

APPEAL NO. 020067
FILED FEBRUARY 14, 2002

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 December 3, 2001. On the single issue before him, the hearing officer found that the appellant (claimant) failed to prove that his left knee injury was an extent of his compensable injury of _____.

The claimant complains that this decision is against the evidence. However, he also complains of exclusion of his evidence, about assistance he was given through the ombudsman program, and about the fact that the hearing officer who presided over a brief hearing where the continuance was granted on his case was not the one who ultimately heard the dispute and wrote the decision. The respondent (self-insured) responds that the hearing officer correctly determined the extent of the claimant's injury and did not abuse his discretion in excluding documents not timely exchanged.

DECISION

We affirm the hearing officer's decision.

The claimant's undisputed compensable injury was to his back. He had surgery on March 6, 2000, and three months later began physical therapy. At issue was his contention that he had hurt his left knee twice during physical therapy, once while doing knee bends in a swimming pool on _____, and a second time on a treadmill on _____. A physical therapist's note in November 2000 recorded the claimant's description of an incident at home when he felt his knee pop as he bent down to pick up an appliance.

CHANGE IN HEARING OFFICERS

We find no reversible error in the change of hearing officers. Initially, we would note that when the CCH was started on October 15, 2001, objections were made to several exhibits presented by the claimant on the grounds that they had not been exchanged within 15 days of the benefit review conference (BRC). The claimant asserted that many of these documents had been disclosed or exchanged at one of the multiple preceding BRCs, but that he had left proof of this at home. The hearing officer determined on his own motion that a mere recess would not allow the claimant (who was unrepresented and assisted by an ombudsman) to prepare to counter the evidentiary objections, and he therefore granted a continuance. No substantive matters or witnesses were heard by this hearing officer. We cannot agree, therefore, that the claimant was prejudiced by the fact that the hearing officer who eventually took testimony and heard the entire proceeding was not the same hearing officer who had started, but continued, the CCH.

EXCLUSION OF EXHIBITS

The hearing officer did not abuse his discretion in excluding certain exhibits. At the session of the CCH that led to the decision, the claimant said that some, but not all, of the exhibits to which the self-insured objected had been exchanged at the first BRC. Some documents had been exchanged in October (more than 15 days after the last BRC) and some hospital documents had, according to the claimant, been recently obtained by him only days before the CCH and exchanged to the self-insured at the CCH. The claimant said he had not earlier obtained the hospital documents, created well before they were exchanged by the claimant, because he could not afford the amount charged by the hospital for copies and also was unable to drive to get the records for a month after his knee surgery in late October. Finally, he asserted that some of the six or seven ombudsmen who had assisted him throughout the pendency of the dispute had undertaken to exclude certain information from exchange packets that they apparently deemed were not relevant or helpful to the claimant's side of the dispute, although the claimant said he thought that they were. The hearing officer excluded some records, which included the lately acquired hospital records, and admitted others.

One of the excluded exhibits was a general brochure describing spinal fusion surgery. The other exhibits, relating to the claimant's knee surgery, may be fairly described as duplicating the claimant's history of injury and noting that he had a left knee injury. We do not agree that the hearing officer abused his discretion by declining to admit late-exchanged information, nor that the evidence is of the nature that admission of the evidence would have led to a different result. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

THE OMBUDSMAN ASSISTANCE

Ombudsmen are provided by the Texas Workers' Compensation Commission to assist unrepresented injured workers. They are not attorneys and do not represent claimants. Ultimately, all decisions and responsibilities for exchanging documents are those of the claimant, not the ombudsman. The claimant noted for the record at the CCH that he had had a number of ombudsmen assisting him; nevertheless, he was afforded time to prepare and recesses during the CCH to meet with the ombudsman privately. He did not oppose going forward at the CCH with the assistance of an ombudsman. The claimant was asked at the end of the CCH if he had more documentation to present and he said he did not. The fact that the claimant may, in hindsight, question the advice given by an ombudsman and his decision to follow it does not create reversible error in the hearing officer's decision.

EXTENT OF INJURY

The hearing officer did not err in concluding that the claimant failed to prove a compensable knee injury. A condition caused by medical treatment for a compensable injury may become part of the compensable injury. Maryland Casualty Company v. Sosa,

425 S.W.2d 871 (Tex. Civ. App.-San Antonio 1968, writ ref'd n.r.e. *per curiam* 432 S.W.2d 515). The extent of injury is a factual determination to be made by the hearing officer. Texas Workers' Compensation Commission Appeal No. 011198, decided July 10, 2001. The hearing officer evidently did not believe that the claimant sustained injury during physical therapy as he stated. This determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer on all appealed points.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**C.T. CORPORATION SYSTEM
350 WEST ST. PAUL
DALLAS, TEXAS 75201.**

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

Terri Kay Oliver
Appeals Judge