APPEAL NO. 991676

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 12, 1999. She (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury to his right knee on (injury 2), and that he did not have disability. The claimant appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a railcar painter. He testified that between 9:00 and 9:30 a.m. on injury 2, he was in the break room to retrieve a two-way radio needed in the performance of his job. He picked up the radio and obtained a Coke from the Coke machine. As he left to go out of the break room, he turned and his right knee popped. He said the knee started swelling and he went home. The following Monday, he was sent by the employer to a clinic. Treatment notes of this visit reflect that the claimant stated "this same incident occurred 4-5 months ago"; that he saw a doctor; and that he had soreness in the same area "if he steps wrong since the 1st injury 4-5 months ago." At one point the claimant testified that he was "not sure" what he told the doctor at the clinic and at another point in his testimony he said he did not recall telling the doctor about this incident and does not know what the report is talking about. He also said he had a prior (injury 1) right knee injury while playing basketball and that the knee did not continue to pop after this injury 1 injury. Other doctors' reports reflect no prior history of a right knee injury. He was later diagnosed with an anterior cruciate ligament tear.

The carrier did not dispute that the incident occurred in the break room essentially as described. Much time at the CCH was devoted to whether the claimant was in the course and scope of his employment at the time, with the carrier conceding that the incident originated in the work, but denying that the claimant, at the time, was furthering the affairs of the employer and arguing that the injury arose out of walking as an ordinary activity of life. The carrier also argued that any injury was simply a continuation of a prior condition and not a new injury. The claimant countered these arguments with the assertion that he was furthering the business of the employer at the time, that the injury did not have to involve contact with an "instrumentality" of the employer, and that the injury was at least an aggravation of the prior condition of the knee. The hearing officer commented that she was not deciding this case on the basis of whether an "instrumentality" was involved, *see, e.g.,* Texas Workers' Compensation Commission Appeal No. 980631, decided May 14, 1998, but on the basis that there was no new injury. In her disposition of the case on this basis, she essentially accepted the position of the claimant that the claimed injury, if it occurred, was in the course and scope of employment.

Section 401.011(26) defines injury as "damage or harm to the physical structure of the body." The aggravation of a preexisting condition in the course and scope of employment may be a compensable injury in its own right. However, the mere recurrence or remanifestation of symptoms of the prior condition does not equate to a new compensable injury. Rather, there must be evidence of "some enhancement, acceleration or worsening of the underlying condition" with a reasonably identifiable cause. Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993. Whether there has been a compensable aggravation injury is a question of fact for the hearing officer to decide. Appeal No. 93866.

In the case we now consider, the claimant testified that he did not recall what he told the doctor at the clinic or even an incident involving his right knee some four or five months prior to the current claimed injury. A coworker testified that the claimant complained about his knees prior to this incident. The hearing officer commented that "[i]t is difficult to believe . . . that this information did not come from the Claimant, and he does not deny that it did." Since the incident only involved what the hearing officer considered normal walking, she determined that the claimant was suffering from a "continuation of symptoms from a pre-existing condition," and he did not meet his burden of showing a compensable injury. In his appeal, the claimant asserts that his evidence met his burden of proving at least an aggravation injury and that it would have been impossible for him to have worked these many months with a torn ligament. The hearing officer was the sole judge of the weight and credibility of the evidence. Ultimately, she did not find the claimant credible or persuasive in his assertion of a compensable right knee injury as a result of the incident on injury 2, as described by the claimant. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the claimant for that of the hearing officer, but find her determination of no compensable injury sufficiently supported by the evidence.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge