APPEAL NO. 991052

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 March 16, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational injury on _____, and whether the claimant had disability from March 27, 1998, to July 12, 1998, from such injury. The hearing officer decided that the claimant did not sustain a compensable injury in the form of an occupational injury on _____, and thus did not have disability. The claimant appeals several findings of fact, urging that the injury occurred in a hazardous atmosphere, that defining his injury caused by audits in bushes and walking up to eight hours a day in all weather as an ordinary disease of life is not reasonable, and that his injury was the reason he could not work and had disability. He asks that the Appeals Panel reverse the decision that he did not sustain a compensable injury and did not have disability. The respondent (carrier) urges that the claimant only showed an ordinary disease of life, that there is sufficient evidence to support the hearing officer's decision and that it is factually and legally correct.

DECISION

Affirmed.

The claimant audited and sold cable service which required considerable walking (the claimant indicated at one point up to three to four hours a day). Although he apparently noticed some pain or soreness in his leg previously, on _____, he experienced a sharp pain in his left foot (although he stopped working a couple of days later he experienced pain in the other foot and believes the pain "traveled" to his right foot). He went to his treating doctor, Dr. L, who referred him to a podiatrist, Dr. R. On March 9th, Dr. R gave an opinion that the claimant had pes planus (flat foot) condition and also noted that he was a diabetic (as shown in other medical records). Dr. R also indicated it would be better for the claimant if he were at a job where he was on his feet only three hours per day. According to the claimant, Dr. R returned him to light duty which the employer did not have. Claimant's foot problems persisted and Dr. L referred him to another podiatrist, Dr. S, who confirmed pes planus and gave an impression of plantar fascitis of both feet and recommended a pair of orthotics (foot brace), and according to claimant, a cushion in his shoe. Dr. L, noting the diagnosis of plantar fascitis, states his opinion that the foot condition is mainly caused by the claimant's prolonged and excessive walking in his job as a cable man over the past seven years.

Dr. F, an orthopedic specialist, examined the claimant and stated in a November 17, 1998, report that the claimant probably had at most, if any, a nonspecific, unverifiable plantar fascitis syndrome without a definable etiology, inciting trauma, or surgical lesion, and notes that claimant had been fitted with orthotics and that professionally; he did not find the walking the claimant did excessive or inappropriate.

Claimant testified that he returned to work on June 12, 1998, but that he was "readjusted to" light duty. He states that shortly after he went back to regular work he was chased by a dog and twisted his right foot, which caused his foot to swell and resulted in his being off of work at that time.

The hearing officer found from the conflicting medical evidence that the claimant was diagnosed as having preexisting bilateral plantar fascitis and that claimant's treating doctor opined that that preexisting condition was aggravated by the excessive walking related to claimant's employment. The hearing officer also makes a finding that walking is an ordinary activity of life not constituting a repetitive trauma injury even though that ordinary activity may exacerbate a preexisting condition, and concludes that claimant did not sustain a compensable injury in the form of an occupational injury on _____. While the aggravation of a preexisting condition can result in a compensable injury (Texas Workers' Compensation Commission Appeal No. 970716, decided May 29, 1997), it must be proven that there is an active incident or sequence of incidents which result in the enhancement, acceleration, or worsening of the preexisting condition. The hearing officer was not convinced that the claimant met his burden of proof to establish a compensable aggravation injury. Texas Workers' Compensation Commission Appeal No. 950236, decided March 30, 1995. We agree the claimant did not sustain that burden of proof. Although walking is normally an ordinary activity of life and as a general rule does not establish an occupational disease, the Appeals Panel has upheld an award of benefits in Texas Workers' Compensation Commission Appeal No. 981175, decided July 17, 1998, where a hearing officer found a compensable injury from activities, which included walking and standing and stated in his decision:

> While generally, prolonged walking or standing does not constitute a repetitive trauma type injury, the evidence in this case supports the Claimant's position that her work activities [working some shifts of 12 hours, repetitively climbing a ladder, standing, walking, squatting, pushing, pulling, bending, and stooping] during the week of August 18, 1997 greatly exceeded the type of activities inherent to everyday, ordinary activities to which the general public is exposed outside of employment.

Here, the hearing officer, although finding that the claimant's work activities involved excessive walking, did not find the walking involved to be other than an ordinary activity and thus not an occupational injury itself or because it may have exacerbated a preexisting condition. While there is some conflict in the evidence, there is sufficient evidence to support the findings and conclusions of the hearing officer that the claimant did not establish a compensable injury had been sustained. From our review of the record, we cannot conclude that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Accordingly, the decision and order is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

In Finding of Fact No. 7, the hearing officer found that the claimant's treating doctor opined that the claimant's preexisting, bilateral foot condition was aggravated by excessive walking related to the claimant's employment. We have previously commented on purported findings of fact that merely state what a doctor reported. The hearing officer did not find that the claimant's job resulted in excessive walking or that excessive walking aggravated a preexisting condition. She then made Finding of Fact No. 8 that states "[w]alking is an ordinary activity of life and does not constitute a repetitive trauma injury, even though that ordinary activity may exacerbate a preexisting condition." In my view, Finding of Fact No. 8 is not a finding of fact. In Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993, the Appeals Panel affirmed the decision of the hearing officer, cited several of its decisions, and wrote:

> 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.

I would reverse the decision of the hearing officer and remand for her to make appropriate findings of fact and apply the law to those facts to determine whether the claimant sustained a compensable injury.

_____
Tommy W. Lueders
Appeals Judge