APPEAL NO. 991531

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 was held on June 23, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____, and that since he did not sustain a compensable injury, he did not have disability. The claimant appealed, contended that the hearing officer erred in not admitting a document he offered, reviewed evidence favorable to his position, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The respondent (carrier) replied, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We affirm.

The claimant had been treated for diabetes for about 10 years prior to the claimed injury. He was not insulin dependent, but did take two types of oral medication. The claimant testified that he began working for the employer as a city driver about two or three weeks before the claimed injury, that he had a preemployment physical examination, that he did not understand some of the questions on the physical examination form, and that he did not intentionally provide false information because he would not get the job if he answered the questions truthfully. He said that on _____, he jumped to the ground from the back step of a trailer; that he felt a stinging sensation on the bottom of his right foot; that his shift was about over and he completed the shift; that he went home; that the next morning his right foot was swollen; and that his right foot had never been swollen like that before. He testified that the next day he told his supervisor what had happened, showed him his swollen foot, and that the supervisor said the foot was swollen. In response to questions by an adjuster, the supervisor said he was aware the claimant's foot was swollen, but at the time the claimant did not say anything about an injury. The claimant also testified that on October 25, 1998, he went to an emergency room (ER); that one doctor told him tests would be performed and x-rays would be taken; that he was seen by another doctor and tests were not performed and x-rays were not taken; and that the doctor told him he had a diabetic infection. The claimant stated that he went to his family doctor, Dr. S, on October 26, 1998; that she said she would stay with what the ER doctor said; that he was seen by Dr. JM; that Dr. JM did not perform any tests and said he thought it was gout; that he was treated for gout for one week without success; that x-rays were taken; that the x-rays showed a fractured bone; that a CT scan was performed; and that the record showed a CT scan of the left foot but was corrected to show the right foot. Reports of the CT scan corroborate the correction of the error. The claimant testified that medical records dated in June 1998 showing his left foot was swollen are correct and a report dated September 30, 1998, that states recurring swelling of the right foot is wrong and should state the left foot. He said that in January 1999 he had surgery, including a bone graft, to repair the broken bone in his right foot.

A report from the ER dated October 25, 1998, indicates that the chief complaint was right foot pain and swelling; that there was no recent injury; that blood tests and x-rays were considered but not performed; that an antibiotic was prescribed; and that the claimant should follow up with Dr. S. A report from Dr. S dated October 26, 1998, states that the claimant was there because of a swollen right foot, that his blood sugar was high, and that he was to continue taking his medication for diabetes control and the antibiotic. In a letter to Dr. S dated November 9, 1998, Dr. JM stated:

> I couldn't find any lesions on the foot or leg or any pain in the joints that might give us a clue to the etiology of this. He adamantly denies any injury to the leg, and reports a similar episode in the past on the left leg that resolved spontaneously. I really had nothing more to offer him than the antibiotics you had already given him except to reassure him that compression was a good idea as that would decrease edema. Hopefully, this was just some superficial phlebitis with a deep venous insufficiency. I have written him a prescription for TED hose, and asked him to call in a week if he is not experiencing steady improvement.

The claimant was first seen by Dr. CM, a podiatrist, on December 18, 1998, and Dr. CM reported that x-rays showed a displaced fracture of the navicular with pes cavus type foot and requested a CT scan. The report of the CT scan dated December 21, 1998, contains "IMPRESSION: FRAGMENTED PROBABLY SUBLUXED NAVICULAR BONE, MOST LIKELY RELATED TO DIABETIC NEUROARTHROPATHY." The first report stated the left foot and was corrected to state the right foot. In a report dated December 21, 1998, Dr. CM wrote:

> Upon questioning as to etiology of fracture, patient relates his occupation is [sic] a truck driver has him jump off trucks and I related that this may be the causative agent along with neuropathy to repair the trauma as a result of a nutcracker type fracture to the navicular. Because of the longstanding nature of the problem of approximately two months, the possibility of mysolization of the middle portion of the bone may result in possible autogenous grafting and/or TN fusion with the possibility of leading to further hindfoot fusion to provide stability and prevent breakdown of a Charcot type nature.

Dr. CM performed surgery on January 6, 1999; discovered fusion would be necessary; and, with the assistance of another surgeon who removed bone from the hip, performed a fusion using bone and a tubular plate on January 8, 1999. In the history section of the report, Dr. CM stated that on initial examination the claimant could not recall trauma or direct injury and that his preoperative impression was navicular fracture unnoticed due to diabetic neuropathy. In a pathology report dated January 13, 1999, Dr. J wrote:

> Sections show bone with changes consistent with fracture including intertrabecular hemorrhage associated with fragmented and necrotic bone.

Areas of reactive new bone formation are noted as well. There is no evidence of pathologic fracture.

We first address the contention that the hearing officer erred in not admitting a letter from Dr. S dated June 22, 1999. The letter states "[o]n September 30, 1998 I did not treat [claimant] he was treated by another physician. I first treated [claimant] on October 26, 1998 for swelling in his right foot." The claimant stated that he attempted to get the letter from Dr. S immediately after the benefit review conference held on April 29, 1999, but was not able to obtain it until the day before the hearing. He wanted the letter to show that another doctor in Dr. S's office, not Dr. S, saw him on September 30, 1998, and by mistake indicated right, rather than left, foot recurring swelling. Evidentiary rulings by a hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary and will be reversed only if there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether there is an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414. The hearing officer did not abuse his discretion in ruling that the claimant did not have good cause for not having obtained the letter earlier and not having exchanged it earlier. Even if the hearing officer had erred in not admitting the letter, the error would not have been reversible error because there is no showing that not admitting the letter was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992.

We next consider the determination that the claimant was not injured in the course and scope of his employment. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An expert's deductions from facts are never binding on the hearing officer even when not contradicted by an opposing expert. Texas Workers' Compensation Commission Appeal No. 961610, decided September 30, 1996. In a case such as the one before us where both parties presented evidence on the disputed issue of whether the claimant was injured in the course and scope of his employment, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. The hearing officer made a finding of fact that the claimant's testimony was not credible. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance

Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn the factual determinations of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence to be sufficient to support that determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge