APPEAL NO. 001209

This appeal from a decision issued on remand (Texas Workers' Compensation Commission Appeal No. 000248, decided March 15, 2000) 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 January 13, 2000.

The issues involved whether the appellant, who is the claimant, had a compensable injury on _____, which included her right medial and lateral meniscus tears, and whether she had disability as a result of the _____, injury. The case was remanded primarily to reconsider evidence which had been excluded at the first session of the CCH, although it was asserted that the claimant had exchanged them at the benefit review conference (BRC).

In his decision on remand, the hearing officer noted that a search of the claims file failed to show that the documents excluded at the first CCH had been exchanged at the BRC, and no subsequent exchange was proven. They were therefore excluded. He continued to find that the claimant had not sustained a torn right meniscus in the motor vehicle accident (MVA) which was the basis for the claim.

The claimant has appealed and argues that the hearing officer did not follow the instruction of the first Appeals Panel decision, and simply reconsidered the entire first case again based on the same evidence. The claimant argues that the hearing officer failed to impose a sole cause burden of proof on the respondent (carrier) and that there was no evidence of any cause of the meniscus tears than the MVA. The claimant argues that it was error to exclude the claimant's exhibits on remand because the carrier had essentially admitted at the first hearing that the documents were exchanged at the BRC. The carrier responds that it did not raise a sole cause defense and that the claimant failed to meet her burden of proof. The carrier further argues that although there may have been some records discussed at the BRC, none were exchanged at all prior to the first session of the CCH, which it asserts was an untimely exchange.

DECISION

Affirmed based upon our standard of review.

At the beginning of the first session of the CCH, when the claimant sought to tender her documentary evidence, the carrier's attorney objected on the basis of the failure to exchange, except for emergency room (ER) records from May 7 which it also tendered into evidence. The claimant's first attorney responded that all information that she submitted had been exchanged previously at the BRC. This was not clearly refuted at the time by the carrier's counsel, who stated that the basis for his objection was that the documents were not again exchanged within 15 days after the BRC. The claimant's first attorney, noting that she had not done a CCH in a while, asked for, but was not granted, a continuance.

At the beginning of the second session of the CCH after remand, the same documents were again tendered by the claimant and the same objection raised. At this time, the carrier's counsel, noting that he had apparently not made himself clear before, stated unequivocally that he had not seen the documents at any time before, during, or after the BRC (until the first session of the CCH) nor had he received an exchange "packet" from the claimant's first attorney.

The claimant testified as to her specific recollection that all of the proffered documents were presented at the BRC as necessary to present the elements of her case. She maintained that her attorney brought three copies of the documents to the BRC, and left one with the Texas Workers' Compensation Commission (Commission) and one with the carrier's attorney. At this point, the hearing officer was asked to look at the Commission's file. A recess was taken, during which it was ascertained that the file was maintained at the Austin headquarters of the Commission, and that the records in issue were not in that file.

These records were again excluded based upon the hearing officer's recited conclusion that the records had never been exchanged, including at the BRC. The claimant's attorney at the remand hearing attempted to argue that such documents had been exchanged to her by the carrier's attorney preparatory to the remand hearing and that this somehow cured the problem, but the hearing officer pointed out that it did not.

It was undisputed that the claimant was involved in an MVA on _____, while on a training conference for (employer). The vehicle in which she was riding was rear-ended by another vehicle. She was riding in the front passenger seat at the time which she said was pulled all the way up because of tall coworkers sitting in back. The claimant said she was thrown forward and hit her knees on the dashboard of the car.

She was taken to the ER. She reported a headache. It was noted that claimant had discoid lupus. Joint effusion, tenderness to palpation, and limited range of motion in the right knee were also noted. The doctor recommended x-rays of the neck and right knee and the claimant declined, stating that she had a flight to catch back to her home city, which was several hours away from her training site. A knee immobilizer was applied and she was told to see her physician upon returning home. The claimant testified at the remand hearing that her lower back was also treated.

She testified that after she returned to (city) she sought treatment from another doctor, Dr. F, on May 10, and was given therapy. She said that May 10 was her first missed day of work. The claimant said that although advised by Dr. F to take some time off from work, she returned to work on May 11. Through her therapy she was treated also by Dr. T beginning May 13 and she kept working although he advised otherwise due to swelling in her knee. She said that Dr. T told her she had a severe cervical strain.

The claimant said that she was off work from June 2 to September 6, 1999, at which point she resumed part-time work and later full time (on November 11, 1999), for the same employer, in a different job, at first, than she had at the time of her injury. She said that her knees were in excruciating pain and this kept her from working. However, she also said that pain throughout her body, not just the knee, prevented work. The claimant was fired on January 28, 2000.

The claimant testified that she had previously undergone knee surgery in December 1998 on her right knee to repair a cartilage tear. The claimant said that she had physical therapy, was discharged from care in March 1999, and had no further problems with her knee prior to the accident. She said that after the accident, her knee would "lock up." Claimant's supervisor, Ms. E, agreed that claimant had not complained before of her knee "locking up," although she was aware that claimant had prior knee problems, but was unable to recall any of the operative dates other than to say claimant had been on medical leave in January and came back to work in February.

There was some testimony concerning the fact that the claimant was apparently beneath the desired production level of the employer. The facts and testimony on this point are set out in our first decision and will not be repeated here. The claimant said she kept trying to work in pain and that she felt her production was impacted by her knee pain because it was harder to get out and visit prospective clients. At a June 1 meeting, a plan was presented to claimant which she did not sign, and she said she saw Dr. T later that day and was taken off work.

The claimant testified that Dr. T discussed her MRI (done on June 6) with her and told her she had two tears in the ligaments around her knee. (The MRI report was excluded from evidence.) The claimant testified that her regular health insurance would not pay for the needed surgery because it was of the opinion that her injury was work related and yet the carrier had also denied coverage.

At the remand hearing, the claimant said that she had an MRI of her left knee in August 1999 and was told she had some tears. She stated that she had fallen onto her left knee in May after the accident, when her right knee locked up, but just scraped her knee.

At the first session of the CCH, the parties stipulated that the claimant had sustained "a compensable injury on _____." The parties did not seek to limit the stipulation to any condition or diagnosis. We stated that this stipulation should be clarified to specify the regions on which there was a meeting of the minds. Although the carrier, in argument at the end of the remand CCH, stated that it had accepted a lumbar and cervical injury, the modification of the stipulation was not done. There is nothing in the record (carrier presented no documentary evidence) to explain why a right knee injury, documented and treated by a stabilizing device (immobilizer) on May 7 in the ER, was not "accepted" by the carrier.

EXCLUSION OF EVIDENCE

It is clear from reading the first Appeals Panel decision that the record left the impression that medical records that were excluded by the hearing officer were present and disclosed at the BRC. However, on remand, the hearing officer was able to clarify that the documents in question were not in fact exchanged at the BRC. He disbelieved the claimant's testimony to the contrary, as he was entitled to do.

It is troubling that the carrier's response indicates the possibility that there may have been some medical records discussed at the BRC. And, as the recommendation in the BRC report is in favor of the claimant, it defies logic to believe that no medical records were present at the BRC. Unfortunately, the new BRC report form does not list documents considered at the BRC, the carrier's attorney cannot recall the precise records that may have been discussed (but were not exchanged), and there was no subsequent exchange made by the claimant's first counsel that would have avoided the issue entirely. The statute is unequivocal on the consequences of the failure to exchange; the records cannot be admitted as evidence in the absence of a finding of good cause. Section 410.161. We cannot agree that the hearing officer erred by continuing on remand to exclude the proffered documents.

OCCURRENCE OF A RIGHT KNEE INJURY AND DISABILITY

The carrier argued at the remand hearing (and in its response) that it had never raised a "sole cause" defense. We will respond by repeating what was stated in the first decision: "Whether or not the words ‘sole cause’ are used during a CCH, a carrier that wishes to assert that a current condition and incapacity results only from conditions in existence prior to an intervening accident [or, for that matter, an event occurring after the accident] bears the burden of proving that the preexisting [or subsequent] condition is the sole cause." Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. It was the carrier that inquired as to two other events: the claimant's December 1998 surgery, and a purported fall occurring after the MVA. There would appear to be no other purpose in such inquiry except to propose alternate causes of the meniscal tears.

We agree that the claimant must initially show a causal connection between the incident and injury. The ligament tears did not arise in a vacuum; they either were there at the time of the _____, MVA or arose at the time of the accident or thereafter. There is evidence, through the ER report and the claimant's testimony, that would meet this burden if believed in entirety. The ER records plainly document a right knee injury for which further testing was recommended and a stabilizing device prescribed. The claimant's supervisor agreed the claimant complained of her knee "locking up." In this case, there was an accident immediately after which the claimant began to experience her knee pain. Although the hearing officer questioned the credibility of the claimant, he believed her enough to find, as fact, that she had right medial and lateral meniscus tears diagnosed after the MVA.

It is clear to us that the claimant sustained at least a documented right knee strain on _____, but the issue before the hearing officer was limited to the matter of meniscal tears. On this precise issue, the hearing officer has found that these tears are not part of the compensable injury. He, therefore, had to believe that they existed before or arose after the injury. In this case, the fact that the claimant continued to work until after a personnel action was taken, coupled with her testimony about a subsequent fall, would support the hearing officer's obvious doubt as to the cause of the tears being the MVA. He tied the determination of disability entirely to the claimant's meniscus tears.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We are not second-tier fact finders, and as the decision of the hearing officer is supported by the admitted record, we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge