

APPEAL NO. 000722

This appeal after remand 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 December 6, 1999. The record closed December 6, 1999. In her first decision, the hearing officer determined that on _____, 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) appealed, 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 responded that the Appeals Panel should affirm the hearing officer's decision and order. The Appeals Panel, in Texas Workers= Compensation Commission Appeal No. 992941, decided February 10, 2000, remanded the case to the hearing officer for further consideration. On March 8, 2000, a hearing on remand was held. In her decision and order after remand, the hearing officer determined that: (1) claimant sustained a compensable occupational disease injury to her left foot on _____, while in the course and scope of employment; (2) there is continuous good cause for her late report of the injury to her employer; (3) claimant reported her injury on November 12, 1998, rather than on November 29, 1998; and (4) claimant had disability from November 16, 1998, to February 2, 1999. Carrier again appeals the injury, good cause, and disability determinations on sufficiency grounds. Carrier also complains that the hearing officer changed the determination regarding the date the claimant reported the injury, despite the fact that no one appealed that fact finding. The claimant responds that the Appeals Panel should affirm the decision and order.

DECISION

We reverse and render.

Carrier contends the hearing officer erred in determining that claimant had good cause for failing to report her _____, injury until November 29, 1998. The applicable law, summarized testimony, and procedural history of this case are set forth in our prior decision. In her first decision, the hearing officer determined that claimant reported the injury on November 29, 1998. We remanded for the hearing officer to consider whether good cause continued up until that date. On remand, the hearing officer reconsidered the evidence and determined that claimant trivialized her injury until November 9, 1998, and that she actually reported it on November 12, 1998.

Claimant was not consistent in her testimony regarding when she reported her injury as a work-related injury. There was evidence that claimant told her supervisor on or about November 12, 1998, that she had a problem with her foot which was work related. This issue was for the hearing officer to consider and resolve. The hearing officer determined that claimant reported her injury on November 12, 1998, after deciding what facts were established by the evidence and we will not disturb that fact finding. However, we must reverse the hearing

officer's determination regarding trivialization and good cause because they are against the great weight and preponderance of the evidence. Claimant said she first realized she had a serious foot problem on _____. However, claimant admitted that she saw the doctor and underwent injections to her foot on October 12, 1998. This is evidence that claimant knew that her foot condition was not trivial. After considering the record, we conclude that the hearing officer's determinations regarding good cause and trivialization are 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). We render a determination that claimant did not have good cause for failing to report her injury within the requisite 30-day period.

Carrier contends the hearing officer erred in determining that claimant sustained a compensable injury. In this case, the hearing officer could find from the evidence that claimant sustained an injury operating carts at work on _____. After reviewing the evidence, we conclude that the hearing officer's determinations in this regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. The hearing officer determined that claimant felt a strain or Apull@ on _____, while operating a cart. Although there was medical evidence that claimant had a repetitive trauma or Aoveruse@ injury, this is not what the hearing officer found. Because the hearing officer determined that claimant's strain or Apull@ injury occurred on one day, _____, this was actually a specific injury. Texas Workers= Compensation Commission Appeal No. 992851, decided January 27, 2000.¹ In this regard, we stress that a claimant is not bound by Apleadings@ at the benefit review conference regarding whether the injury is a specific injury or an occupational disease. Texas Workers= Compensation Commission Appeal No. 992343, decided December 6, 1999. A hearing officer may find that a claimant sustained a work-related injury if this is supported by the evidence. However, due to our determination regarding good cause/timely reporting, we reverse the determination that claimant's injury was compensable and render a determination that claimant did not sustain a compensable injury. We note that, because carrier is not liable for compensation, we must determine that the injury is not Acompensable@ even though it was work related.

Carrier contends the hearing officer erred in determining that claimant had disability from November 16, 1998, to February 2, 1999. Given our disposition of the other issues in this case, we conclude that claimant did not have disability because she did not have a compensable injury. Disability means the A inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.@ Section 401.011(16).

¹ We had remanded for reconsideration given the conflicting evidence regarding whether claimant's injury occurred on just one day.

Disability, by definition, depends upon there being a compensable injury. *Id.* We reverse the hearing officer's disability determination and render that claimant did not have disability.

We reverse the hearing officer's decision and order and render a decision that claimant did not sustain a compensable injury, that carrier is relieved of liability because claimant did not timely report her injury, and that claimant did not have disability.

Judy L. Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge