

APPEAL NO. 992049

On August 2, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the respondent's (claimant) left knee injury is a result of the injury sustained on _____; and (2) whether claimant has had disability resulting from the injury sustained on _____, from April 22, 1999, to May 24, 1999. The hearing officer decided that: (1) claimant's left knee injury is a result of the injury sustained on _____; and (2) claimant had disability resulting from the injury sustained on _____, from April 22, 1999, through May 24, 1999. Appellant (carrier) requests that the hearing officer's decision on the disputed issues be reversed and that a decision be rendered in its favor. Claimant requests affirmance.

DECISION

Affirmed.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Claimant has the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also has the burden to prove she has had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993.

On _____, claimant, who was 57 years of age at the time, was working as a teacher's assistant in a special education class and on that day participated in a volleyball game with her students. Claimant testified that during that game her right knee popped and hurt, that she continued to play, and that she put more "dependence" on her left leg while playing because her right leg was hurting. The parties stipulated that on _____, claimant sustained a compensable injury to her right knee in the form of a tear to the meniscus and that, due to the compensable injury, she was unable to obtain and retain employment at her preinjury wages from September 5, 1998, through October 25, 1998. Claimant went to Dr. R for evaluation of her right knee pain. Dr. R wrote that an MRI of the right knee done on September 30, 1998, showed a tear of the lateral meniscus. Claimant underwent surgery to her right knee on October 20, 1998. Claimant said that she was on crutches for a short time after surgery and that by the time she returned to work on

October 26, 1998, she was not on crutches, but that she was limping and had to bear most of her weight on her left leg. She said she had to walk up and down stairs at the school where she worked.

Claimant said that she first noticed pain in her left knee in late October or early November 1998. Dr. R wrote on January 5, 1999, that he evaluated claimant on that day for complaints of left knee pain, which he referred to as a new problem, and that claimant thought that her left leg pain was related to her right knee surgery because of so much weight bearing on her left leg following that surgery. An MRI of the left knee done on January 8, 1999, showed tears of the medial and lateral menisci. On February 17, 1999, Dr. R wrote:

She reiterates that she never had a problem with either or [sic] her knees before the volleyball game and it was subsequent to that that she had the problems. It is true that she has had some degenerative changes in her knee but the tears of the meniscus in her knee are related to the injury. She has an MRI which does confirm it. She has a torn cartilage in her left knee. There was no complaints about that prior to the volleyball game and the complaints are now subsequent to the volleyball game and she needs arthroscopic evaluation and treatment for that.

Dr. R also wrote that "It's likely that this could have happened during the volleyball and she had such severe pain in the right knee that she was overlooking the pain in the left knee."

Claimant underwent left knee surgery on April 22, 1999, and Dr. R took her off work and prescribed physical therapy. Claimant returned to work on May 24, 1999. Claimant said that she thought her left leg problem was from putting extra weight bearing on that leg while recovering from the right knee surgery.

Dr. A examined claimant and reviewed claimant's medical records at carrier's request and he wrote on January 29, 1999, that "[g]oing over the history and the records, there is no causality as far as the problems with the left knee with any activity that she had at work from _____, on." Dr. A added that claimant has an arthritic left knee, which happens to also have a tear of the medial meniscus, that the operative report of the right knee noted chondromalacia changes, and that "this type of wear and tear of a knee joint is usually bilateral in someone [claimant's] age and weight." Dr. A's report notes that claimant weighs approximately 180 pounds. Dr. A also added that "[s]o wear and tear from activities of daily living that is what one can attribute the troubles with the left knee."

The hearing officer found that claimant sustained an injury to her left knee on _____, and that claimant was unable to obtain and retain employment due to her compensable injury from April 22, 1999, through May 24, 1999. The hearing officer

concluded that claimant's left knee injury is a result of the injury sustained on _____, and that claimant had disability resulting from the injury sustained on _____, from April 22, 1999, through May 24, 1999. Carrier contends that the hearing officer's findings are not supported by sufficient evidence, that Dr. R's opinion is not based on reasonable medical probability, and that it did not have an opportunity to defend against a theory of an injury occurring to the left knee on _____, because claimant's theory was a follow-on injury. While the attorney for claimant did mainly urge that the evidence showed a compensable follow-on injury to the left knee from additional weight bearing due to surgery to the right knee, he also referred in opening statement to a "mask injury," and stated that the menisci tears of the left knee occurred either in the volleyball game or as a result of non-weight bearing of the right knee.

Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence, that conformity to legal rules of evidence is not necessary, and that a hearing officer may accept a written statement signed by a witness and shall accept all written reports signed by a health care provider. It has been held that a medical expert need not use exact magic words in providing an opinion on causation. Stodghill v. Texas Employers Insurance Association, 582 S.W.2d 102 (Tex. 1979). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate 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. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge