APPEAL NO. 011608
FILED AUGUST 10, 2001

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 June 7, 2001. The hearing officer determined that although the appellant (claimant) had a knee condition, it was not sustained as the result of a compensable injury on the employer's premises on _____. Although the claimant was unable to obtain and retain employment due to the knee condition, it did not constitute disability as defined in the 1989 Act, because the injury was not compensable.

The claimant appeals, and argues that this decision is an abuse of the hearing officer's discretion and the result of bias. He argues that the hearing officer improperly admitted into evidence a videotape which had not been exchanged. He further argues that the respondent (carrier) failed to carry its burden to prove that he had a preexisting injury, or that his knee condition did not occur on the job. He contends that it is unlawful for the hearing officer to have denied disability and benefits based upon speculation. He argues that it is irrelevant to have considered the fact that the claimant had been reprimanded for tardiness prior to the alleged incident. The carrier responds that the hearing officer is ultimately the judge of credibility. The carrier points out that evidence has been attached to the appeal which was not part of the record of the hearing. The carrier seeks affirmance. While the claimant argues that he was not properly served with the response by the carrier, such would not form a basis for reversing the hearing officer's decision.

DECISION

We affirm the hearing officer's decision.

ADDITIONAL EVIDENCE ATTACHED TO APPEAL

Evidence is to be submitted at the CCH. Section 410.163(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2 (Rule 142.2). The Appeals Panel does not have similar authority to admit evidence, and will generally not consider evidence that was not admitted at the CCH and is submitted for the first time on appeal. Section 410.203(a) and Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. In determining whether there is a basis to remand a case to a hearing officer based on a claim of newly discovered evidence, the Appeals Panel considers whether the evidence has come to the knowledge of the party after the CCH; it was not owing to want of due diligence that knowledge did not come sooner; the evidence is not just cumulative; and the evidence is so material it would probably produce a different result if a new hearing were granted. Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992. After reviewing the record and the documents submitted by the claimant on appeal, we do not

conclude that the decision of the hearing officer should be reversed and remanded so that the hearing officer could consider the documents that are not in the record.

FACT SUMMARY

The claimant contended that he tripped over a security light on _____, as he walked toward the workplace, having arrived at the employer's parking lot at the time he was supposed to begin work, which was 8:00 a.m. According to the diagram in evidence, the claimant was parked about 15 parking spaces and two "islands" away from the area where he said he had fallen. It was light outside when the claimant arrived; a picture of the security lights in question show that they are well-centered in the grassy areas near the parking lot and not along the sidewalks nearer the buildings. The security lights are somewhat large and hooded fixtures which stick up above the grass for what appears to be a foot or more above the ground. They appear to be well away from areas where a person would walk, even if cutting across the grass to a sidewalk. The claimant said that he was not in a hurry as he walked from his pickup truck to the building because there was a 10 minute "window" even though he was supposed to start work at 8:00 a.m.

The light fixture in question was several feet from where the claimant said he parked his truck. At the beginning of his testimony about the accident, the claimant stated that he fell over the security light and lay on the ground "a few minutes." He then said that he lay on the ground "20-30 minutes." Finally, he concluded by saying that "as soon as" he fell, he got up and limped back to his truck, then drove to the security office, where he was logged in at 8:22 a.m. Although this was a time when people were arriving for work, the claimant said that no one who drove by stopped to help, although he caught the eye of some drivers. He said that no one walked by him during this time. The claimant reported his accident to the security office and it was, in turn, reported to Mr. B, a supervisor, who referred the claimant for medical attention.

The claimant asserted that he was not driving his own Ford Explorer that day; that a friend had taken his vehicle for mechanical work to a local auto dealership, where the friend worked, and, in turn, had loaned the claimant his own "extend-a-cab" brown Chevrolet pickup truck. Asked what verification there would be of this mechanical work on his vehicle, the claimant asserted that there would be no service ticket from the dealership because the friend was doing this for free as a favor to him.

A surveillance videotape that was admitted over the claimant's objection portrayed stop-action scenes from two cameras posted at entranceways to the employer parking lot in question. Neither camera's films show a brown extend-a-cab truck entering either lot at or near 8:00 a.m. One camera showed a pickup truck leaving the lot at about 8:20 a.m., but (as the claimant agrees in his appeal) the color cannot be determined. Likewise, it is difficult to tell if the truck is indeed an "extend-a-cab," largely due to the angles at which the three-second "snapshots" are captured. When the videotape was played at the CCH, the claimant identified this as the truck he was driving on the day in question.

Medical evidence shows that the claimant received extensive treatment, including two surgeries, for his right knee, due to an October 21, 1997, injury. This was a work-related injury with a different employer but the same carrier. The claimant's doctor during 2000 was Dr. M. His January 29, 2000, surgery included a right medial meniscectomy, for a partial tear of the medial meniscus. Dr. M certified on May 18, 2000, that the claimant had reached maximum medical improvement with (MMI) a 12% impairment rating. Ten percent was for the medial meniscectomy.

On July 7, 2000, the claimant was noted as having intermittent pain, but was able to live with it. He had diffuse tenderness around his knee but full extension and flexion. The claimant testified that he had a slip-and-fall accident at work on September 7, 2000, which he characterized as minor. He saw Dr. M that day, and Dr. M noted that the claimant's knee hurt as a result of twisting it. Dr. M noted that the claimant would be switching his treatment over to his regular insurance. Dr. M's diagnosis that day was internal derangement of the right knee. Dr. M wrote out a return-to-work notice that says that the claimant should be excused "from 09-06-00" with no end date specified.

After he reported his accident to security, the claimant was first seen by the employer's clinic. It was noted on the clinic's charts that the claimant had no effusion and no crepitus in his right knee. He was diagnosed with a right-knee sprain. At his request, the claimant was referred to Dr. M for further treatment. Dr. M examined the claimant on September 22, 2000, and noted that the claimant had lumbar muscle spasms as well as a swollen knee. On September 28, 2000, Dr. M noted moderate swelling in the knee but full extension and flexion. However, Dr. M took the claimant off work for six weeks pending an MRI. On November 14, 2000, the claimant had a lumbar and right-knee MRI. The lumbar MRI was essentially normal, noting only minimal degenerative changes associated with morbid obesity. The MRI of the knee was reported as showing some indications around the posterior horn of the medial meniscus that could be associated with a complex tear or a "saucerized" area, although it was characterized as uncertain.

Dr. M wrote on February 15, 2001, that because the claimant was injured "in the parking lot" of the employer, and was "completely asymptomatic" prior to this incident, the injury is a new injury. He characterized the MRI of the knee as one showing a medial meniscal tear.

The claimant agreed that he had been counseled on September 12 for tardiness, but stated that he could not recall if it was for more than one incident. In fact, a counseling report dated September 13, and signed by the claimant and his training supervisor, detailed seven instances of absences or lateness since his August 28 employment date. (One of those occasions was for being eight minutes late, which is inconsistent with the claimant's testimony about a 10-minute "window.") According to another memo from this same supervisor (but not signed), the claimant was counseled on September 13 for an unauthorized 25-minute break, but the claimant denied at the CCH that this had been discussed with him. He stated that he happened to be in the break room while making a call to his wife. (The claimant contends that

this memo was admitted in violation of the exchange requirement; however, it was admitted without objection from the claimant's attorney at the CCH.)

WHETHER THE HEARING OFFICER ERRED IN HIS EVALUATION OF THE EVIDENCE

We do not agree that the hearing officer erred by finding that the claimant was not injured in the course and scope of his employment or that he did not have disability. Much of the claimant's argument expresses the belief that he should prevail because the carrier failed to disprove his testimony as to how the accident occurred. However, the burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The facts set out in a medical record are not proof that a work-related injury, in fact, occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer is, by statute, the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The fact that a trier of fact believes some evidence, and rejects other evidence, does not constitute speculation or bias, but is part of the responsibility of reconciling or weighing conflicting evidence. 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). The fact that the claimant had a possible tear in his meniscus, shown by an MRI in November 2000, does not mean that it necessarily occurred due to the alleged incident.

The claimant argues that his attendance record is irrelevant to his claim. We disagree; a contention that a workers' compensation claim may be motivated by personnel actions is a valid defense which may be raised. The claimant has not cited any legal basis for his contention that submitting evidence in support of this defense is improper.

The claimant objects as speculation or bias that the hearing officer found incredible the claimant's assertion that he lay on the ground for at least 20 minutes after his fall. The hearing officer could infer just from the claimant's testimony that the time spent to walk to the area of the light fixture after arriving at 8:00 a.m., plus the time spent to limp back to the truck after the fall, and the time spent to drive some distance to the security gate around the front of the building where he logged in at 8:22, simply did not allow for the duration of time the claimant contended he was on the ground. Such discrepancies (as well as inconsistency in the testimony at the CCH about the duration of time) may validly be considered by a trier of fact in the assessment of credibility of the entire testimony.

Temporary income benefits are due when an injured worker has not reached MMI and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." A finding that an injury occurred in the course and scope of employment is the threshold finding. While the hearing officer agreed that the claimant's knee condition resulted in an inability to work, it is clear that the hearing officer was not persuaded that the condition was due to a work-related accident. Our review of the evidence does not show the findings and conclusions of the hearing officer to be without sufficient support in the record. We observe also that we find no support in the record for the claimant's allegations of any bias on the part of the hearing officer.

ADMISSION OF THE VIDEOTAPE

The claimant contends that the videotape showing the comings and goings at the parking lot, where the claimant said he parked on the morning in question, was improperly admitted because it had not been timely exchanged. At the CCH, the attorney for the carrier described the circumstances surrounding this videotape. It was a surveillance videotape routinely made in the course of the employer's business, but consisted of a series of snapshots taken at three-second intervals. The attorney stated that the tape's existence was discussed at the benefit review conference (BRC). Thereafter, the attorney stated that he was told by a video-copying service that the videotape could not be copied on a format viewable by standard VCR videotape players.

The carrier's attorney went on to state that he identified the videotape to the claimant's attorney within 15 days after the BRC, and told this attorney that the tape would be made available to play on the employer's equipment at the convenience of the claimant's attorney. The claimant's attorney responded in a letter that it was "completely unreasonable" to expect him to go to the employer's site to review the tape, and that he would object to any videotape offered at the CCH. The attorney for the carrier stated that he thereafter had the tape copied, as best as the copying service could (and which he acknowledged was not viewable on a VCR), and he then gave it to the claimant's attorney.

However, by the date of the CCH, there was a standard videotape of those tapes offered into evidence. The employer's representative, Mr. B, explained at the CCH that the employer's new chief of security figured out a way to copy the tape so it would be viewable on a VCR; this copy was made the day before the CCH and given to the claimant at the CCH. The claimant's attorney objected to the videotape on the basis of late exchange.

After hearing the argument of both parties, the hearing officer pointed out that the carrier had timely offered to make the tape available for viewing, and stated that under the unusual circumstances of this case he would admit the tape into the record. Because he did not precisely state that he was finding a "good cause" for a late exchange, he apparently concluded that there had <u>not</u> been a failure to timely disclose the tape, such that it could not be introduced as evidence as set out in Section 410.161. He allowed the claimant and his attorney to view the tape before the CCH.

We cannot agree that the hearing officer abused his discretion in admitting the videotape. Under the circumstances, we agree that the tape was timely disclosed and made available to the claimant, in what was understood to be the only viewable format at the time. Submission of what was, in effect, a clearer copy did not constitute new evidence not previously disclosed.

In any case, the videotape is of somewhat limited utility, and was by no means the only basis for the hearing officer's decision. The decision is sufficiently supported, even without the videotape.

CONCLUSION

The decision of the hearing officer will be set aside by the Appeals Panel only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this is the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge