APPEAL NO. 941171

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 23, 1994, before a hearing officer. The record was reopened for a brief hearing on August 1, 1994. The appellant, who is the claimant, was a legal secretary for (employer), a law firm in a downtown office building, and she alleged she injured her knees on (alleged injury date), when she tripped on a stairway in the lobby of the office building where she worked. The claimant's theory of recovery was that she was on a special mission for her employer because she was bringing work home. The claimant also asserted that she had disability for a twelve week period following her knee surgery. Two issues that she moved to add at the contested case hearing, whether the carrier filed a sufficient TWCC-21 dispute to compensability, and whether acceptance of medical benefits in the TWCC-21 constituted an estoppel to dispute the claim, were not added by the hearing officer.

The hearing officer determined that claimant had injured her knees when she fell, but that such injury did not occur while she was acting in the course and scope of employment for her employer, and that she therefore did not have disability from a compensable injury.

The claimant appeals these decisions. First of all claimant asserts, as she did at the hearing, that the theory of recovery is not the "access doctrine," and that the evidence otherwise proved that she was on a special mission for her employer that brought her within the course and scope of employment. Second, the claimant argues that although she had left work for her employer prior to her surgery due to other physical conditions, the effect of her knee surgery would have caused an inability to obtain and retain employment equivalent to her preinjury wage. Third, The claimant asserts that the hearing officer erred by refusing to add an issue relating to the TWCC-21, which actually amounts to two issues: that the TWCC-21 was not sufficient and therefore the injury is compensable because not adequately disputed, and second, that the carrier through acceptance of benefits and its conduct prior to the benefit review conference (BRC) should be estopped from denying that benefits are due. Claimant asserts a violation of procedural due process through denial of these issues, and also asserts error in the hearing officer's ruling that the TWCC-21 could be excluded for failure to exchange. Finally, the claimant asserts that the new workers' compensation law is unconstitutional, although specific ways in which such asserted unconstitutionality have impacted claimant's case are not set forth. There is no response from the carrier.

DECISION

We affirm the hearing officer's decision and order.

Claimant worked as a legal secretary for the employer, which was located on three floors of a multi-story bank building. Claimant said that on (alleged injury date), she left her offices to go home for the day. Claimant said that she chose a lobby exit that had a stairway leading up to an alleyway, and that as she climbed the stairway her knees buckled, causing her to fall. She stated that this had not happened here before, and that she attributed her loss of balance in part to a parcel she was carrying. Claimant said the parcel contained a Rolodex, which she was required to periodically update for the use of the attorneys for whom she worked. Claimant conceded that she had not been expressly directed to take the work home that night, but that she did so with the knowledge and consent of her bosses. She maintained it was necessary to bring it home because there was not time during the working day to perform this task. Claimant and a witness for the carrier, the law firm administrator, agreed that the employer did not have control over the lobby areas. Claimant testified at the hearing that this did not occur to her until she spoke with her attorney about her case and he asked her if she had been carrying anything when she fell. (A post-hearing brief asserted that claimant tried to bring this fact up with the ombudsman but it was not taken seriously.)

Claimant said she hurt her knees. She worked for her employer until October 29, 1993, when she retired on Social Security disability. Claimant agreed she had carpal tunnel syndrome which prevented her from performing the tasks required of a legal secretary. Claimant indicated at first that she did not have significant problems with her knees prior to the fall, but later indicated she had fallen once at home when her knees buckled. Claimant had arthroscopic knee surgery on March 25, 1994, for bilateral patellofemoral malalignment, bilateral chondral shaving, and lateral medial meniscectomy. She asserted that if she had still been working, this surgery would have prevented her from working for 12 weeks. Claimant did not assert that she had disability for any other period.

Claimant indicated that she filed a workers' compensation claim in early 1994 after this was suggested by her long-term disability insurer.

(Mr. S), the law firm administrator, testified that legal secretaries, unlike paralegals and lawyers, were not asked to take work home and he stated that such would be discouraged. Mr. S stated he spoke with one of the attorneys for whom claimant worked, and determined that this attorney did not instruct claimant to take her Rolodex home. He did not ask if this attorney had any knowledge that claimant did take her Rolodex file home.

Claimant filed a motion on June 13, 1994, asking that the hearing officer add an additional issue as to the sufficiency of the TWCC-21 filed by the carrier in this case. The motion did not also request an issue on estoppel. The hearing officer denied the motion because it was not timely made in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7), but also indicated that he would have denied the motion because the TWCC-21 was sufficient to dispute compensability. At the hearing, the carrier

indicated disagreement with adding the issue, and it was not added at the hearing level. For the first time, the claimant also raised an estoppel/waiver issue, but the hearing officer disallowed evidence on this issue as well. When the claimant tendered the TWCC-21 into evidence, the carrier objected that it had not been exchanged, and it was not admitted on that ground.

On August 1, 1994, the hearing officer called a hearing *sua sponte*, for reasons not cited in the order setting the hearing and which were not fully articulated during the hearing. (However, the procedure followed by the hearing officer in setting the hearing has not been appealed and therefore will not be addressed further.) At the hearing, the benefit review officer (BRO) testified that claimant had only raised the access doctrine, and whether she was taking work home had never come up. However, as to the issue of the sufficiency of the TWCC-21 as a dispute of compensability, he conceded that he had raised this matter himself in accordance with language in previous Appeals Panel decisions, but determined that it was sufficient and therefore did not report it as an issue. The BRO stated that if it was, in his opinion, insufficient, he would have reported the TWCC-21 sufficiency as "an issue."

WHETHER THE HEARING OFFICER ERRED BY NOT ADDING AND CONSIDERING ISSUES RELATED TO THE SUFFICIENCY OF THE CARRIER'S TWCC-21, AND WAIVER/ESTOPPEL BASED UPON PAYMENT OF MEDICAL BENEFITS

As to the issue relating to waiver or estoppel, we do not agree that the hearing officer erred by refusing to add this as an issue. It was raised only at the hearing level, and no good cause was shown for the failure to raise it sooner. Further, we would note that the 1989 Act, Section 409.021(c), expressly states that initiation of compensation does not affect the right of a carrier to deny compensability of the claim within the 60 day period for disputing.

However, the hearing officer did abuse his discretion by not determining the matter of the sufficiency of the TWCC-21 when it became apparent, through the BRO's testimony, that the matter had been raised and discussed at the BRC. Because it was a matter considered at the BRC, it did not constitute an additional issue for which a motion was required within the time limits established by Rule 142.7, or for which a good cause finding was required. We are concerned that both the BRO, in his testimony, and the hearing officer, in his letter denying the claimant's motion to add this issue, indicate that their perception of whether this should be included as an issue is determined by their evaluation of its substantive merit. We do not agree with this approach. Once raised as a point of inquiry at the BRC, the matter of whether the TWCC-21 was a sufficient dispute of compensability of the injury was "an issue" unless the claimant and the carrier reached agreement that it was sufficient. There is no evidence that this was the case.

We further agree that the hearing officer erred by excluding the TWCC-21 based

upon an exchange objection. The TWCC-21 is a document, like a claimant's claim form, that arguably outlines the jurisdiction of the Texas Workers' Compensation Commission. As such, it is not merely "evidence" but defines the permissible grounds upon which a carrier may proceed in its defense of the claim. *See* Section 409.022. As such, if not tendered by either party when a dispute is raised as to its timeliness or sufficiency, it should be included by the hearing officer as part of his or her mandate to fully develop the record and ensure the preservation of the rights of the parties in accordance with Section 410.163. We therefore consider it part of the record for purposes of review.

The hearing officer's error by failing to decide the issue in this case is not prejudicial error requiring a reversal because the TWCC-21 in this case fairly disputed compensability of the injury as not being within the course and scope of employment, and we so hold. Although more detail would have been desirable, the language used, given the facts of the case, and the carrier's initiation of medical benefits to treat a physical injury, were sufficient to put claimant on notice that the carrier did not believe the injury was work-related. *See* Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993.

WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT CLAIMANT WAS NOT INJURED IN THE COURSE AND SCOPE OF HER EMPLOYMENT, AND HAD NO DISABILITY

There is sufficient evidence to support the hearing officer's decision that claimant was not injured while in furtherance of the affairs of her employer. Assuming for argument that a "special mission" theory even applies where a claimant is not employing "transportation," we would note that there was no evidence of direction given to claimant to work on the Rolodex at home; indeed, she agreed there was none given. As to whether or not there was consent by the employer to do so, this was a fact determination for the hearing officer, and we cannot agree that his determination is against the great weight and preponderance of the evidence so as to be manifestly unjust.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). 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, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, 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 Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). There are conflicts in the record, but those were the responsibility of the hearing officer to judge. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance

Co. of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

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." Because there was no compensable injury established, one of the underpinnings of the definition of disability is not present.

CONSTITUTIONALITY OF THE 1989 ACT

Recognizing that claimant wishes to preserve these issues for appeal, we would nevertheless note that the hearing officer did not err in failing to consider arguments concerning the unconstitutionality of the 1989 Act, because the agency has no authority to declare the Act unconstitutional. Texas Workers' Compensation Commission Appeal No. 92094, decided April 27, 1992.

The decision of the hearing officer will be set aside 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 Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, and the record sufficiently supports the hearing officer's decision and order, which we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge