APPEAL NO. 000661

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 February 10, 2000, with the record closing on February 28, 2000. The issues at the CCH were whether the respondent (claimant herein) sustained a compensable occupational disease on _____; and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable occupational disease on _____, and that she had disability from September 10, 1999, through February 10, 2000. The appellant (carrier herein) files a request for review, arguing that medical evidence supporting the claimant's injury is not based on an accurate history and that the Appeals Panel has previously found injuries involving walking and standing not to be compensable. The carrier also asserts that the evidence does not support the hearing officer's finding of disability. The claimant responds that sufficient evidence, including the medical evidence, supports the hearing officer=s finding of injury. The claimant points to cases where the Appeals Panel has affirmed determinations of the hearing officer's concerning injuries due to excessive walking. The claimant argues that the hearing officer's finding of disability was supported by the claimant's own testimony and medical evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarized the evidence and the rationale for his decision as follows:

> The Claimant worked for the Employer, (Grocery Supply Company), and contends that she sustained an occupational disease (repetitive trauma injury) on _____. The Claimant worked as an "order selector" in a large wholesale grocery warehouse. The mechanism of injury involved standing and/or walking. The Claimant=s position as set forth in the benefit review conference report is as follows:
>
> > **She is a grocery order filler for the Employer, her job requires constant standing and walking at very high pace. In August she began experiencing severe foot pain, her doctor attributes her problem to her employment. She has been diagnosed with plantar fascitis and tarsal tunnel syndrome.** (See H.O. Ex. 1)
>
> The Carrier has denied liability for this injury and contends that the Claimant=s injury is an "ordinary disease of life" and not compensable under the [1989 Act].

The evidence indicates that the Claimant is 35 years old and worked for the Employer for approximately three and a half years. According to the Claimant she works four days per week between ten and seventeen hours per day. However, an Employer=s Wage Statement [TWCC-3] indicates that during the thirteen weeks immediately preceding _____, the Claimant worked a total of 438 hours or, on average, 33.7 hours per week. (See Carrier=s Ex. 1) The Claimant testified that she is standing and/or walking on a wood floor ninety percent of the time. The other ten percent of the time the Claimant is standing and/or walking on a concrete floor. The Claimant has a fifteen minute break every 2 **2** hours and a 30 minute lunch break during her shift. The Claimant testified that she must walk very fast in order to meet her production requirements.

[Dr. B] is the Claimant=s treating doctor. In a letter to the Claimant=s attorney dated January 27, 2000, [Dr. B] writes:

> **Based on the history [claimant] gave me, my examination of her, the diagnostics which have been performed on her, and my analysis of the Employer=s documents I, based on a high degree of medical certainty, strongly believe that there is a solid causal connection between [claimant=s] current medical condition and her work environment. Based on that same high degree of medical certainty I can also say that [claimant] clearly sustained physical stresses on her feet that are way over and above the stresses which are encountered by the general public.** (See Claimant=s Ex. 5)

The record was left open in order to allow the Carrier to respond to [Dr. B=s] letter of January 27, 2000. The Carrier requested that [Dr. H] review the Claimant=s medical records. In a report dated February 21, 2000, [Dr. H] answers a question posed by the Carrier:

> **Is this an ordinary disease of life or is this secondary to any compensable injury?**
>
> **In this case (Claimant=s case) of course it is an ordinary disease of life. This type of foot discomfort, as described by [claimant], secondary to standing and walking is not compensable under the [1989 Act].** (See H.O. Ex. 2)

With the exception of her breaks, the Claimant was constantly standing and/or walking during her entire shift. In this case, the Claimant was exposed to

particular stresses over and above that which would be encountered by the general public. The medical evidence from [Dr. B] is unequivocal. The Claimant has established a firm causal connection between her work related activities and her foot injury.

Even though all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

Section 401.011(26) defines injury as follows:

"Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease.

Section 401.011(34) goes on to define occupational disease as follows:

"Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term 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.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. The Claimant worked for the Employer and, with the exception of breaks, was required to constantly stand and/or walk during her entire shift.

3. The Claimant's work related activities contributed to her foot injury.

4. The Claimant was exposed to particular stresses over and above that which would be encountered by the general public.

5. The Claimant was exposed to "repetitive physically traumatic activities" in her workplace.

6. The Claimant was unable to work from September 10, 1999, through February 10, 2000, due to the continuing effects from her injury.

CONCLUSIONS OF LAW

1.The Claimant sustained a compensable occupational disease on _____.

2.The Claimant had disability from September 10, 1999, through February 10, 2000.

Both sides cite a number of prior decisions of the Appeals Panel. The carrier cites Texas Workers' Compensation Commission Appeal No. 941618, decided January 17, 1995; Texas Workers' Compensation Commission Appeal No. 961148, decided July 24, 1996; Texas Workers' Compensation Commission Appeal No. 951630, decided November 15, 1995; Texas Workers' Compensation Commission Appeal No. 971198, decided August 11, 1998; Texas Workers' Compensation Commission Appeal No. 941018, decided September 12, 1994; Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992; Texas Workers' Compensation Commission Appeal No. 93796, decided October 22, 1993; Texas Workers' Compensation Commission Appeal No. 950867, decided July 14, 1995; and Texas Workers' Compensation Commission Appeal No. 972145, decided December 4, 1997. The claimant cites our decisions in Texas Workers' Compensation Commission Appeal No. 980352, decided April 6, 1998; Texas Workers' Compensation Commission Appeal No. 981175, decided July 17, 1998; Appeal No. 972145, *supra*; and Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993. It is essentially the carrier's position that our prior cases stand for the proposition that an occupational disease due to walking or standing is exceedingly rare. The claimant argues that each case turns on its own facts and under the facts of the present case there is sufficient evidence to support the hearing officer's finding of injury.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and 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 would 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight

of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we find sufficient evidence to support the hearing officer's finding of injury. Dr. B clearly provides evidence of causality. While the carrier argues that Dr. B's opinion should be discounted. We do not find that Dr. B's reference to concrete floors establishes that his opinion is entirely based upon the claimant's having walked primarily on concrete flooring. As we stated in Texas Workers' Compensation Commission Appeal No. 000653, decided May 15, 2000, the variance between the doctor's understanding of the mechanism of injury and the actual mechanism of injury was a matter for the hearing officer to consider in assessing the weight and credibility to be assigned to the opinion. We do not find Dr. B's opinion insufficient as a matter of law to support the hearing officer=s findings. Nor was the hearing officer required to rely upon the conflicting medical evidence from Dr. H.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Applying our standard of review outlined above, we find no error in the hearing officer's finding concerning disability.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

We have affirmed denials of many standing and walking cases that would seem to have little difference with this case. However, I agree that we have not said walking injuries per se are not compensable. The only evidence here that causes me to concur in affirmance is the

employer's own assessment of the physical demands of the job. These state that walking is constant (over 60% of the time) and that walking is constant and the pace "very high," meaning body parts in constant motion. I am satisfied that this evidence establishes that the claimant's time on her feet exceeds either that spent by the general population OR the general working population, most of which does not spend in excess of 60% walking at a very high pace.

Susan M. Kelley
Appeals Judge