APPEAL NO. 960037
FILED FEBRUARY 21, 1996

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 5, 1995. Addressing the disputed issues, the hearing officer determined that the appellant (claimant herein) did not sustain a compensable injury on _____, failed without good cause to timely report the claimed injury, and did not have disability. The claimant appeals these determinations, arguing that they are against the great weight and preponderance of the evidence. The respondent (carrier herein) replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed. Unless otherwise indicated, all dates are in 1995.

DECISION

Affirmed.

The claimant worked as a leasing agent at an apartment complex. She testified that she had experienced car problems and arranged for her husband to pick the car up after she drove it to work on the morning of _____. She arrived at work at about 8:00 that morning and proceeded to perform her routine tasks. A short time later, according to the claimant, she looked through the glass door of the apartment office and saw her husband approach. She said she got up, opened the door, stepped out and handed him the keys to her car. As he left, she waved and turned to re-enter the building when, she said, she fell off the two-to-three-inch-high ramp on which she was standing. According to the claimant, a tenant, Ms. H (Ms. H), helped her up. The claimant said she went back into the office and immediately told Ms. M (Ms. M), the apartment manager, and Ms. B (Ms. B), the assistant manager, what had happened and that she was experiencing severe pain and swelling in her right ankle. She said she asked Ms. M if the employer had workers' compensation coverage and she responded that they did not. No accident report was filled out at this time. The claimant further stated that, although the employer provided a golf cart to use in showing apartments, when it did not function she had to use her own car. She said she was not paid mileage for use of her car and did not know if a golf cart was available at the time of her claimed injury.

The claimant first sought medical care the same day from Dr. S (Dr. S) whom she apparently found in the phone book. This was her only visit with Dr. S. She said she was told when she called to come in right away because Dr. S had a scheduled golf game. Dr. S's report for this visit noted a prior ankle fracture some eight years before and continuing ankle problems with possible polio as a child. He also quotes the claimant as denying any previous injury or other significant medical problems. His diagnostic impression was neuromusculature imbalance in the right ankle with probable postpolio paralysis of the anterior and lateral musculature. He recommended orthotics and a follow-up visit. The

claimant said she was dissatisfied with Dr. S's care because he seemed rushed and unconcerned. She said he did not write anything down as he examined her and insists she told him she injured her ankle on the job.

The claimant testified she next talked to Dr. O (Dr. O), D.C., by telephone the next day because of her dissatisfaction with Dr. S. She said she knew Dr. O personally and went to Dr. O's house for a consultation on January 14th at which time Dr. O diagnosed a bad ankle sprain. She again saw Dr. O in her home on January 21st because the ankle was not getting better. No records were made of these two visits. In the meantime, on January 19th, the claimant also saw Dr. C (Dr. C), an orthopedist, who referred her to an internist. The internist, who may have been a Dr. W (Dr. W), diagnosed peripheral neuropathy caused by a vitamin B12 deficiency. The claimant then saw Dr. O in her office for the first time on February 18th. The first notes of Dr. O pertain to this visit. Dr. O describes the claimant as complaining of foot numbness and discomfort and mentioning a recent diagnosis of "B12 deficiency resulting in neuropathy." Dr. O noted neuromuscular degeneration in the feet "especially." She diagnosed sacrum subluxation, C7 subluxation, multiple thoracic subluxations and muscle atrophy bilaterally of the feet and hands "caused by neuropathy due to B12 deficiency." In a letter of February 24th, Dr. O noted the claimant was under her care since January 14th for an acute right ankle sprain and had recently been diagnosed with neuropathy. She recommended she discontinue work. In a letter of September 2nd, Dr. O wrote to "certify" that during her "informal" treatment of the claimant in January and February the claimant both noted right ankle pain and attributed this to a fall at work. She again confirmed this in a letter of September 26th and observed that the neuropathy condition would "definitely impair" the claimant's ability to recover from the ankle condition. The claimant took a medical leave of absence on February 28th, on the recommendation of Dr. F (Dr. F), who, in a letter of February 20th, notes only her neurological condition and makes no mention of a work-related ankle injury. The claimant resigned for medical reasons on March 6th. The claimant also asserted that there was hostility between herself and Ms. M related to certain accusations against Ms. M.

The claimant's husband testified and submitted a written statement to the effect that he saw the claimant fall and Ms. H help her up. Both the claimant's son and Ms. H provided similar statements.

Dr. O testified as to her treatment of the claimant. After she was made aware of the neuropathy diagnosis, she concentrated on this but considers the injury at work to be an ankle sprain, not the neuropathy, which she attributes to a vitamin B12 deficiency.

Ms. B testified that she was under the impression that the claimant had a prior broken ankle from which she continued to limp and wear support bandages before January 6th. She said she did not observe the fall and was not told by the claimant she fell. She was aware that the claimant was being treated for a vitamin deficiency and for this reason took a leave of absence and then resigned. She said the claimant never gave her ankle

condition as the reason for taking off work and Ms. B did not realize there was a workers' compensation claim for the ankle until called about it in July. Ms. M testified that she noticed the claimant was having ankle problems before January 6th and was aware of two incidents of domestic violence in which the claimant injured her ankle in falls. She said the claimant did not mention her ankle when she resigned for medical reasons; that the employer always had workers' compensation coverage which the claimant knew because she posted the advisory signs at the workplace; that Ms. H was a former tenant who was evicted for failure to pay rent; that claimant's letter of resignation of March 6th, which was admitted into evidence, does not mention her ankle; that it was not the employer's policy to have the claimant use her own car, but she was allowed to if the golf cart was not available; and that she first learned of the claim from the carrier in July.

The claimant had the burden of proof on the appealed issues of whether she sustained a compensable injury, gave the required notice and had disability. *See* Texas Workers' Compensation Commission Appeal No. 941058, decided September 21, 1994. The claimed injury in this case was an ankle sprain and could have been established by the testimony of the claimant alone if found credible. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The carrier's position was that, alternatively, the claimant did not injure her ankle at work on _____, or, if she did, the injury was not in the course and scope of employment, or the ankle condition was an ordinary disease of life (peripheral neuropathy). It is unclear from the findings of fact and conclusions of law whether the hearing officer concluded the claimant did not injure her ankle as she claimed or that, if she did injure it at work, the injury was not in the course and scope of employment. Based on our review of the record, we conclude that the hearing officer did not rely on the theory of an ordinary disease of life in reaching his determinations. In any event, we believe there was sufficient evidence to sustain his determination on either of the other two theories. There was evidence that the claimant had a prior ankle condition. The contemporary medical records of Dr. S do not reflect complaints of an injury at work, which the claimant explains as inattention on the part of Dr. S. Dr. O's reports that the claimant attributed her ankle condition to the fall at work were not contemporaneous with the two earliest informal visits. The two supervisors were adamant that the claimant did not complain to them about a fall and ankle injury immediately after the incident. While there was other evidence of a fall, this in itself does not necessarily establish the claimed injury. The hearing officer was the sole judge of the weight and credibility to be given this evidence. Section 410.165(a). He could well have been unpersuaded by the claimant's evidence that she injured herself as alleged.

To be compensable an injury must occur in the course and scope of employment. Section 401.011(12) defines course and scope of employment as an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs of business of the employer.

In this case, the claimed injury occurred while the claimant was returning from giving her car keys to her husband. While there was essentially uncontradicted evidence that the claimant could use her car in her employment when a golf cart was not available to show apartments to prospective tenants, there was no evidence that she was then in the process of showing or scheduled to show an apartment, or that the golf cart was not available. Whether an employee is acting in the course and scope of employment is generally a question of fact. Texas Workers' Compensation Commission Appeal No. 94089, decided February 14, 1994. In this case, there was evidence, which the hearing officer could have found credible, that the claimant, when she was injured, was acting for the purely personal reason of having her car tested for a possible defect and that she was not required by the employer to maintain the car for use in her employment. The fact that the accident occurred on the employer's property did not render the injuries compensable as a matter of law. *See* Texas Workers' Compensation Commission Appeal No. 960021, decided February 16, 1996.

With regard to the notice issue, Sections 409.001 and 409.002 require an injured worker to give notice of the injury to the employer no later than 30 days after the injury occurs. Failure to do so without good cause relieves the employer and the carrier of liability for workers' compensation benefits. The claimant did not offer a good cause explanation for an untimely report of her injury because she has always maintained that she reported the injury to Ms. B and Ms. M on the day it occurred. Ms. B and Ms. M were firm in there recollections that the claimant did not ever notify them of a work-related ankle injury and that they first found out about the claimed injury the following _____, which was well over 30 days after the claimed injury. Whether notice was given as claimed was a question of fact for the hearing officer to decide. The evidence was in conflict. The hearing officer could believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). He again resolved this credibility question against the claimant. As an appellate reviewing body, we will not disturb the factual findings of a hearing officer unless they are 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.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Having reviewed the record in this case, we are satisfied that there was sufficient evidence to support the findings and conclusions of the hearing officer on the issues of a compensable injury and timely notice and we decline to reverse those determinations on appeal.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge