APPEAL NO. 93219

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1993). On February 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer), presiding. He determined that respondent (claimant in this decision) was injured in the course and scope of employment when he stepped on a staple at work which entered his shoe sole and later punctured his toe when he arrived at home. Appellant (carrier in this decision) asserts that no injury occurred when claimant was acting in the furtherance of his employer's affairs. Claimant did not respond.

DECISION

Finding no error of law and that the decision is not against the great weight and preponderance of the evidence, we affirm.

Claimant had only worked for (employer) a few months when he testified that he stepped on a staple at work on (date of injury). He noticed nothing at work and felt no pain to indicate that an injury to his person had occurred while on the job. He described his job as that of assembling wood in door jams. To do so, he routinely uses a staple gun; staples fall on the floor when "undoing doors." Claimant brought a staple to the hearing, not introduced into evidence, which he described as being identical to the staples he used at work and identical to the one he removed from his shoe after it had entered his toe. He described the staple as one and one-sixteenth inches in length and testified that his shoe soles that day were five-eighths inch thick. No one contradicted that staples of that size were used at the job or that claimant had incorrectly measured the length of the staple. (Claimant also testified that he did keep the deleterious staple, but it had been misplaced in his household before the hearing.)

Claimant worked the next day and told his supervisor that his foot was beginning to hurt him. No issue of timely notice to the employer was raised at the hearing. The only issues were whether the injury was in the course and scope of employment, disability, and extent of temporary income benefits.

The supervisor, (Mr. P), testified that claimant told him of his sore foot on August 18th in the context of an injury at home mentioned to explain a slower pace at work. He never saw the shoe or staple that was reportedly pulled from it. His first indication of the possibility of a work-related injury occurred when claimant's daughter called employer from the hospital, when claimant was being treated, asking what insurance to use to pay the bill. In answer to a hearing officer's questions, Mr. P said that claimant was a good worker and had been truthful in the past. He answered a question of whether he thought claimant was telling the truth in the hearing by saying, "to the best of his (claimant's) knowledge."

Claimant testified that upon arriving at home at the end of the work day on August 17th, he stepped on a stepping stone and felt the puncture of his second toe on his right

foot. It did not bleed and he considered it not serious. He took off his shoe and saw the staple penetrating it. His toe began to hurt at work the next day, and he did not return to work after August 19th. He went to a minor emergency clinic on August 23, 1992, which referred him to Hospital. That hospital admitted him that day and discharged him on September 12, 1992, after the toe had been amputated. At admission, the toe was black with dry gangrene and the foot was swollen. (The hospital discharge summary noted that claimant "stepped on a nail" approximately six days before admission. The ER note by the doctor on August 23rd had said that there was "a nail puncture through the sole of his foot through the shoe six days ago. . . ." The note on the ER form, used when care begins, had said, "nail puncture from nail gun.") Also admitted was a doctor's release to return to work on October 23, 1992. Claimant stated that he did not feel able to return until November 1, 1992. He has worked since returning.

The carrier argued at the hearing and on appeal that claimant was not in furtherance of his employer's business when injured at home. It cited Banfield v. City of San Antonio, 801 S.W.2d 134 (Tex. App.-San Antonio 1990, n.w.h.) as controlling. In that case a policewoman took her weapon home at the end of her shift (as required) and her five-year-old child accidentally shot her. The court in this case distinguished it from Lujan v. Houston Gen. Ins. Co., 756 S.W.2d 296 (Tex. 1988). Lujan involved an event at the work site, drenching with paint thinner, while Banfield did not. The court in Banfield, however, chose to describe Lujan as having been injured at work because of the irritation he felt at work from the paint thinner. To rid himself of the paint thinner, Lujan went home to take a bath and suffered fatal burns.

We agree that Banfield can be distinguished from Lujan. Banfield is also distinguishable from the case before us. The Banfield case would be more in point to claimant's situation had Banfield in some manner fired her weapon while on duty with one of the cartridges misfiring, but overlooked, only to fire and strike her at some time as she drove home, or as she laid the pistol down at home, or even later as she slept.

The case of American Motorists Ins. Co. v. Steel, 229 S.W.2d 386 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.) was reviewed, but is not controlling because of Lujan and other more recent cases, such as North River Ins. Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ), which consider "course of employment" less restrictively. In Steel, a worker was exposed to metal shavings at work; on his way home a shaving, which was lodged in his hair, fell into his eye. That court did not allow recovery because it said that the injury was not received while in the course of employment.

While Purdy dealt with an injury in travel, it quoted favorably from the trial court's instruction that said "an injury has to do with and originates in the work business trade (sic) or profession of the employer when it results from a risk or hazard which is ordinarily inherent in the performance of the work or business." In Employers' Cas. Co. v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, n.w.h.) the court referred to the "but for" test and cited

Purdy. That test is said to focus on whether the injury would have occurred if the conditions and obligations of employment had not placed the claimant in harm's way. That court concluded that the bowel movement that precipitated the aneurysm was not related to the work and would have been confronted regardless of the employment, notwithstanding that the injury occurred on the premises. Application of the "but for" test to the facts of this case would have resulted in the same outcome as that reached by the hearing officer--the injury was compensable.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. He concluded that claimant stuck the staple in his shoe at work. That finding is not against the great weight and preponderance of the evidence. The cited cases addressing personal comfort issues necessarily had to question extensively whether the act in question furthered the employer's business; the case before us is much more straightforward. The hearing officer's decision is consistent with Lujan, which stressed that the precipitating factor originated in the work. Once set on that track at work, the manifestation of the injury by the staple, whether later at work or at home, is not controlling. Claimant cited Texas Workers' Compensation Commission Appeal No. 91111, dated January 30, 1992. While that case does not control the fact situation here, its assertion that a compensable injury can occur other than at the job site is consistent with this decision.

The decision of the hearing officer is supported by sufficient evidence of record and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge