APPEAL NO. 001382

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 May 16, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _________; that the claimant without good cause failed to timely report his claimed injury; and that the claimant did not have disability. The claimant appealed, expressing his disagreement with these determinations. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a bread deliveryman. He testified that on or about _________,[1] while he was pushing a bread rack, it tipped over and scraped his left shin up to the kneecap. Mr. D, a division sales manager, was accompanying the claimant at the time. According to the claimant, Mr. D helped him set up the bread rack and asked if he was okay. The claimant said he responded that he could walk and the two continued the route. The claimant further testified that most pain came from his shin and he did not know at the time that he injured his knee. He continued working until October 12, 1999. On October 13, 1999, he went to a VA clinic with complaints of left knee pain. Eventually, he was diagnosed with a meniscal tear. The VA treatment notes do not reflect a history of an injury at work until February 23, 2000, when the VA responded to a letter of the claimant which asked that the notes of treatment on October 18, 1999, be amended to delete the sentence that the claimant did not "remember any injury per se, although several months earlier he did have a contusion to the anterior tibia" to reflect that he "did turn over a 12 high bread rack over and it caught my shin and my left knee on _________."[2]

Mr. D testified that he was on the route with the claimant when a bread rack tipped over, but he could not remember the exact day. He said he saw the rack scrape the claimant's leg, but not his knee. He did not remember if the rack fell all the way to the floor or not. He said the claimant never told him he was hurt in the incident and that he first learned of a possible work-related injury from Mr. SH, area sales manager, on November 3, 1999.

---

[1]The claimant conceded that the incident could have happened anytime between ________ and _______. The decision and order of the hearing officer contains an extensive rendition of the evidence, which will be greatly summarized here.

[2]The claimant also testified that he was variously told by his doctors that the injury could or could not have been caused by twisting or by trauma. In response to the suggestion that it could have been caused by twisting, he apparently reported another incident of twisting at an unspecified time, later reduced to a separate claim. At the CCH, he stressed that he was only claiming for purposes of these proceedings a left knee injury on _________.

With regard to reporting the injury, the claimant testified that he told Mr. S, his immediate supervisor, about his knee injury in a telephone conversation on October 18, 1999. Mr. S testified that he first learned of a claimed knee injury on November 2, 1999, but that on October 11 or 12, 1999, the claimant's wife called him to find out what doctors were included on the employer's insurance plan. According to Mr. S, she wanted to make an appointment for left knee medical care, but never gave the details of how the left knee was injured and never reported it as work related. Mr. S said he talked to the claimant on numerous days between October 12 and 20, 1999, to discuss the left knee and the claimant's ability only to do light work, but the claimant never said his knee condition was work related. Mr. S testified that he first received notice of a workers' compensation left knee injury on November 2, 1999, in a telephone call from Mr. SH. Mr. S then completed an accident report in which he indicated the claimant had "no idea when the accident happened."

Mr. SH testified that he was called by the claimant on November 2, 1999, and told that he had been off work since October 12, 1999, from a work-related left knee injury and related the injury to a twisting incident, not the bread rack incident. Until shortly before the CCH, Mr. SH said he thought the claimed injury was from a twisting incident.

The claimant had the burden of proving he sustained a compensable knee injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. In this case, the hearing officer recounted the evidence and noted the lack of a reference to causation in the initial, uncorrected medical reports and evidence from various management officials which reflected confusion on the part of the claimant as to what event he believed caused his injury. Based on his evaluation of the evidence, he determined that the claimant did not sustain the claimed left knee injury.[3] In his appeal, the claimant essentially reasserts the position he took at the CCH and expresses his disagreement with the hearing officer's decision on this issue. 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). Under this standard of review, we find the evidence sufficient and affirm this determination.

With regard to the notice issue, the claimant asserted both that Mr. D had actual knowledge of the injury and that otherwise the claimant had good cause based on trivialization of the injury for not giving timely notice. He further premised his good cause on the contention that he gave notice to Mr. S on October 18, 1999.

The hearing officer made no findings as to actual knowledge. This is unfortunate and the hearing officer should have done so because Mr. D was apparently a supervisory

[3]We interpret the hearing officer's finding of no compensable injury to relate only to the bread rack incident.

official. Given our affirmance of the finding of no compensable injury, a remand to resolve an actual notice issue would serve little purpose and we conclude that the issue of actual knowledge is moot.

The claimant's argument of trivialization depends on notice being given on or about October 13 or 18, 1999, the day trivialization presumably ended with the receipt of medical advice from the VA. The claimant testified he gave notice of his claimed knee injury to Mr. S on October 18, 1999. Mr. S testified that he was informed of a knee problem, but said no connection was made between that problem and the claimant's activities in the course and scope of his employment. Which version was more credible was a question for the hearing officer to resolve. The hearing officer found Mr. S more persuasive and credible and found that notice was given on November 2, 1999, well after trivialization ended on October 13 or 18, 1999. Under our standard of review, we affirm that determination.

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

____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in the result. I agree that the notice issue is moot in this case. However, were we to reach the merits on this issue, I would reverse and render a decision that the employer had actual knowledge of an injury. The claimant's supervisor saw the bread rack scrape the claimant's leg. This is more than an incident, it is an injury, and the claimant's supervisor witnessed it. The claimant need not have given notice of the extent of his injury. He was required only to give notice of an injury. The claimant's supervisor saw the injury, so there was actual knowledge. I would affirm in part and reverse and render in part.

____
Judy L. Stephens
Appeals Judge

CONCUR:

____
Gary L. Kilgore
Appeals Judge