APPEAL NO. 001963

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 July 26, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that she did not have disability because she did not sustain a compensable injury; and that the respondent (carrier) did not waive its right to contest compensability in this case because it contested within the 60-day period provided for doing so in Section 409.021(c). In her appeal, the claimant asserts error in each of those determinations. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, after she had clocked out and was walking to leave the building, she caught her foot on a sticky substance on the floor, lost her balance, and twisted her left knee. She stated that she did not fall but that she heard a "pop" in her left knee when it twisted. The claimant testified that she did not report an injury before she left work because she did not think it was serious; that she went home, elevated her knee and put ice on it; that the next morning her knee was tender and swollen; that she went to work that evening and worked for a few hours and then her left knee began throbbing; that she then reported her injury to the assistant store manager; and that he referred the claimant to a clinic used by the employer.

At the clinic, a physician's assistant, Ms. H took x-rays and determined that there was no dislocation or fracture of the claimant's left knee and advised her to follow up with an orthopedic specialist. Thereafter, the claimant sought treatment with Dr. S, with whom she had previously treated for a work-related right knee injury. In his September 13, 1999, progress notes, Dr. S states that the claimant's left knee x-rays are normal and that he is referring her for an MRI of the left knee. Dr. S's September 21, 1999, progress notes reflect that the claimant's MRI revealed a tear of the anterior cruciate ligament (ACL) and a bucket handle tear of the medial meniscus.

Ms. W testified that she worked in risk management for the employer at the time of the claimant's alleged injury. Ms. W stated that the claimant told her that she fell and hurt her knee while she was walking out of the store and that the claimant did not know how she had fallen but she thought that her knee had just "given out on her." The carrier also introduced a written statement from Ms. R, a coworker of the claimant's, who stated that the claimant told her that her leg gave out when she was walking out of the store. Ms. R also stated that the claimant had told her that she had problems with her leg prior to her alleged injury at work. The carrier also introduced a written statement from Ms. TR, a former friend of the claimant's. Ms. TR stated that the claimant injured her knee dancing at a bar. Ms. IR testified that she is the personnel manager for the employer and that Ms. TR contacted her to tell her that the claimant had not injured her knee at work; rather, she injured it dancing at a bar.

The claimant had the burden to prove that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that the claimant twisted her left knee in the course and scope of her employment on _____; however, she further determined that "the twist of Claimant's left knee on _____ did not cause harm to Claimant's body and did not result in an injury." The claimant argues that the hearing officer's determination in that regard is against the great weight of the evidence because the MRI of her left knee demonstrated that there was damage, namely tears of the ACL and the medial meniscus. The hearing officer is not finding that there is no damage or harm to the physical structure of the claimant's knee as the claimant asserts; rather, she is finding that the incident at work on _____, where the claimant twisted her knee, did not cause the damage or harm to the claimant's knee. The hearing officer was acting within her province as the finder of fact in so finding. Our review of the record does not demonstrate that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the hearing officer's injury determination on appeal. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

Lastly, we consider the claimant's assertion that the hearing officer erred in her determination that the carrier did not waive its right to contest compensability in this instance. The claimant did not appeal the hearing officer's finding of fact that the carrier disputed compensability on September 23, 1999, after receiving notice of the injury on September 13, 1999. As such, it appears that the claimant's argument is that, pursuant to Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26, 2000), the carrier has waived its right to contest compensability in this instance because it did not do so within seven days of the date it received written notice of the injury. In Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio August 16, 2000), the Fourth Court of Appeals in San Antonio issued a decision on rehearing again determining that a carrier waives the right to contest compensability if it fails to either agree to begin payment of benefits or provide written notice of its refusal to

pay within seven days after it receives written notice of an injury. On August 28, 2000, the Executive Director of the Texas Workers' Compensation Commission (Commission), issued Advisory 2000-07 acknowledging the Court of Appeals decision on rehearing in Downs. However, the advisory states that the "August 16th decision in the *Downs* case should not be considered as precedent at least until it becomes final upon completion of the judicial process." In addition, the Director of the Hearings Division has informed the Hearings Division that the Commission's position is that a carrier has 60 days to contest compensability and that hearings staff are to follow the Commission's position statewide pending final resolution of Downs. The Director of Hearings reissued this directive following the issuance of the decision on rehearing in Downs. Based on these directives, the hearing officer did not err in making her determination that the carrier timely contested compensability under Section 409.021(c) because it contested compensability well within 60 days after it received written notice of the claimed injury.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge