

APPEAL NO. 001514

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 22, 2000. The hearing officer determined that the respondent's (claimant) compensable injury of _____, was a producing cause of the claimant's current left knee condition and that the first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) by Dr. H did not become final because it was timely disputed. The appellant (carrier) appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The nature of that injury was a left knee injury. The claimant was treated by various doctors. On December 9, 1998, Dr. T diagnosed left knee strain and contusion. On the morning of January 18, 1999, Dr. K examined the claimant and found mild crepitation, but an otherwise apparently normal knee, and released the claimant from his care with a return to unrestricted duty. According to the claimant, he then returned to work and felt a pop in his left knee while lifting a bucket of tar. While being taken back to Dr. K and before Dr. K saw him again, the claimant was arrested and placed in the county jail where he remained from January 18 to November 4, 1999.

On March 18, 1999, he was taken from the jail by sheriff's deputies to be examined by Dr. H. Dr. H completed a Report of Medical Evaluation (TWCC-69) on March 24, 1999, in which he certified MMI as of March 8, 1999, and assigned a one percent IR based on a diagnosis of left knee contusion and strain. Although Dr. H noted no knee effusion in his examination, the claimant insisted his knee was still swollen. The claimant was then returned to jail. He said that while in jail he repeatedly sought treatment for a painful left knee, but was only given ibuprofen.

On December 6, 1999, after his release from jail, the claimant returned to Dr. T who diagnosed left knee pain. An MRI on December 9, 1999, showed a suspected anterior cruciate ligament (ACL) tear. No meniscal tear was felt to be present. On December 17, 1999, Dr. K diagnosed a partial ACL tear and possible medial meniscus tear. On February 9, 2000, Dr. K performed arthroscopic surgery. The surgery found the ACL and lateral meniscus intact, but identified medial femoral condyle reticular surface defect with synovitis. In a letter of March 10, 2000, Dr. K considered the claimant's "episode of knee pain" after his release from jail "to be related to his original injury of October 1998."

A nurse in the county sheriff's department testified that the claimant never requested medical attention for his left knee in writing on a medical request form provided to inmates and she did not recall if he ever verbally communicated to her about left knee pain.

The compensability issue was framed as follows: "Is the compensable injury of _____, a producing cause of left knee condition after January 18, 1999, diagnosed as partial [ACL] tear and probable vertical tear in the posterior horn of the medical [sic] meniscus?". The hearing officer concluded that the injury of _____, was a producing cause of these "diagnosed" conditions. Neither party attempted to reconcile this issue with the postoperative diagnosis which found no tears but another condition. The position of the carrier was that the claimant's original injury completely resolved by January 18, 1999, as evidenced by Dr. K's report of this date without regard to the incident later that day after Dr. K's examination. The position of the claimant was that his knee condition never resolved but continued throughout and after his incarceration and, at least impliedly, that the popping sensation on January 18, 1999, after Dr. K's examination, was not a new injury.

The issue of whether the original knee injury resolved and a new injury was sustained presented a question of fact for the hearing officer to decide. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In the discharge of his fact-finding responsibility, the hearing officer considered the evidence and found the claimant's testimony and Dr. K's post-incarceration report more persuasive than the carrier's inference from Dr. K's pre-incarceration report that the left knee injury resolved. The hearing officer could well have concluded that an unrestricted return to work was not necessarily synonymous with a resolution of the injury, but that the pre-incarceration report was consistent with some abnormality. 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 find the evidence sufficient to support the compensability of the claimant's current left knee condition.

The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) in effect at all times pertinent to this case provided that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. If the IR becomes final under this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The 90-day period for disputing a first certification of IR runs from the date the disputing party received written notice of the certification. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. The parties agreed that Dr. H's certification was the first for purposes of Rule 130.5(e).

In evidence was a letter of March 26, 1999, commonly called an EES-19, from the Texas Workers' Compensation Commission to the carrier, with a copy sent to the claimant and which gave the results of Dr. H's certification and stated the provisions of Rule

130.5(e). The claimant's address is not listed on the letter. Also in evidence was a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) dated March 29, 1999, to the claimant, but again no address of the claimant was contained on the form. The carrier asserts that one or both of these forms was mailed to the claimant by regular mail without return receipt at his address and that all of his mail was delivered to him in jail by his fiancée. The claimant testified that his family moved two days after he went to jail and denied ever receiving any mail advising him of Dr. H's certification. He said he only found out about the certification in December 1999 after he was released from jail. The carrier provided no evidence about its procedures for informing the claimant of the results of such certifications or that it complied with such procedures in this case. There was other evidence that the claimant discussed this certification and expressed his disagreement with it while in jail. Whether and, if so, when, the claimant received written notification of Dr. H's certification presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 990408, decided April 12, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 950207, decided March 24, 1995 (Unpublished). The hearing officer found the claimant credible in his assertion that he did not receive Dr. H's certification until December 1999 and disputed it that same month. Under our standard of review, we find this evidence sufficient to support this determination.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge