APPEAL NO. 991458

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 22, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable occupational disease injury, that she did not have disability, and that her average weekly wage (AWW) is $296.53. Claimant appeals the injury determination on sufficiency grounds. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order. The disability and AWW determinations were not appealed.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that she did not sustain a compensable occupational disease injury. Claimant asserts that the uncontroverted documentary evidence shows that claimant sustained a compensable injury, that there was no evidence that the neuroma was an ordinary disease of life, that claimant did not have any symptoms prior to the "date of injury," and that there was nothing to show that claimant's work caused only "pain."

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 401.011(26). The definition of "injury" includes occupational diseases. An occupational disease is defined as "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body," but does not include "an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). To establish that she has an occupational disease, the claimant's evidence must show a causal connection between the employment and the disease. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Whether the necessary causation exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), including the medical evidence. Where there is conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v.

Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that she sustained an injury at work while repeatedly working a pedal on a truck with her left foot, while wearing steel-toed boots. She said she began to notice left foot pain in January 1998. Claimant said she had not had any prior foot injuries or pain and that nothing else could have aggravated her neuroma. Claimant said she was told her alleged injury is a Morton's neuroma. Claimant said that her work aggravated her injury and that "even just walking around causes pain." When asked about her understanding of how her work aggravated the neuroma, claimant said, "maybe putting pressure [sic] is causing me to have pain." Claimant agreed that "when we're talking about aggravated," "what we're talking about is if [she had] to be on [her] foot and [she did] anything that put pressure on that area of [her] foot, it's going to cause it to hurt."

In a February 11, 1998, Initial Medical Report (TWCC-61), Dr. M stated under "history of occupational injury or illness": "Injury caused by repetitive up and down motion of foot while operating machinery." Dr. M referred claimant to Dr. Y, an orthopedic surgeon. In a March 18, 1998, report, Dr. Y noted claimant's foot pain and wrote "rule out inter-digital neuroma versus possible [reflex sympathetic dystrophy (RSD)]." In an April 7, 1998, letter, Dr. Y recommended formal neurological testing and said, "although [claimant's] injury is very likely aggravated by her current working conditions, I cannot state that this was caused by the order picker and reach truck." In an August 18, 1998, report, Dr. E, a neurologist, stated that: (1) claimant had had foot pain for about eight months; (2) she said she did not recall any particular cause; (3) claimant said she used to be a heavy machine operator and that she used to use her left leg a lot to operate the machinery; (4) claimant experiences numbness and hyperesthesias along her entire left leg and into her groin and buttocks; and (5) claimant's examination is consistent with two possible etiologies, plantar fascitis and possible nerve entrapment or plexopathy. A September 17, 1998, EMG report stated that the study was normal and that there was no significant evidence of radiculopathy, plexopathy, or neuropathy. In an October 7, 1998, report, Dr. E stated that claimant's EMG study implied that there is no neurogenic etiology to claimant's symptoms and that "given the quality of her complaints, it is quite possible that this represents soft tissue injury . . . ." Dr. E also stated, "The patient informs me that she is employed as a heavy machine operator which requires depression of foot pedals on the left side. Conceivably, this may be work related in this sense." In a February 1999 report, Dr. B noted under "impression" a "possible Morton's neuroma" and stated that he was asked whether working driving a piece of heavy equipment with repetitive use of the left foot could have either caused or aggravated the neuroma. Dr. B said, "I certainly doubt that it caused it, but certainly could have aggravated it." In an unsigned "peer review" report by an author who stated that he or she is an orthopedic surgeon, the author states that he reviewed claimant's medical records, that: (1) the footrest pedal could have caused claimant's pain from the neuroma; (2) the footrest pedal could have aggravated the tumor if the tumor was present in January 1998; (3) anytime someone walks on a neuroma, they will feel pain whether or not they are working; (4) the author suspects that the neuroma was present in January 1998 "and that she had increasing pain as this Morton's neuroma was stimulated"; and (5) the footrest pedal would not have caused the tumor.

The evidence raised an issue of fact regarding causation of the claimed occupational disease injury. The hearing officer considered the evidence and resolved this issue in carrier's favor. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer did not believe that claimant's activities at work caused or aggravated her neuroma. From the evidence, the hearing officer could have found that claimant did not meet her burden of proof in this regard. Texas Workers' Compensation Commission Appeal No. 960569, decided April 22, 1996. The hearing officer was the sole judge of the medical evidence in this case. After reviewing the medical reports and the other evidence in this case, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review, we will not disturb the hearing officer's determination.

We affirm the hearing officer's decision and order.

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Judy Stephens
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge