APPEAL NO. 931067
FILED DECEMBER 31, 1993

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On October 26, 1993, a contested case hearing (CCH) was held in _____, Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon for resolution were:

1.Whether or not CLAIMANT suffered an injury in the course and scope of his employment.

2.Whether or not CLAIMANT reported an injury to EMPLOYER not later than the 30th day after the date CLAIMANT knew or should have known that his injury was work-related.

3.Whether or not CLAIMANT has had disability.

The hearing officer determined that the appellant, claimant herein, did not sustain a compensable injury in the course and scope of his employment; that although claimant timely gave notice of his injury to his employer, because he had not sustained a compensable injury, he has not had disability.

Claimant contends that the hearing officer erred in finding his injury was not compensable and that medical evidence supports his position. Respondent, a self-insured governmental entity, employer herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The facts are not greatly in dispute. Claimant testified that he has been employed by the employer for 36 years, most of which were in the sign shop. Claimant alleges a repetitive trauma injury to his feet caused by constant standing on concrete floors, painting, stenciling or otherwise making road signs. Claimant testified he first started having problems with his feet in 1978 when "corns" began to develop. Claimant stated he treated the corns himself by "trimming" them. In 1979, claimant states, he went to see Dr. A, who prescribed orthotic "inlays" or inserts in his footwear, which he wore for many years. Claimant stated his feet became progressively more painful over the years and that he consulted Dr. S on November 18, 1991. Claimant testified he reported a repetitive trauma injury to his feet within a day or two thereafter. Dr. S testified, at the CCH, that claimant reported that he "had painful bunions." Dr. S diagnosed claimant "as having hammertoe with bursitis of the fifth toe bilaterally." Dr. S testified this is a "fairly common" problem and that standing "could have possibly contributed to his problem." Dr. S conceded that claimant's "deformity can be congenital" and there was no evidence, in claimant's case, that it was not congenital. There is some disagreement whether Dr. S referred claimant to Dr. W or if claimant went to Dr. W "on his own." A letter dated December 20, 1991, from Dr. S to Dr. W would indicate Dr. S referred claimant to Dr. W.

Dr. W, in a report to the employer dated January 28, 1992, discusses claimant's foot history, Dr. S's treatment and gave a diagnosis of:

> phalangeal exostosis of the fourth and fifth toes of the right and left feet, hammer toe contracture of the fourth and fifth toes of the right and left feet and hallux exostosis right and left feet with associated dermal lesions. Bio-mechanically examination did show some calcaneal valgus with a fore foot varies, uncompensated.

Dr. W comments on the causation of claimant's problem by saying:

> I cannot truly with good conscience relate that this is associated with the patient's current work. Although I feel that his discomfort is associated with the above diagnosis, it may be exacerbated by standing long periods

> of time on his feet. I cannot directly associate his work to causing his current problems.

Dr. S, in a July 20, 1993, letter, stated: "It is difficult to determine at this point whether the hammertoe contracture is congenital or acquired. However, given his structural foot type, acquired hammertoe contracture is a strong probability."

> Employer requested that Dr. H of (clinic) review claimant's records. In a report dated October 22, 1993, Dr. H comments:
>
> It is entirely unlikely that a hammertoe would be caused by prolonged standing on a hard surface, as the patient maintains. Neither [Dr. S] nor [Dr. W] offer any positive corroborations that this man's hammertoes are caused by his working conditions. [Dr. A] offers a feeble statement that his problems are due to standing on concrete, but offers no corroborating rationale for it.

By the strong preponderance of the evidence and current knowledge, I can state with a high degree of certainty that hammertoes are entirely unlikely to be caused by prolonged standing on a hard surface.

The Employer's First Report of Injury (TWCC-1), dated November 22, 1991, states the injury was reported by claimant to the employer on November 18, 1991. Dr. S took claimant off work from July 27, 1993, to September 30, 1993, when claimant voluntarily retired from the employer's service. Claimant testified he worked one day in August 1993 and one day in September 1993, in order to maintain his benefits with the employer.

The hearing officer determined that claimant had not proven that he sustained a compensable injury under the 1989 Act, that he did provide timely notice of the injury to the employer, but that because the injury was not compensable, claimant has not had disability. Claimant appealed, contending that Dr. W said that his condition "may be exacerbated by standing long periods of time on his feet." Claimant also refers to Dr. S's testimony that his condition, in all probability, was due to years of standing and that Dr. S's report says claimant's "acquired hammertoe contracture is a strong probability."

We have on a number of occasions addressed the issue of whether standing or walking in the course of one's employment can constitute a repetitive foot trauma. In

Texas Workers' Compensation Commission Appeal No. 93420, decided July 16, 1993, a flight attendant alleged her bunions and bilateral hallux valgus metatarsus, a largely hereditary condition, were caused or aggravated by long hours of walking and standing in "required footwear." The Appeals Panel reversed a hearing officer's decision and rendered that the flight attendant was not exposed to a greater hazard in her employment than that of the general shoe-wearing public and that no particular style of footwear was imposed on claimant as she contended.

In Appeal No. 93420, *supra*, we noted Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992, where a janitor at an airport alleged his bilateral hallux valgus with prominent bunions were caused by walking six to nine miles daily on a concrete floor during an eight-hour shift. We held expert medical testimony was necessary to establish a "reasonable probability" that the condition is causally connected to the employment. The Appeals Panel affirmed the decision of the hearing officer that claimant failed to show that her bunions and corns arose out of her employment.

In Texas Workers' Compensation Commission Appeal No. 93390, decided July 2, 1993, a hotel bellman alleged that his "plantar fascitis," which caused his feet to become irritated with itching and swelling, was caused by a repetitive trauma injury. In that case we observed that an occupational disease does not include an ordinary disease of life to which the general public is exposed outside of employment unless such disease is incident to a compensable injury or occupational disease. After noting that the claimant bears the burden to prove the injury was received in the course and scope of employment, we stated that "[t]o recover for a repetitive trauma injury, one must not only prove that repetitious physical traumatic activities occurred on the job, but also prove that a causal link existed between the activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. (Citation omitted.)" In Appeal No. 93390, *supra*, as in Appeal No. 92220, *supra*, we found the foot condition not compensable because there was no causal link between the work-related activities and the medical condition.

In Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993, a saleslady contended she suffered a repetitive trauma injury to her knee caused by "being on her feet and walking around her department" for eight hours a day. The employee in that case testified that she was not permitted to sit down or take breaks and that her department was busy all the time. In that case, we recited the definition of repetitive trauma injury and noted that while repetitive trauma is included under the definition of an occupational disease, the term occupational disease does "not include an ordinary disease of life to which the general public is exposed outside of employment." We went on to state:

Unquestionably, we believe, the general public is exposed to any "hazards" inherent in walking and standing, and that such activities are an attribute to employment generally (as well as of daily living). Although the claimant testified generally that she walked around her department and stood on her feet much of the day, there is nothing in the record indicating that such walking or standing, amounted to a particular stress over and above that which would be encountered by the general public, or employment generally.

* * * *

Thus, assuming that a case could be made that a particular employment created a trauma as a result of standing or walking that was not inherent in daily life or employment generally, the hearing officer was correct in his determination that the evidence in this case fails to demonstrate that an injury was sustained in the course and scope of claimant's employment.

In Texas Workers' Compensation Commission Appeal No. 93305, decided May 26, 1993, a security guard claimed a repetitive trauma back injury for sitting in a vehicle for long periods of time. The Appeals Panel reversed and rendered, citing several previous opinions which held that mere sitting, without more, does not constitute a repetitious, physical traumatic activity as contemplated by Section 401.011(36) and that claimant was not exposed to anything more than "an ordinary disease of life to which the general public is exposed outside of employment."

In the instant case the medical evidence is ambivalent as to whether many years of standing on a concrete floor can reasonably be determined to have caused claimant's hammertoes. Dr. S seems to be saying that standing could possibly, have contributed to claimant's problems and that the problem may be exacerbated by long periods of standing. However, even Dr. S conceded that it is difficult to determine whether claimant's hammertoe contracture is congenital or acquired. Both Dr. W, who Dr. S recognized as a qualified podiatrist, and Dr. H appear to firmly believe that claimant's problems are not associated with his employment. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and also judges the weight to be given expert medical evidence and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer apparently gave greater weight to the evidence that claimant's foot

problems were not caused by his employment. There is sufficient evidence to support that determination.

The hearing officer in his findings noted that although claimant may have "experienced pain [as opposed to an injury] while standing at work, he would also have experienced the same pain from his foot and toe condition while standing at home or at places other than his work place." As should be evident from our previously cited decisions, we are reluctant to find a compensable injury from activities such as standing, walking, or sitting, without anything more, where the employee in his or her employment, is not exposed to a greater hazard or risk than the general public is exposed to outside the employment. Standing, as walking or sitting, is an ordinary function of life, and that activity, without anything more, and without specific medical evidence establishing that activity, during the course of employment, caused the complained of injury, is in this case, held not to be compensable.

In reviewing this case, we do not find any reversible error as a matter of law, and in reviewing a case for sufficiency of the evidence, we will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara 764 S.W.2d 865, 868, (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2nd 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Finding no reversible error and the decision supported by sufficient evidence, the decision of the hearing officer is affirmed.

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Thomas A Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Gary L Kilgorel
Appeals Judge