

## APPEAL NO. 991833

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 8, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant's (claimant) compensable (right knee sprain, and left shoulder) injury was not a producing cause of claimant's right knee torn meniscus or the right knee degenerative arthritis and that respondent (carrier) had timely contested compensability of the right knee torn meniscus and degenerative arthritis.

Claimant appealed, contending that her "right knee problem" was caused by the compensable "injury of (injury 1)" and that carrier had "failed to timely dispute the right knee involvement," giving reasons why that might be so. Inferentially, claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, urging affirmance.

### DECISION

Affirmed.

It is important to note at the outset that the injury at issue concerns the right knee. In evidence are medical records where doctors have confused extensive injury, and a total knee replacement, of the left knee. Also, there was testimony and evidence of a low back injury of November 1996 which is also not directly at issue. The testimony and evidence also includes a (Injury 2), right knee injury; however, at that time this carrier did not have coverage and that injury is relevant only as it may have aggravated or made symptomatic the original injury 1, injury.

Claimant was employed as a school bus driver for the handicapped and on injury 1, claimant was knocked down by a student. Claimant testified that her main problem was her left shoulder but that she also had immediate and excruciating pain in her right knee. Dr. M initially referred to a left knee injury but subsequently corrected himself to show a right knee injury. The original report also notes a "normal knee exam." As previously indicated, claimant sustained a low back injury on Injury 3, and was seen by Dr. G. Dr. G, in a note of that date, notes the circumstances of claimant's back injury, notes a "normal knee and ankle jerk" and prescribes physical therapy (PT) for the back. Claimant went to PT but none of the notes make any reference to any knee complaints. It is undisputed that claimant sought no attention for her right knee injury until December 1997. The hearing officer sums up claimant's testimony thusly:

Claimant acknowledged she had no treatment for the right knee for over one year because she knew how to "self-help" herself for a knee injury. Claimant said she had prior unrelated injuries to her left knee, and this is why she knew what to do for her right knee injury. Claimant said other reasons she did not seek right knee treatment was because her husband was sick, and

the doctor she wanted to see was not available. Claimant acknowledged she had no treatment for the right knee until after a subsequent injury on Injury 2.

Claimant testified that on Injury 2, she was manually pushing a heavy motorized wheelchair up an incline when her right knee "locked" and the "popping began." Claimant testified that she had had problems with her right knee since the Injury 1 injury. Claimant went back to Dr. G and in an office progress note dated December 16, 1997, Dr. G wrote:

Patient presents with complaints of left knee pain. She hurt her knee about a year ago then aggravated it yesterday pushing a heavy motorized wheelchair in her employment for the school as a bus driver. She complains of sensation of giving way. Occasionally the knee will "lock." Occasionally has a little swelling.

Patient has some crepitation with ROM [range of motion] of right knee. She has tenderness to palpation along the joint line laterally, no ligamentous instability. She has some tenderness to palpation on the inferior aspect of the patella. Neurovascular exam normal.

[P]robable right knee torn meniscus.

There is no evidence when, or if, carrier received this note. Dr. G referred claimant to Dr. LT), a knee specialist. In a note dated December 30, 1997, Dr. LT comments on claimant's left knee history, the Injury 1 injury and "a couple of other injuries." X-rays were taken and Dr. LT had an impression of "early degenerative arthritis, right knee with possible tear in the lateral meniscus." Claimant received conservative treatment to the right knee until she had arthroscopic surgery on May 26, 1998. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated June 18, 1998, carrier disputed the claimant's compensable injury 1, injury stating that injury was limited to the left shoulder and left knee. In a report dated January 5, 1999, Dr. LT commented that "because of her troubles with her left knee she has overused her right knee and has begun to get some degenerative arthritis in her right knee at her age. [Claimant was 45 years old.]"

Claimant's medical records were sent to Dr. NT for a record review. In a report dated February 17, 1999, Dr. NT refers to a left shoulder and left knee injury of "Injury 1," and Dr. LT's reference to an overuse right knee injury. In a follow-up report dated February 26, 1999, Dr. NT notes "serious question and confusion in all the medical reports as to what is left and what is right," comments that the "present symptomatology regarding the right knee is unrelated to the alleged injury 1 date event" and concluded: "In my estimation the knee sprain/strain which most likely occurred on or around alleged injury 1 date has completely resolved, leaving little or no long term disability." In another report, dated March 11, 1999, Dr. NT explained:

I think there is good medical documentation to suggest that the right knee is **not**, a work compensable body part. There is a lack of any temple relationship to right knee medical treatment for some 15 months. I would state that this patient has received a multitude of medical treatment in that

period to her low back but none to her right knee. I further suggest that the findings on her right knee examination by [Dr. LT] on 12/30/97 point to an ordinary disease of life [sic], i.e. osteoporosis arthritis, and in my opinion this is a national [sic] progression with ordinary disease of life very similar to what the patient occurred on her left knee. [Emphasis in the original.]

Dr. NT testified at the CCH to the effect that claimant at most had a knee sprain on injury 1; that claimant had none of the signs or symptoms of a meniscal tear for 15 months between Injury 1 and Injury 2; and that claimant would not have been able to go 15 months without treatment had she torn the meniscus on injury 1.

Dr. G, in a report dated February 3, 1999, opined, "It is my feeling that she did have a new damage that took place on the incident on Injury 1 that has ended up resulting the surgery that she had to have in May of 1998." A report dated February 2, 1999, from Dr. NT continues to confuse the left knee with the right knee and concludes that all the events were factors in causing claimant's right knee arthritis. Claimant and carrier entered into a Benefit Dispute Agreement (TWCC-24) where the parties agreed that claimant sustained a compensable right knee injury. It is carrier's position that claimant had a minor right knee sprain or strain on injury 1, which resolved well before her reinjury on Injury 2.

On the issue of timely contest of compensability, the hearing officer commented:

Carrier disputed the right knee meniscus tear and the right knee degenerative arthritis by filing a TWCC-21 with the Commission [Texas Workers' Compensation Commission] on June 16, 1998. This appears to be in response to the operative report from [Dr. LT] dated May 26, 1998. This operative report reflects Claimant had right knee surgery, and the accompanying documents seem to indicate this condition may be related to the injury of injury 1. There is no indication Carrier had written notice of right knee involvement before May 26, 1998. The TWCC-21 filed on June 16, 1998, is timely.

Claimant, at the CCH, pointed out that carrier disputed a left knee injury in the TWCC-21 and points to Dr. G's December 16, 1996, office note arguing that note was sent to Dr. NT in February 1999. We note the confusion on knees has continued into claimant's appeal, which states "The form 21 filed on June 16, 1998 disputes the right knee as opposed to the left knee."

Certainly the medical evidence is in conflict. The hearing officer and Dr. NT appeared to give great weight to the fact that after the injury 1, injury, there is only brief mention of a right knee injury and at least two notes indicate normal knee findings. Claimant did not seek medical attention for her right knee injury for 15 months, her testimony notwithstanding. The hearing officer apparently did not find her testimony credible. We have frequently noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v.

Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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 for that of the hearing officer.

On the issue of timely contest of compensability, the hearing officer found that Dr. LT's operative note of May 26, 1998, gave carrier fair written notice of a claimed right knee torn meniscus and degenerative arthritis. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)). Carrier timely disputed those injuries on June 18, 1998, claiming that the compensable injury is limited to the "left shoulder and left knee." Subsequently, in May 1999, carrier agreed that claimant had a compensable right knee injury but that the injury was limited to a right knee sprain/strain which resolved before Injury 2. With this confusion, we are unable to say that the hearing officer's decision is either wrong as a matter of law or is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Judy L. Stephens  
Appeals Judge