant was not in the course and scope of employment at the time of injury. Claimant replied that the decision should be affirmed.

DECISION

We affirm in part and reverse and render in part.

Claimant worked as a teacher for a junior college. She testified that her responsibility as a teacher required her to prepare for classes, that she needed to work at the college in order to use a computer, and that _____, was during the Christmas break and a new semester would begin later in January. On the day in question, claimant was leaving her office at college to go to her car in the parking lot; she cut across a grassy area and stepped in an "indentation," hidden by grass cut to an even height. When she stepped in the indentation, she said, she did not fall but said it "felt like my knee had snapped" and like she had "twisted my ankle and everything." She waited for a short period and then proceeded to her car, drove to her home and "put ice on it." Claimant also testified that it was common practice for teachers "in my division" to work at the college at odd hours. She also said that she was there on _____, to prepare for registration and referred to her help in regard to some campus clubs, but added that working with clubs was "not required."

The chief focus of the hearing was in regard to whether claimant could be in the course and scope of employment by working, without having been directed to do so, at a time when the college was not in session. A statement from claimant's supervisor, Mr. M, "chairperson of division of business," states that he has personally observed claimant working in her office at night and weekends "preparing for classes." He added, "the professional is required to commit the time and energy to perform the duties of the job regardless of when or where it is required." He did not say that claimant was required to work extra hours at any specific time, but did say that working "non-traditional" hours is required. Following the guidance set forth in Esis, Inc., Servicing Contractor v. Johnson, 908 S.W.2d 554 (Tex. App.-Fort Worth 1995, writ denied), which affirmed a compensable injury incurred by an off-duty jailer cleaning his pistol at home because he was required to have a clean pistol (no one directed that jailer how often or at what time to clean that pistol), the evidence is sufficient to support the determination that claimant was in the course and scope of employment when she stepped in the indentation.

Claimant testified to stepping in an indentation which felt like "my knee had snapped," and also testified to putting ice "on it." (Emphasis added.) She did say that she may have stepped in the indentation with both feet. However, the only other possible point

of injury testified to was her "ankle and everything." Claimant also replied to questions asked on February 17, 1999, in which she said that when she stepped in the indentation her knee felt as if it popped, she did not fall, but "it just twisted my knee and my hip" and she stood there a while "trying to wiggle my knee back." After talking of her left knee and left hip being injured, claimant was asked if "any other part of your body was injured," to which she replied, "no, my whole body hurts, but I think that's the, that's the limping and all of that and I keep wanting to twist my right leg where I'm, where I'm, uh, favoring my left leg." Between the statement and her testimony, claimant mentioned her left knee, her left hip, and her left ankle in regard to the _____, injury.

Claimant also submitted a response to the benefit review officer's report, accepted into evidence as Hearing Officer's Exhibit No. 2, in which she disagreed that she was walking to the office, saying that she was walking away from the office, and adding that she stepped in an indentation without slipping and falling and, "I injured my left knee and hip (not my back)." In addition, claimant submitted two exhibits, the statement of Mr. M and an MRI of one part of her body, the left knee.

The only other evidence was a copy of claimant's statement and two doctor's reports, provided by the college. The doctor's reports are dated March 22 and April 8, 1999. They are both from Dr. B. Dr. B alluded to claimant's history as including a fall in 1996 onto her left knee. He added that she thereafter had "intermittent" knee pain. He said that since the January injury she had a "give-way episode which resulted in a fall and she landed on her right knee" in February 1999, and she has had hip pain and swelling of both ankles. Dr. B gave significant attention to claimant's hip in the March note. In the April note he noted pain in both knees. Both knees had meniscal tears. He next mentioned arthroscopy to "address the meniscal tears" and then said, "these have been present likely since 1996 and have failed to improve." Dr. B's notes make no mention of the right knee as having been injured in the _____, incident, but they do say that after the _____, incident claimant fell on (alleged date of injury), on the right knee in a "give way episode." There was no evidence that the latter fall was at work or in the process of doing anything to further the business of the employer. Similarly, there is no claim before us to review based on an injury occurring on (alleged date of injury). As stated, the evidence, including claimant's testimony, her statement, and her response to the benefit review officer, do not include reference to any right knee injury. *See* Texas Workers' Compensation Commission Appeal No. 951038, decided August 4, 1995, which said that an injury to a claimant's left knee occurring when the compensably injured right knee "gave way" was not compensable.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In this case, however, there is an absence of any evidence indicating that claimant injured her right knee in the course and scope of employment. The hearing officer, in her Statement of Evidence, does refer to the February 1999 give-way episode ("more pain to her left knee and has experienced buckling which resulted in a fall in February 1999"), which was mentioned only by Dr. B. In her immediately following sentence, the hearing officer then says:

> There was no mention of a prior injury to the right knee, so one can only assume that the meniscal tear of the right knee occurred on _____.

The hearing officer does not say why the meniscal tear could not have occurred during the only incident attributed to the right knee, the (alleged date of injury), give-way fall and does not say why she must assume the injury occurred on _____, when, Dr. B said, claimant had "meniscal tears, as these have been present likely since 1996." The hearing officer has the discretion to reject Dr. B's opinion concerning causation in 1996 when the claimant testified to injuring her left knee on _____, but does not have the discretion to find a right knee injury when there is no evidence of such an injury on _____, contrary to what the hearing officer found.

We note that the hearing officer made no finding of either a hip or an ankle injury, about which there was some evidence of an injury related to the _____, incident. With no appeal as to the hip or ankle, we will not review whether the hip or ankle was injured.

The evidence sufficiently supports the determination that claimant caused some injury to her left knee on _____, and that such injury was in the course and scope of employment. That part of the decision is affirmed. Insofar as the decision includes an injury to the right knee, the decision is reversed and a new decision rendered that the claimant has a compensable injury to the left knee.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I respectfully dissent regarding reversing and rendering a decision that the claimant did not suffer a compensable injury to the right knee. I understand that the evidence regarding a right knee injury on _____, is sparse. However, as the fact finder the hearing officer can make inferences from the evidence and we generally will only set aside the factual determination of a hearing officer if it is contrary to the great weight and preponderance of the evidence.

Of even greater concern to me is that the majority is rendering a new decision of no compensable right knee injury. There was evidence that the claimant injured her right knee when her left knee gave way. This was evidence of a compensable "follow-on" injury. The hearing officer did not frame her findings in finding a compensable right knee injury in terms of a follow-on injury. However, we have stated many times that a decision of a hearing officer may be affirmed on any reasonable theory supported by the evidence, often citing Daylin, Inc. v. Jaurez, 766 S.W.2d 387,392 (Tex. App.-El Paso, writ denied).

At the very minimum, I would remand this case for the hearing officer to determine whether or not the claimant had a compensable follow-on injury. We have held such injuries can be compensable. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993. In doing so we have followed the precedent of the Texas appellate courts. *See* Maryland Casualty Company v. Sosa, 425 S.W.2d 871 (Tex. Civ. App.-San Antonio 1968, writ ref'd n.r.e. *per curiam* 432 S.W.2d 515). We have held that whether or not the claimant suffered a compensable follow-on injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993. We have also remanded for the hearing officer to make factual findings concerning whether or not there was a follow-on injury. *See* Texas Workers' Compensation Commission Appeal No. 990140, decided March 8, 1999.

_____
Gary L. Kilgore
Appeals Judge