

APPEAL NO. 000092

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 December 20, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable right foot injury on _____, and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable right foot injury on _____, and had disability from August 26, 1999, through November 23, 1999. The appellant (carrier) appeals, urging that the hearing officer's decision is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant began working for the employer as a concrete truck driver on August 23, 1999. The claimant testified that on the morning of (day before the date of injury), he walked on his treadmill at home and had muscle pain in his right foot, but was able to perform his job duties. The claimant said that he told several people at work, including Mr. T, who was training him, that his right foot was sore and that he thought he had hurt himself walking on his treadmill. The claimant testified that on _____, after filling the water tank on a concrete truck, he stepped up into the cab of the truck and felt a pop in his right foot. The claimant said that immediately thereafter his foot began to swell and he was unable to operate the truck safely. According to the claimant, he told Ms. P, the safety compliance officer, that he felt a pop in his foot and that he thought it might be related to the use of his treadmill. The claimant testified that the pain he felt after the pop in his foot on _____, was different and more severe than his previous foot pain and he was unable to continue working that day.

The claimant sought medical treatment with Dr. L and Dr. F on _____, and was diagnosed with a fracture. Dr. F prescribed a brace and crutches and took the claimant off work until November 23, 1999. The medical records of Dr. F indicate that the claimant gave a history of using a treadmill the day before the injury and that he stepped up on a concrete truck and felt a pop in his foot. Dr. F states "[t]he patient has a 5th metatarsal shaft fracture. It is my impression that this is due to the injury described by the patient as the amount of pain the patient is experiencing now, I do not think he could have worked this morning without difficulty had he sustained this injury yesterday." Dr. L opines that the claimant would not have been able to work the morning of _____, with severe pain caused by the fracture.

The carrier asserts that the evidence was insufficient to show a compensable injury. The carrier presented the testimony of Mr. T, Ms. P, and Mr. B to support its position that the claimant did not sustain an injury while at work on _____. Mr. T testified that the

claimant told him that his foot was bothering him and that he had hurt it on his treadmill at home. According to Mr. T, the claimant told him on _____, after filling the water tank, that he had hurt his foot climbing into the truck. Ms. P testified that she spoke with the claimant on _____, and the claimant told her that he had hurt his foot on the treadmill the day before and was unable to drive because he could not use the brake. Ms. P said that she advised the claimant to seek medical treatment and later that day the claimant called her from the doctor's office and stated that he had hurt his foot when he stepped out of the truck. Mr. B, the president and CEO of the employer, testified that he spoke with the claimant on _____, and that the claimant told him that he had hurt his foot at home and was going to have to go to the doctor. Mr. B said that later that day the claimant called him, asked about workers' compensation insurance, and when he asked the claimant where he had hurt his foot, the claimant said that he thought he had hurt it at work.

The claimant had the burden to prove that he injured himself as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.- Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer determined that the claimant sustained a compensable injury on _____, and had disability from August 26, 1999, until November 23, 1999. After considering the conflicting evidence, the hearing officer found the claimant's testimony credible and that the totality of the evidence established that the claimant injured himself while at work on _____. The claimant testified that he was unable to work due to the injury beginning _____, and this is supported by the medical records of Dr. L and Dr. F. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find there was sufficient evidence to support the determinations of the hearing officer that the claimant sustained a compensable right foot injury on _____, and had disability from August 26, 1999, until November 23, 1999.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Susan M. Kelley
Appeals Judge