APPEAL NO. 992941

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 November 10, 1999. The record closed December 6, 1999. The hearing officer determined that respondent (claimant) sustained a compensable occupational disease injury to her left foot, that she had good cause for failing to report her injury until November 29, 1998, and that claimant had disability from November 9, 1998, to February 2, 1999. Appellant (carrier) appeals, contending that: (1) claimant did not sustain a work-related injury; (2) claimant did not have good cause for failing to report her injury within 30 days; and (3) claimant did not have disability due to her earnings after November 9, 1998. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and remand.

Carrier contends the hearing officer erred in determining that claimant sustained a compensable occupational disease injury to her left foot. Carrier asserts that claimant did not sustain damage or harm to her left foot in the course and scope of her employment. Carrier contends that: (1) claimant's testimony was inconsistent with her transcribed statement regarding whether anything in particular caused her foot pain on _____; (2) claimant's medical records showed she had prior foot problems even though claimant denied that she did; (3) claimant's medical records indicated that she complained of pain in both feet and related this to her shoes; (4) no medical records show that her left foot problems were related to her work; (5) claimant's problems were not due to "overuse," as stated by Dr. M, because claimant worked only 80 hours per month; and (6) an injury from wearing uncomfortable shoes is not compensable pursuant to Texas Workers' Compensation Commission Appeal No. 93420, decided July 19, 1993.

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 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 or infection 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).

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 on _____, while working as a flight attendant. She said her left foot began to hurt that day after she had to use extra pressure with her foot to operate some carts that were not functioning properly. She said the repeated act of using her foot in this manner all during _____, caused her foot pain. Claimant said she thought the pain would go away, but that her doctor told her on October 19, 1998, that she may have plantar fasciitis and gave her injections in her foot. When she saw Dr. M on November 9, 1998, he placed her in a short-leg, weight-bearing cast. Claimant testified that at that time she realized that "this could be a serious injury." Claimant was inconsistent regarding when she reported her injury, although the hearing officer determined that she reported it on November 29, 1998, and there is evidence to support this determination. Claimant said she had injured her right foot in an unrelated incident at home when she stepped on a jar.

The hearing officer determined that claimant injured her left foot at work on _____, and that her injury was caused by repetitive activities that day. It appears that this case involved a specific injury rather than an occupational disease repetitive trauma injury. *See* Texas Workers' Compensation Commission Appeal No. 992851, decided January 27, 2000. We must remand this case to the hearing officer for reconsideration of the issue regarding whether the evidence establishes a specific injury rather than an occupational disease. The resolution of this issue does impact the issue regarding timely notice, because the date of injury would be different in a specific injury case.

Regarding carrier's specific arguments about causation, the hearing officer considered the evidence and resolved the injury issue in claimant's favor. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). There was evidence from Dr. M and from Dr. H that claimant's left foot condition is related to her work activities. Although there was some inconsistency in the medical records regarding the exact mechanism of injury, this was a factor for the hearing officer to consider in making her determinations. The hearing officer considered whether claimant's left foot condition was caused by operation of the carts at work, and she determined what facts were established. The hearing officer was the sole judge of the evidence in this case. After reviewing the medical reports and the other evidence, we

conclude that the hearing officer's determination that claimant sustained an injury in the course and scope of her employment is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier contends the hearing officer erred in determining that claimant had good cause for failing to report her injury until November 29, 1998. Carrier asserts that claimant did not have good cause for late reporting of her injury.

A claimant must report an occupational disease injury to his or her employer within 30 days of the date the employee knew or should have known of the condition and that it was work related. Section 409.001(a)(2). However, a specific injury must generally be reported within 30 days of the date of the injury itself. Good cause is a legal excuse for late notification; however, good cause must continue to the date when the injured worker actually reports the injury. *See* Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995.

Claimant testified that she knew her foot pain was work related and due to operating the carts on _____, but that she thought the foot pain would go away. She indicated that she thought her condition might be serious on November 9, 1998, when Dr. M put her in a cast. However, it is also significant that claimant said she decided that she needed to see a doctor regarding her injury on October 19, 1998, and that she had injections in her foot that day. This case was tried as an occupational disease case; however, the hearing officer did not make a finding regarding an occupational disease date of injury, *i.e.* when claimant knew or should have known that she may have a work-related injury. The hearing officer stated that the repetitive trauma injury happened "on" _____. There was evidence that claimant was treated by a doctor for her left foot condition on October 19, 1998, and that it was put in a cast on November 9, 1998.

The hearing officer determined that claimant trivialized her injury and that she did not report a work-related injury until November 29, 1998, for this reason. The hearing officer determined that claimant had good cause for late reporting of her injury. As noted above, good cause must generally exist up to the time of reporting. We believe that the hearing officer committed reversible error in: (1) failing to consider whether this is an occupational disease injury case and, if it is, then failing to determine the date when claimant knew or should have known that her injury may be work related; (2) failing to determine the date that claimant knew or should have known that her injury was serious and not trivial; and (3) failing to address the action or inaction of the claimant from the date of injury until the date the claimant actually reported the injury. *See* Texas Workers' Compensation Commission Appeal No. 981259, decided July 27, 1998. For these reasons, we reverse the determinations regarding good cause and timely reporting and remand these issues to the hearing officer for further consideration

and findings, based on the evidence already submitted, on timely notice, date of injury, good cause, whether good cause continued to November 29, 1998, and, if so, what constituted the good cause.

Carrier contends the hearing officer erred in determining that claimant was unable to obtain or retain wages equivalent to her preinjury wage from November 9, 1998, to February 2, 1999. Carrier asserts that: (1) claimant did not miss any time from work until after November 15, 1998, and earned $1,787.21 from November 1, 1998, to November 15, 1998; (2) claimant "earned" $1,368.20 for the period from November 16, 1998, to November 30, 1998; (3) claimant earned $564.85 from November 15, 1998, to December 12, 1998, and $1,487.69 from January 10, 1999, to February 6, 1999, while working as a nurse; and (4) claimant failed to prove she had any period of disability.

Claimant testified that her foot was put in a cast and she was taken off work from November 9, 1998, until February 2, 1999. Claimant said she worked for the airline one day, November 15, 1998, even though she had been taken off work, but that she regretted it because she was in pain. She said her supervisor had told her she could not continue working after November 12, 1998, with the cast on her foot. Claimant testified that she wanted to continue to work in a cast, but she was not permitted to work. Claimant said she took vacation time from her airline job for the remainder of November. She said she did not return to work for the airline until February 3, 1999. Claimant said she worked about three days per month at her other job doing nursing work, and that she continued to do this after November 9, 1998. Dr. M noted in December 1998 that claimant was unable to even stand more than four hours per day.

The hearing officer could still find from the evidence that, for some period of time, claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage because she could not perform her airline work. Regarding her earnings from the airline from November 16, 1998, to the end of November, we note that claimant said she was on vacation. This was not earnings for work claimant performed after November 16, 1998. *See* Texas Workers' Compensation Commission Appeal No. 941210, decided October 17, 1994. There is evidence to support a finding that claimant was unable to earn her preinjury wage from November 16, 1998, to the end of November.

Regarding the beginning date of any disability, there was evidence that claimant was unable to do her work at the airline after November 9, 1998. However, claimant did work on November 15, 1998, and was paid for working that day. For that reason, it appears that, if claimant did have a compensable injury and she did, therefore, have disability, the disability would not have begun to accrue on November 9, 1998. Therefore, we must remand this issue to the hearing officer for reconsideration.

Because the failure without good cause to give timely notice of an injury would mean the left foot injury is not compensable, we must reverse the determination that the claimed injury was "compensable." Because disability depends on the existence of a compensable injury, we also reverse the determination that claimant had "disability," pending resolution of the compensability issue.

We reverse the determinations that claimant sustained a compensable injury, that she had disability, and that carrier is not relieved of liability in this case and remand these issues to the hearing officer for reconsideration consistent with this decision.

Regarding the hearing officer's statement in the decision and order about "offset" of liability because of claimant's earnings from her concurrent employment, we would note that carrier is not entitled to such an offset. *See* Texas Workers' Compensation Commission Appeal No. 972678, decided February 12, 1998; Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge