APPEAL NO. 991681

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 13, 1999, a contested case hearing (CCH) was held. The issues disputed at the CCH were whether the respondent, who is the claimant, sustained a repetitive trauma injury to her right knee with a date of injury of (injury 3); and whether she had disability as a result of her injury. The appellant's (carrier) motion to add issues regarding timely notice of injury to the employer and the date of injury (when claimant first knew, or should had known, that she had an occupational disease) was denied by the hearing officer, who found no good cause to add issues which had not been brought up at the benefit review conference (BRC).

The hearing officer found that the claimant had a repetitive trauma injury to her right knee, which caused disability beginning injury 3, and continuing through the date of the CCH.

The carrier appeals. First, the carrier argues that there was an abuse of discretion by the hearing officer in not allowing inclusion of the requested issues, and further argues that the failure of the hearing officer to recite the proceedings or her ruling on these matters in her decision is reversible error. Second, the carrier argues that the determination that the claimant sustained an occupational disease to her right knee is against the great weight and preponderance of the evidence. There is no response from the claimant.

DECISION

We affirm as there is sufficient evidence to support the decision of the hearing officer. We hold that there was no abuse of discretion by the ruling of the hearing officer that additional issues not raised at the BRC would not be added to the CCH.

At the beginning of the CCH, argument was considered by the hearing officer on a motion filed by the carrier to add issues regarding the date of injury and timely notice to the employer. The claimant was opposed to adding these issues. The attorney for the carrier asserted that the basis for the motion was "newly discovered evidence." Although the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on March 25, 1998, controverting the knee injury, in part, for the reason that it was a preexisting condition that was an ordinary disease of life, issues raised relating to the date of injury or timely notice to the employer were not included at the BRC, which was held on May 17, 1999. The carrier argued that it was not until it received an October 1998 report from the claimant's family doctor that it was aware that these issues should be added. The carrier asserted that it had relied on claimant's interview with the adjuster on March 24, 1999, in declining to raise the timely notice issue. We note, however, that during this interview the claimant identified her family doctor and said that she had been having problems with climbing up and down stairs for" about the last month...or probably more...." She said she had noticed popping about a month and one half prior to her vacation (which began on or about February 20, 1999).

The hearing officer stated that she did not read the October 1998 report (to the extent that she could read the doctor's handwriting, which is somewhat indecipherable) to constitute newly discovered evidence indicating knowledge of the existence of a right knee injury at that time discussed with the doctor, and found no good cause to add the requested issues.

The claimant was the head housekeeper for an outlet of (employer). She said she worked six days a week, an average of six hours a day. In her job, she was responsible for loading the carts that were used by the maids to tidy up rooms and change linens, and for inspecting the rooms once they were completed. The hotel was two stories tall, the linen storage area was on the first floor, and claimant said she had to go up and down the stairs numerous times a day, carrying plastic bags full of linens that weighed about 25-30 pounds. She estimated that she climbed up and down stairs 50 times a day.

Claimant was treated for high blood pressure by Dr. K, who she said was her "medicine" doctor. She said that she would mention her aches and pains in her knees to him, and assumed that this was just arthritis or generalized aches (but not an injury) because of the type of work she did. Claimant agreed that her doctor told her she did not have arthritis. She said that when interviewed by the adjuster on March 24, 1999, she could not recall exactly when she first mentioned knee pain to Dr. K and thought that time it was about a month before her vacation.

The claimant testified that about a month or so before her date of injury, she began to feel popping in her knee and mentioned this to Dr. K. He examined her and found no fluid and no swelling, and he told her that this popping sensation was normal, but prescribed Tylenol. The claimant said that she began her vacation with a brief weekend trip to a casino in (Country); she rode the bus there and back. Claimant said there were escalators to her hotel room, and there was only a five or six-step walk to the casino, where she sat all day. She said it was a miserable vacation because she was in pain. She returned home and spent the rest of her vacation at home. When she returned to work on March 2, 1999, she said she had considerable pain, and told her manager, Mr. G, that she would have to go to the doctor. She was at work about three hours when this occurred. Claimant went to the emergency room at (Hospital P) because she was feeling ill from her medication, and she went to see Dr. K, but he told her she would have to see an orthopedic surgeon about her knee. Claimant found this would take three to four weeks to schedule. She experienced such pain she then went to (Hospital H), where a torn ligament in her knee was diagnosed, on injury 3.

Claimant was questioned at some length about inconsistencies in her statement, which was compared to her testimony concerning the number of trips she made. Specifically, she was asked about the statement to the adjuster in which she said she did not want to make 20 trips up and down the stairs loading the carts. She explained that all of her trips up and down the stairs were not made in connection with loading the carts, that she went up and down for other reasons. When claimant was asked on cross-examination if this meant 50 trips up and down combined, or 50 round-trips, she did not appear to

understand the question and responded somewhat obliquely by noting that all trips she claimed would not have been made carrying linens. She asserted that she was limping when she returned to work on March 2nd, but that she also had been limping prior to her vacation.

Claimant was asked if the maintenance man would carry sheets up and down the stairs for her. Claimant responded that he would do this, but very seldom. She agreed that she made comments to coworkers before her vacation that she was looking forward to some time off because she needed a rest.

The claimant testified that she had no prior injuries to her knee. She filed a workers' compensation claim in injury 1 for an injury to her neck. She had filed a injury 2 claim for a ruptured disc in her back. She also agreed that in May 1998 she had filled out papers to file a claim for a back injury, but continued to work. She was asked if she ever told the adjuster on that claim that she had arthritis in her knee, but appeared not to have a firm recollection on what she might, or might not, have mentioned about this.

Mr. G testified and said he was the general manager of the employer. He lived on the property and accordingly could frequently interact with his employees. He began working for the employer in July 1998. He agreed that the claimant never missed work due to a knee problem prior to her last day of work, nor did she request additional assistance to perform her work. Mr. G said that "to an extent," claimant's testimony about her job activities was accurate. He disagreed that she went up and down stairs 50 times a day. On cross-examination, Mr. G said his own estimate was that she made about 30 trips. He agreed she was the only person who would check the rooms after they were cleaned; the number of rooms checked could range from 35 to 95 rooms a day. He said that several rooms at a time would be checked.

Mr. G agreed that claimant took her vacation "because it was due," and she did not mention anything about her knee before this. Mr. G agreed to let her have 10 days off. Mr. G said that he never saw claimant limping or favoring her knee prior to Injury 2. He said he was not there the day claimant returned, and his manager on duty told him that when claimant returned, she could hardly walk, and went home.

Mr. G said that claimant told him on Injury 1 that she was filing a workers' compensation claim when she came to pick up her paycheck because she had hurt her knee at work. He described taking statements from other employees to the effect that they were unaware of any injury to the claimant. There were no statements that anyone overheard claimant saying she was hurt on vacation.

The medical records in evidence from Dr. K are not entirely legible, and Dr. K was apparently not approached by either party to decode "doctor's handwriting." There does appear to be a reference to right knee pain in his January 20, 1999, notes. However, Dr. D, claimant's treating doctor for her injury, was asked to transcribe his notes of his March 11, 1999, examination, and did so. He indicated that he examined claimant that day for

increasing knee discomfort from stair climbing at work, and that claimant was told at Hospital H that she had torn cartilage in her knee. X-rays Dr. D ordered confirmed the existence of chondral tearing. He stated on April 5, 1999, his opinion that her current condition was due to aggravation through (if not completely caused by) her work-related activities, described as stair climbing and carrying heavy loads both up and down stairs and on flat surfaces. The claimant testified that scheduled surgery had to be postponed because the carrier disputed the claim.

First of all, we do not agree that the hearing officer abused her discretion by declining to add issues relating to the date of injury or timely notice to the employer. In order to add these issues, the hearing officer would have had to find good cause for not raising same at the BRC. Section 410.151(b)(2). She could determine that the existence of a preexisting condition could have been raised at the time of the BRC, well before the receipt of the October 1998 report from Dr. K. Claimant's own statement to the adjuster alluded to the fact that her pain may have been appreciated by her in advance of 30 days before her notice to her employer; sufficient information was given to the adjuster to enable her, through even a minimal investigation of the claim, to ascertain from Dr. K when or if he treated a knee condition at an earlier time. Evidence developed through belated investigation of the facts does not qualify as "newly discovered." *See* Texas Workers' Compensation Commission Appeal No. 960973, decided July 8, 1996; Texas Workers' Compensation Commission Appeal No. 972124 (Unpublished), decided December 3, 1997. Although it would have been the better practice for the hearing officer to make the motion of the carrier part of the record, and to make a brief recitation of the ruling in the decision, we note that the carrier did not move to include the motion as an exhibit. It is the responsibility of the parties to preserve potential error, not that of the hearing officer.

The citation to Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998, is inapplicable; the holding in that case was that abuse of discretion existed because the issues sought to be added had actually been raised at the BRC, unlike the facts here. Likewise, reliance on Texas Workers' Compensation Commission Appeal No. 971856, decided October 27, 1997, for the proposition for which it is cited is misplaced; that case was remanded because the opposing party had not been properly served with the motion to add an issue, but the issue was nevertheless added, and because there was no finding of good cause for not raising the issue at the BRC. We cannot agree that the hearing officer in this case abused her discretion or committed reversible error in not adding the requested issues.

Second, on the issue of whether claimant sustained a repetitive trauma injury, 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, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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.). 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 Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ). Plainly, there was evidence which, if believed, pointed to an event on claimant's vacation as the causative factor in the injury. However, a belief that the claimant had escalating pain and, ultimately, a diagnosed injury from her activities at work (at least 30 trips a day up and down the stairs, according to carrier's own witness) is likewise supported, and the hearing officer could conclude that the relationship of the vacation to the ultimate diagnosis was merely temporal. Finally, there being no evidence that anything but the knee condition resulted in claimant being off work, the finding of disability is supported.

We, therefore, affirm the hearing officer's decision and order as to the appealed issues.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Alan C. Ernst
Appeals Judge