

APPEAL NO. 040046
FILED FEBRUARY 19, 2004

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 15, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain an injury to his left knee on _____, and that because the claimant did not sustain an injury to his left knee, he did not have disability. The claimant appealed, disputing both the injury and disability determinations. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that on _____, he was struck by a motor vehicle on his left side while performing his duties as a tire technician. Both parties represented at the CCH that the claimant sustained a compensable left shoulder injury during this incident. The specific issues to be decided at the CCH were whether the claimant sustained an injury to his left knee on _____, and whether the claimant had disability as a result of his _____, injury, and if so, for what periods.

The claimant testified that he sustained a work related injury to his left knee in 2001. In evidence was a MRI of the claimant's left knee dated May 9, 2002, which showed a tear of the medial meniscus. Whether or not the claimant sustained an injury to his left knee as a result of the incident of _____, was a question of fact for the hearing officer to resolve. Conflicting evidence was presented on this issue. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We have reviewed the challenged injury determination. The hearing officer's decision that the claimant did not sustain an injury to his left knee on _____, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra; In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Section 401.011(16). The hearing officer concluded that because the claimant did not sustain an injury to his

left knee, he did not have disability. It is clear that the hearing officer did not consider the claimant's compensable left shoulder injury when making this determination. The evidence reflects that the claimant had left shoulder surgery on August 12, 2003, and additionally, that he received various treatment for his left shoulder, including physical therapy. There are medical records in evidence which indicate that the claimant was taken off work due to his left shoulder injury. The hearing officer found that "due to the *claimed injury* [emphasis added], claimant was not able to obtain and maintain employment at wages equivalent to his pre-injury wage on the following dates: July 18 through August 14 and September 11, 2002, through the present." This finding was based on the condition of the claimant's left knee without any consideration of whether the claimant's left shoulder injury was a cause of any period of disability. The determination that the claimant did not have disability is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's disability determination and remand the case back for further consideration of the evidence previously admitted.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

We affirm that part of the hearing officer's decision and order that determined that the claimant did not sustain an injury to his left knee on _____. We reverse the hearing officer's disability determination and remand for the hearing officer to reconsider this determination consistent with this decision.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge