APPEAL NO. 980289
FILED MARCH 26, 1998

This appeal arises 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 January 12, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. The record closed on January 16, 1998. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on (injury No. 2); that the alleged injury was not caused by the claimant's wilful attempt to injure himself; and that the claimant did not have disability. The parties resolved the issue of the claimant's average weekly wage by stipulation. The claimant appeals the findings of no compensable injury and no disability, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding that the claimant did not wilfully attempt to injure himself has not been appealed and has become final. Section 410.169. Only the matters timely submitted by the claimant will be considered in the resolution of this appeal. Sections 410.202 and 410.203. .

DECISION

Affirmed.

The claimant, who is an insulin-dependent diabetic, worked as a freight loader. He sustained a compensable right ankle sprain, which is not the subject of these proceedings, on Friday, (injury No. 1). On the following Monday, (3 days after injury No. 1), he was hired by a school district to perform grounds maintenance work. He worked for the school district from (3 days after injury No. 1), to August 11, 1997, when, he said, he was released because the school district no longer had the funds to pay him. During this time, the claimant said, his ankle did not affect his work for the school. The claimant then returned to work for the employer on August 25, 1997, supposedly to do light duty only, but, he said, he was given his old job back.

The claimant said that on (injury No. 2), he used his right foot to push the blade on a fork lift in order to narrow the blades. He said he did this by putting the heel of his right foot on the fork and pushing. In the process, he said, he felt his ankle pop and started hobbling. He said he was wearing steel-toe boots at the time. He further testified that his ankle became swollen, he felt pain in the arch of his foot, and his toes became discolored. He expressly denied that he was kicking the blades. He went to an emergency room (ER) for treatment and has not worked since this claimed injury.

Dr. M then became his treating doctor. In a letter of January 8, 1998, Dr. M wrote that, in his medical opinion, the claimant sustained a new injury on (injury No. 2), and that the claimant's prior right ankle problems had resolved. He believed that the claimant developed chronic arthritis, "better known as traumatic arthritis" after the (injury

No. 2), injury. On December 23, 1997, the claimant underwent a right ankle arthroscopy with partial synovectomy.

On October 24, 1997, Dr. F examined the claimant as designated doctor for the ankle injury of (injury No. 1). In a Report of Medical Evaluation (TWCC-69) of this date, Dr. F assigned a one percent IR. In an attached report, he commented that the claimant stated he had a new injury of (injury No. 2), and that there was some dispute over this. He found no instability or crepitation in the ankle joint, no evidence of muscle wasting or weakness despite an assertion by the claimant of total numbness of the entire dorsum of the right foot up to mid-calf. He found some discoloration (blueing) of the third toe but no obvious swelling. He noted "marked variation and discrepancies in today's examination . . . with my observed functional activities of this patient."

Dr. MM examined the claimant on December 1, 1997, at the request of the carrier. He included in his report a history of two right foot injuries and noted that the claimant "specifically" denied any other injuries to the foot other than minor sports sprains. X-rays showed evidence of an "old trauma and arthritic changes of the ankle although by their very nature have to predate the injuries in question. These changes simply could not have occurred and matured this much since an injury in (injury No.1)." He found the ankle stable and concluded there may have a "mild resprain" of the ankle without permanent impairment. In a letter of January 13, 998, Dr. MM reviewed Dr. M's comments and agreed there was evidence of chronic arthritis in the right ankle joint and that there was a "temporary aggravation" of the ankle on (injury No. 2). He did not, however, believe that later incident worsened the previous condition or that the chronic arthritis was materially aggravated by the later incident.

Mr. H, the forklift operator on the day of the claimed injury, testified at the CCH that the claimant kicked the fork two or three times and did not push on it. He further said that the claimant wanted to go home when he found out at the start of the day that a sorter belt used in warehouse activities was broken. Mr. W, a supervisor, also testified that, at a meeting at the start of the day, he announced that the sorter was down. According to Mr. W, the claimant then said he wanted to go home, but was not allowed to.

The claimant had the burden of proving that he injured his foot and ankle as claimed on (injury No. 2). Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The aggravation of a prior injury can be a new, compensable injury in its own right, provided there is some enhancement, acceleration, or worsening of the underlying condition rather than simply a recurrence or remanifestation of symptoms. Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993. Whether the claimant sustained a compensable injury on (injury No. 2), under an aggravation or new trauma theory of causation, was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer commented that the record raised "a significant question" about the claimant's credibility. Of special

concern to the hearing officer was the claimant's failure to report his history of prior injuries in various documents he completed. Thus, in his employment application materials for the employer, he indicated that he never had a prior workers' compensation claim. Other records reflect at least three prior claims. In a recorded conversation with an adjuster, the claimant admitted to only one prior work-related injury. Dr. MM records the claimant as denying a prior ankle injury. The claimant testified that Dr. MM was wrong about this and admitted he had a prior ankle injury in 1996 which, he said, he disclosed to Dr. MM. There was other evidence that when the claimant completed an application on (3 days after injury No. 1), for the grounds maintenance job with the school district he did not list in his history of employment the employer where he claimed he sustained an injury three days before on (injury No. 1), which was the same employer for the (injury No. 2), claimed injury. The hearing officer also commented that the claimant was receiving temporary income benefits (TIBS) for the (injury No. 1), injury for the same period of three weeks of full-time work for the school district. The claimant's explanation for this was that he was not aware of how TIBS were calculated or of what the 1989 Act required him to do in these circumstances, and that he would have eventually reported the wages after he received a check for TIBS. There was other evidence that the claimant did not want to be at work on the day of the claimed injury and of allegations by the claimant that the employer tried to provoke the claimant into a fight in order to justify termination. The claimant stresses in his appeal the medical evidence to support his position that he did sustain a compensable injury on (injury No. 2). The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). In the discharge of his responsibility to determine what facts had been established, he could accept or reject all, part of none of the evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 26, 1993. As noted above, he found the claimant to generally lack credibility. This evaluation also affected the credibility given the various medical reports to the extent that these doctors relied on the incomplete history given them by the claimant. As an appellant review body, we will reverse a factual determination of a hearing officer only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We decline to reweigh the evidence in this case or substitute our opinion of the credibility for that of the hearing officer, but find that the determination of the hearing that the claimant did not sustain a compensable right ankle of foot injury on (injury No. 2), as claimed, was sufficiently supported by the evidence.

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).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Christopher L. Rhodes
Appeals Judge