APPEAL NO. 990068

Following a contested case hearing held on November 16, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not report an injury to (employer) on or before the 30th day following the injury and that good cause does not exist for failing to timely report the injury; that claimant did not sustain a compensable injury on or about _____; that the injury sustained by claimant on _____, does not extend to and include lumbar strain; and that claimant did not have disability because there is no compensable injury. Claimant has appealed these determinations, contending that the hearing officer did not adequately consider the evidence adduced at the hearing. The respondent (carrier) urges in its response that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed, as reformed.

Claimant testified that on _____, as she and another nursing assistant were transferring a patient from a bed to a chair, she heard her left ankle "pop" and injured it; that she reported the injury the same day to her supervisor, Ms. P, but that Ms. P was busy with a stroke patient and failed to prepare an incident report; that three days later, she went to the employer's emergency room and Dr. P examined her ankle, told her she should take off work for three days, and gave her a prescription for Vicodin; and that she continued to work and did not fill the prescription because that medication makes her sleepy. She said she next sought treatment on December 31, 1998, from Dr. S and was given an air cast which she wore to work; that she returned on January 14, 1998, and was taken off work and in February 1998 was referred to Dr. UP; that Dr. UP placed her in a hard cast; and that she returned to work on April 28, 1998, but could only work for a day and one-half because of pain. Dr. UP's February 24, 1998, report reflects his diagnosis as a partial tear of the posterior tibial tendon of the left foot, that claimant would be in a cast for six weeks, and that for six to eight weeks she would be limited to light duty, if available, or else off work completely. On March 18, 1998, Dr. UP reported that claimant reported not doing any better and that he would order an MRI "to see whether or not she does have a tear or other condition of the ankle." The April 14, 1998, MRI report states that the there was no evidence of acute internal derangement, tendon tear, or tenosynovitis. Dr. UP's diagnosis on April 28, 1998, was chronic posterior tibia tendinitis of the left foot and ankle.

Claimant further testified that Dr. UP recast her ankle; that in May 1998 she developed back pain from walking crooked with the new hard cast and used a cane which was not prescribed; that Dr. UP felt that she needed surgery but she did not want surgery because she had previously undergone numerous operations; and that she changed treating doctors to Dr. R, who has since provided chiropractic treatment for her back and ankle. Dr. R wrote on September 16, 1998, that he saw claimant on May 11, 1998, and

that he diagnosed an eversion sprain of the left ankle, tibial tendinitis, and secondary lumbar strain due to her constant antalgic gait. He also stated that claimant responded well to treatment, that she was able to ambulate without the cane, that on July 7, 1998, she returned to work without restrictions, and that she had an exacerbation of her condition and he took her off work on July 20, 1998.

Claimant further stated that she did not pay for the ER visit with Dr. P and that she used her health insurance to pay for Dr. UP, notwithstanding that she had previously had workers' compensation claims and knew the difference between workers' compensation insurance and health insurance.

On March 10, 1998, Ms. S, a supervisor, wrote that she discussed with claimant the fact that claimant had not completed an injury report at the time of the injury and that this lapse may mean she is not eligible. She stated that claimant responded that she realized this and that it was "OK," "fine." Claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) was signed by her representative on May 11, 1998, and states that claimant began losing time on February 24, 1998. Ms. D, wrote on August 6, 1998, that claimant had informed her of a foot injury after assisting a patient in transferring from bed to a chair, that she told claimant she needed to see the doctor in the ER and fill out an occurrence report, and that she did not follow up to see if this was done. Claimant conceded that since 1992 she had visited the employer's ER for various reasons, including flu shots, back strain, stomach pain, hepatitis shots, nausea, headaches, and so forth, that she uses the ER for her immediate health care needs, and that there are ER records reflecting those visits but not her visit in _____ for her left ankle injury.

According to the affidavit of Ms P, claimant did not report any incident or injury to her in October, November or December 1997, and the first report she can recall was claimant's report on March 10, 1998, after which she prepared an injury report. Ms. P further stated that she knows claimant is familiar with the procedure for reporting work-related injuries because claimant has had numerous work-related injuries in the past and has always promptly reported them, filed out an incident report and gone to the ER. She also said that the only supervisors claimant would have reported a work-related injury to were herself or Ms. S.

As the hearing officer advised her, claimant had the burden of proof by a preponderance of the evidence on all the disputed issues. Not appealed is the hearing officer's finding that claimant sustained an injury to her left ankle while in the course and scope of employment on _____. Claimant has appealed findings that she informed her employer of her work-related injury on March 10, 1998; that she did not establish good cause for failing to notify her employer of her work-related injury within 30 days; and that her lumbar sprain is not a direct and natural result of her compensable injury. Claimant also appeals the dispositive conclusions on all the disputed issues including disability.

Section 409.001(a) provides that an employee shall notify the employer of an injury not later than 30 days after the date the injury occurs and Section 409.002 provides that

failure to provide such notice relieves the employer and the carrier of liability unless the employer or the carrier has actual knowledge of the injury or the Texas Workers' Compensation Commission determines that good cause exists for failure to provide timely notice. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could credit the evidence from Ms. P and Ms. S, the supervisors, that claimant did not report her ankle injury of _____, until March 10, 1998. It was claimant's position that she reported her injury to Ms. P on _____, not that she had good cause for a late notice. Since claimant failed to timely report the left ankle injury she sustained in the course and scope of employment, the employer and the carrier were relieved of liability for the injury and it was, thus, not compensable. *See* Section 401.011(10). Since claimant did not have a compensable injury, she could not, by definition, have disability. *See* Section 401.011(16). The law is well settled that a compensable injury may be the cause of a subsequent compensable injury (Maryland Casualty Company v. Sosa, 425 S.W.2d 871 (Tex. Civ. App.-San Antonio 1968, writ ref'd n.r.e. *per curiam* 432 S.W.2d 515)) and the Appeals Panel has recognized that a back injury may be caused by an altered gait due to a prior injury such as a knee injury (*See, e.g.,* Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 950512, decided May 16, 1995.) However, since claimant's left ankle injury was determined by the hearing officer not to be compensable because of her failure to provide the employer with timely notice of the injury, it follows that her claimed follow-on lumbar spine injury is also not compensable.

To be consistent with the hearing officer's findings of fact and conclusions of law, we reform Finding of Fact No. 5 to delete the word "compensable" from "compensable injury" and Conclusion of Law No. 5 to change "1998" to "1997." We also reform the third sentence of the Decision to delete the word "compensable" from "compensable injury.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge