

APPEAL NO. 000074

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 December 15, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury to her left knee on _____, and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury to her left knee on _____, and did not have disability. The claimant appeals, urging that the hearing officer erred in determining that the claimant's injury stemmed out of an ordinary activity of life while at work and therefore was not compensable, and requests that the decision be reversed. The respondent (self-insured) replies that the hearing officer's decision is supported by sufficient evidence that the claimant's left knee injury stemmed out of an ordinary activity of life while at work, and the decision should be affirmed.

DECISION

Reversed and rendered.

The claimant was employed with the school district as a substitute clerk in the administration building. The claimant testified that on Friday, _____, while at work, she was walking down the hall when her foot slipped, and her left ankle went inward and her left knee went outward. The claimant said that nothing in the area caused the incident to occur other than the actions of her own body. According to the claimant, she felt pain in her left knee, but did not realize at the time she was injured. The claimant testified that she did not work the following week because of a death in the family and she treated her swollen left knee with ice packs. The claimant returned to work on August 31, 1999, and said that she did not report the injury as work related because of the treatment she had received from the self-insured as a result of a prior workers' compensation claim. The claimant worked until September 2, 1999, when she said that her condition deteriorated to the point that she sought medical treatment at the emergency room where x-rays were taken, she was given a brace, and taken off work. The claimant testified that on September 2, 1999, her husband gave the employer an off-work slip and reported the injury. The claimant testified that her prior compensable injury was to her left calf, no surgery was performed, and she had no problems with her left knee prior to _____.

Dr. C, the claimant's treating doctor, testified that he saw the claimant on September 8, 1999, and the claimant indicated that on _____, while walking down the hallway, she slipped and twisted her left foot inward and her left knee outward. Dr. C testified that an MRI is needed to obtain a diagnosis, but that the carrier has denied his request for an MRI. Dr. C's possible diagnoses include an injury of the patella ligament or a meniscus tear. According to Dr. C, the claimant's prior compensable injury was a tear caused by a blood clot in her left calf and he certified that she reached maximum medical improvement on July 6, 1999, with an eight percent impairment rating. Dr. C opined that the claimant's

_____, left knee injury is not related to the prior compensable injury. The self-insured argued that the claimant did not sustain an injury on _____. The self-insured presented the testimony of Ms. A, the adjuster for the self-insured. Ms. A testified that the claimant's alleged injury occurred in the hallway just outside Ms. A's office on her first day at work. According to Ms. A, if the claimant had slipped, she would have seen it. The self-insured also presented written statements which indicate that it had no knowledge that the claimant was alleging a work-related injury until it was reported by the claimant's husband on September 2, 1999. The self-insured argues that even if the claimant sustained an injury on _____, it occurred while the claimant was conducting an ordinary activity of life, simply walking, and is not compensable.

A "compensable injury" means "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(10). "Course and scope of employment" is defined in Section 401.011(12) as "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Whether an employee is in the course and scope of employment when injured is ordinarily a question of fact. Injury and disability determinations can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In reaching her conclusion that the claimant did not sustain a compensable injury, the hearing officer made the following findings of fact:

FINDINGS OF FACT

2. On _____ while walking down the hall, Claimant twisted her left leg thereby injuring her left knee.
3. As Claimant's left knee injury stemmed out of an ordinary activity of life while at work, Claimant's injury was not a compensable injury.

In Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999, the Appeals Panel affirmed a hearing officer's finding of a compensable injury in a case where an employee turned when leaving her workstation to check on patients, her left foot slipped slightly, she "planted" her right foot to maintain balance, and her knee locked. In Appeal No. 990252, the carrier argued that claimant's injury was not in the

course and scope of employment because the injury arose from walking and no "instrumentality" of the employer was involved. In addressing that argument, the Appeals Panel stated that:

Workers' compensation law is not tort law; the employee need not prove that the employer was in some way negligent, or the premises defective, in order to recover for injuries that are encountered in the course and scope of employment or arise from that employment, while the business of the employer is being furthered. We do not agree, as the carrier urges, that an injury arising from an activity that could also be experienced outside of work is, per se, noncompensable for that fact alone.

The exclusion of ordinary diseases of life from the definition of injury in the 1989 Act applies to occupational disease injuries but not to a discrete, accidental injury such as the one alleged by the claimant. See Sections 401.011(26) and 401.011(34). The hearing officer found a specific injury; however, the hearing officer determined that the injury was not compensable because it "stemmed out of an ordinary activity of life while at work." Although the injury arose from an activity that the claimant could as likely have performed at home (walking), which is an activity common to the general and working public at large, that fact alone does not make the injury noncompensable. We conclude that the hearing officer erred as a matter of law in determining that the claimant did not sustain a compensable injury to her left knee on _____. We reverse the hearing officer's decision that the claimant did not sustain a compensable injury to her left knee on _____, and render a new decision that the claimant sustained a compensable injury to her left knee on _____.

The claimant contends the hearing officer erred in determining that she did not have disability. The hearing officer determined that "[d]ue to the claimed injury," the claimant was unable to obtain and retain employment equivalent to her preinjury wage beginning on September 3, 1999, and continuing through the date of the hearing. Because we have reversed the determination regarding compensability, we also reverse the determination that claimant did not have disability and render a determination that claimant had disability.

We reverse the decision and order of the hearing officer and render a new decision that the claimant sustained a compensable injury to her left knee on _____, and that she had disability from September 3, 1999, through the date of the hearing, December 15, 1999.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

I concur because I believe Texas Workers' Compensation Commission Appeal No. 980631, decided May 14, 1998, was incorrectly decided.

Alan C. Ernst
Appeals Judge