APPEAL NO. 950314

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in(city), Texas, on January 30, 1995, (hearing officer) presiding. The hearing officer determined the contested issues before him as follows: claimant's compensable injury of (date of injury), did not include an injury to his back; the carrier timely contested compensability of claimant's alleged back injury and therefore did not waive its right to contest compensability; the findings of the designated doctor are not contrary to the great weight of the other medical evidence; and the claimant reached maximum medical improvement (MMI) on November 16, 1994, with an eight percent impairment rating (IR). The claimant appeals these determinations, pointing to evidence which he contends supports his position. The carrier responds that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

We affirm.

The claimant, who had been employed by (employer), was injured on (date of injury), when his leg slipped down the tailgate of a truck while he was pulling a loaded dolly. He said he heard a pop in his knee, which later began to swell. The carrier did not dispute that claimant suffered a compensable knee injury nor that he timely reported this injury. However, the claimant testified that his back began hurting that evening and that the next day he told his supervisor, (Mr. S), that his back was also injured.

Claimant first sought medical treatment when he saw (Dr. C) on October 22, 1992; the claimant contended that he complained of back pain to Dr. C and to subsequent doctors to whom he was referred. Claimant's wife also testified that claimant first experienced back pain after the injury and that she accompanied her husband to his appointments and observed him tell the doctors about his back pain.

Dr. C's notes of the initial visit state in pertinent part:

> Comes in today complaining of discomfort in his right knee that he has had off and on since he injured this back in (date of injury). Patient states he slipped from the tailgate of a truck and states he recalls his knee kind of twisted outward. Patient states at that time he could not walk on it and it did cause him quite a bit of discomfort and swelling . . . On examination he does appear to be very tender over the medial meniscus. He does not appear to have torn the cartilage completely. X-rays do not reveal any bony abnormality. I do feel this should be followed up by an orthopedist. He is scheduled to see [Dr. S] in follow-up . . . .

Dr. S first saw the claimant on November 16, 1992, stating that claimant's chief complaint was "pain, swelling and giving way of his right knee." His report shows he

examined claimant's knee and stated his impression that claimant had a tear of the medial meniscus. Dr. S recommended surgery, which was postponed several times because claimant was suffering from a urinary tract infection. On June 30, 1993, (Dr. K) evaluated claimant "for a twisting injury sustained to his right knee" and stated his impression that, although surgery was warranted, claimant had a five percent IR. Dr. S responded that he did not concur with Dr. K's report as claimant had not yet had an arthroscopic examination. Surgery was ultimately performed on July 30, 1993; the postoperative diagnosis was acute chondrolysis of the medial femoral condyle of the right knee. On August 5, 1993, Dr. S wrote that claimant could return to work with no restrictions; he later completed a Report of Medical Evaluation (Form TWCC-69) finding the claimant had reached MMI on September 9, 1993, with a two percent IR. Dr. K later performed a second knee surgery, on January 27, 1994.

The evidence further shows that on July 19, 1993, Dr. C wrote (Ms. K), employer's office administrator, concerning the claimant's need for knee surgery. In that letter, Dr. C stated, "If this [the surgery] can be carried out I believe that all of the problems that [claimant] has been having lately with his knee pain and back pain (which I feel has developed because of the way he is walking favoring his right knee) will resolve." Also in evidence is a September 30, 1993, letter from Dr. S to the carrier stating that the claimant had returned with the "chief complaint" of lower back pain; he stated, "He feels that because of his knee injury he says it is affecting his back and he wonders why he is favoring that side. After questioning him he has pain very much more typical of a radiculopathy from his spine than he does from the problem with his knee." Dr. S concluded by stating he had sent claimant for an MRI, which was later found to show disk degeneration L4-5 with a suggestion of herniation on the sagittal views.

On October 27, 1993, the carrier filed a Notice of Refused/Disputed Claim (Form TWCC-21) stating that it disputed that the back injury was related to claimant's original compensable injury.

Ms. K testified that the claimant gave her information concerning his injury and that he only reported an injury to his leg. She said the first she learned of a possible back injury was around a year later when she received an off-work note from a doctor (not in evidence) that referred to a knee and back injury.

The Texas Workers' Compensation Commission (Commission) appointed (Dr. O) as designated doctor. Dr. O's report shows that claimant contended he had low back pain which rendered him immobile at times; the doctor stated that a follow-up MRI to the back demonstrated disk herniation at L4-5. He found that the claimant had reached MMI statutorily and assigned a 21% IR, which included 14% due to claimant's lumbar spine. A Commission benefit review officer (BRO) subsequently wrote Dr. O, questioning his determination of MMI which appeared to be prospective; that letter also asked the doctor to address the causal relationship between the claimant's back problems and the original compensable injury. Dr. O responded that claimant's MMI date should be amended to

November 16, 1994; he also stated that he believed that the claimant's back problems and the original injury were causally related. He explained:

From history this patient was walking backwards on an incline and his right leg slipped and he felt a pop and felt pain in the low back. I believe the history is self evident [and] . . . the back injury occurred simultaneously and sustained [sic] a disk herniation in this manner. I do not believe his abnormal gait pattern caused his back injury . . . .

In addition, the claimant was evaluated by (Dr. P) on October 26, 1994. Dr. P's report summarized claimant's treatment for his knee problems and said claimant reported back pain to Dr. S subsequent to his surgery; however, it also reported claimant's statement that he had had knee and back pain ever since the injury and that he had reported the latter to Dr. C. As to the back problems, Dr. P wrote that while it was medically possible that an abnormal gait could aggravate low back symptoms, "it is more probable that the cause of this herniation and low back pain is progressive degeneration of the L4-5 disc over a long period of time, meaning years, and this is the result of an aging process and also daily activities." He also wrote that "[f]rom the standpoint of the patient's low back symptoms, the history of right radicular symptoms although without neurological deficit and the suggestion of a herniated disc on MRI suggest [an IR] of 7% whole person as per table 49 of the AMA Guides to the Evaluation of Permanent Impairment, February 1989, Section II C. However, as stated above, there was no medical documentation of a back injury."

At the hearing the claimant argued that he felt back pain the same day of the injury, that he informed his supervisor of such pain, and that he told each doctor about this problem. He contended that a phrase in Dr. C's initial report--"he injured this back in (date of injury)"--lends credence to his testimony, and he surmises that the phrase contains a typographical error and should actually state, "he injured his back . . . " As support for this contention, he notes other typographical errors in Dr. C's report. He also says there is no evidence to suggest that the knee and the back are not related. He contends that carrier's dispute of the back injury was filed more than 60 days after this report; in the alternative, he contends that it is also untimely if the period is determined to run from Dr. C's July 18, 1993, letter to the employer which, he states, had the obligation to notify the carrier. Because of his position on these issues, he also contends that the designated doctor's full IR of 21% should be accepted.

The claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). While a claimant's testimony alone can establish that such injury occurred, a hearing officer is not compelled to accept in its entirety the testimony of a claimant, an interested witness. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). Thus the hearing officer in this case was not required to accept the testimony of claimant and his wife that he began suffering back symptoms the night of the injury and that he informed his doctors of such symptoms,

particularly in light of medical evidence which does not record back pain until much later in time. To the extent that the language in Dr. C's notes was subject to more than one interpretation, this is precisely the sort of evidentiary conflict which the hearing officer as sole fact finder is entitled to resolve. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). With the evidence in this posture, the hearing officer did not err in failing to accept the interpretation of this language as suggested by the claimant. Further, the later medical evidence is conflicting as to whether even later-manifesting back symptoms were related to the original injury. Once again, the hearing officer was entitled to resolve conflicts in the medical evidence, Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and to accept Dr. P's determination that the two were not related. Dr. O's opinion was not entitled to any special presumption, as we have held that the designated doctor's report is entitled to presumptive weight only on the issues of MMI and impairment. Texas Workers' Compensation Commission Appeal No. 94311, decided April 29, 1994. In short, upon our review of the evidence, we cannot say that the hearing officer's determination that claimant's original injury did not include an injury to his back is so against the great weight of the evidence as to be manifestly unjust and unfair. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). That being the case, we also reject the claimant's argument that Dr. O's full IR should have been accepted, or that the hearing officer employed "an unauthorized type of line item veto" in accepting the portion of the IR relating to claimant's knee. *See* Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995, which approved a similar action of a hearing officer (also involving an extent of injury issue) where the panel wrote that the impairment assigned by the designated doctor for the noncompensable condition was "separate and distinct" from the impairment assigned for the compensable injuries, and could be determined from the designated doctor's report "without requesting additional input from the designated doctor."

Finally, with regard to the issue of timely contest of compensability, the hearing officer determined that the claimant first complained of back pain on July 19, 1993, but that it is not clear from Dr. C's report that the complaint was of a separate injury to the back. He further determined that claimant first related his back pain to his (date of injury), injury to Dr. S on September 30, 1993, and that the carrier timely disputed thereafter. The 1989 Act provides that if an insurance carrier does not timely contest compensability of an injury, it waives its right to do so. *See* Section 409.021(c). Rule 124.6(c) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c)) provides in pertinent part that if a carrier disputes compensability after payment of benefits has begun, it shall file a notice of refused or disputed claim on or before the 60th day after the carrier received written notice of the injury. Rule 124.1 says written notice of an injury consists of the carrier's earliest receipt of the employer's first report of injury, written notification from the Commission to the carrier, or "any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." As noted earlier, Dr. C's initial report was subject to differing interpretations and we do not find error in the hearing officer's determination that it did not mention a back injury. The hearing officer acknowledges that the claimant's complaints of back pain were

mentioned in Dr. C's July 19, 1993, letter, but determined that it did not clearly inform that the claimant was alleging a separate injury. We note, however, the requirement of Rule 124.6(c), *supra*, that the written notice fairly inform the carrier of facts showing compensability, and that per Dr. C's July 19th letter claimant was contending the altered gait resulting from his knee injury had caused back problems. Section 401.011(10) defines "compensable injury" as one that arises out of and in the course and scope of employment, and "injury" is defined in Section 401.011(26) as damage or harm to the physical structure of the body and a disease or infection naturally resulting therefrom. We need not address whether this language sufficiently provided facts showing compensability, however, as we hold that there was no evidence adduced to show whether or when the carrier received this letter, which largely concerned the claimant's need for surgery prior to returning to work and was directed to the employer which had apparently sought to return the claimant to work. In the absence of such evidence, we reject the claimant's argument that information provided to the employer can be imputed to the carrier. (*Compare* Rule 124.1(d), which implies receipt by the carrier of any notice required by the 1989 Act to be filed with the Commission and carrier, on the date received by the Commission.) An appellate body can affirm the decision of a fact finder on any grounds supported by the evidence, Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993, and we find the evidence sufficient to support the hearing officer's determination that the carrier received notice of an alleged back injury on October 1, 1993 (per Dr. S's report) and timely contested compensability thereafter.

Based upon the foregoing, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge