APPEAL NO. 001069

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 April 20, 2000. The hearing officer determined that the respondent's (claimant) current left great toe condition is the result of his underlying compensable injury of _____, as opposed to being the result of a new injury. The appellant (carrier) appeals on several procedural grounds, asserting that the hearing officer abused her discretion, and lacked jurisdiction in deciding that the claimant had not sustained a new injury. The carrier also appeals the hearing officer's finding that the claimant's toe condition is the result of his work-related injury. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds, replying to the points raised by the carrier and urges affirmance. The carrier filed a reply to the claimant's response.

DECISION

Affirmed.

This case revolves around whether or not a compensable toe injury of _____, resulted in or caused the claimant's present problems which include non-union of a toe fusion. The claimant was employed in a scrap yard and it is undisputed that the claimant sustained a compensable injury on _____, when a pipe fell on the claimant's left foot, injuring his left great toe. The claimant contends that this incident caused a "crush injury" to his left big toe while the carrier contends that the injury was a "soft tissue contusion" which resolved. Medical experts, doctors of podiatric medicine (DPM), testified for both sides. What the diagnostic x-rays at the time of the injury showed is subject to different interpretations and inferences. Dr. F, one of the first doctors to treat the claimant, described a "crush injury" but said (in a report dated July 11, 1995) that x-rays were negative for fracture and that there was "some sclerosis in the area." Dr. F believed the claimant was at maximum medical improvement (MMI) in October 1995. The claimant subsequently began treating with Dr. S, complaining of a painful left big toe. Dr. S had additional x-rays taken by a hospital and performed surgery in the form of exploration and debridement on November 10, 1995. On August 16, 1996, Dr. S performed additional surgery and inserted an artificial "1st metatarsal phlangeal joint" (1st MPJ). That joint was removed and the 1st MPJ was fused by Dr. S on April 29, 1997. Dr. S certified the claimant at MMI on June 24, 1997, as did a designated doctor in October 1997. The claimant testified that he continued to be bothered by the toe and in August 1999, when he tried to do some light jogging on grass, his toe got worse. (The carrier contends that the claimant sustained a new injury due to the jogging incident.) The claimant returned to Dr. S, who performed additional surgery to correct the non-union of the previous bone fusion surgery with a bone graft. There was testimony regarding the claimant's demand for premature removal of the cast and a premature discontinuance of an antibiotic IV. In any event, the claimant's foot/toe became infected and additional surgery was performed on December 2, 1999, with the internal bone hardware being removed. Further surgery was performed on February 23, 2000, for debridement of necrotic tissue.

There is extensive medical documentation in the record which defies a brief summarization. Dr. S testified at the CCH and stated that in his opinion the claimant's current condition is a continuation of the claimant's original injury, rather than a new injury, giving reasons for his opinion. Dr. S also stated that the claimant's current injury to the left foot was due to trauma rather than some underlying preexisting condition because the claimant's uninvolved foot was normal. This testimony is supported to some extent by the report of Dr. H, D.P.M., the carrier's required medical examination doctor, who in a report dated March 31, 2000, stated that, while the etiology of the claimant's condition was speculative, "[w]here the condition is unilateral, as in this case, it is commonly caused by trauma." Dr. H concluded:

> My opinion from the x-rays that I have seen is that this foot has never totally healed. The last procedure (fusion) appears to be a non-union. X-rays taken in my office show the bone graft totally disassociated from both the metatarsal and the proximal phalanx. With the extreme soft tissue reaction it could quite possibly be a foreign body reaction with the graft being the offending material.

The carrier discounts Dr. H's report because Dr. H did not have all the x-rays available to him. Dr. K, also a D.P.M., did a peer review of the claimant's medical records and also testified at the CCH. Dr. K's opinion was that the claimant, in the 1999 jogging incident, rebroke a previously asymptomatic non-union of the joint in question, that the claimant had originally only sustained a "soft tissue contusion" which had resolved, and, therefore, the claimant has sustained a new injury or reinjury of some type.

On the merits of the case, the expert medical evidence and testimony is obviously in conflict. The hearing officer, in her discussion, notes that the distinction between the reoccurence of symptoms from a prior injury and a new injury "is often an extremely fine one." The hearing officer goes on to comment:

> However, the Hearing Officer finds it particularly telling to note that, in the case at bar, Claimant's uninjured right foot has been asymptomatic, thereby strongly suggesting that the injury to Claimant's left foot was caused by trauma; even if, as Carrier has argued, Claimant suffered from preexisting pathology in his left foot, his injury to that foot is considered a compensable injury if a work-related event aggravated or accelerated the preexisting condition, and it appears that this is what has occurred. The Hearing Officer also notes that even [Dr. K], an expert retained by Carrier, felt that Claimant's fusion had been unsuccessful, thereby supporting Claimant's allegation that he had not, in fact, recovered to his preinjury status before his continuing injury became increasingly symptomatic when he attempted to jog for exercise.

The hearing officer goes on to note that even if the claimant's choice of activities and the medical treatment was less than optimal, that does not change the outcome that the claimant's current condition is the result of the compensable _____, injury.

The carrier's appeal tends to mainly emphasize some procedural points. The carrier argues that "spoliation" (which the carrier defines as the "improper destruction of evidence") should have been added as an issue. The carrier made this request at the CCH, the hearing officer said that she believed it was subsumed in the issues certified from the benefit review conference (BRC), and the carrier replied, "Okay," and raised no further objection until the appeal, where the carrier again raises the argument. The background is that the hospital (where Dr. S sent the claimant for x-rays), Dr. F's office, and Dr. H's office all apparently gave the claimant x-rays and MRI films to take to an RME examination; that claimant, for one reason or another, did not make that appointment, and that the x-ray films were misplaced (or, according to the carrier, were intentionally or negligently destroyed or at least made unavailable). The carrier's premise presupposes that the claimant knew the significance of these films and that they were detrimental to his case. In any event, the hospital films were eventually found in the hospital's storage facilities pursuant to a subpoena and only some of Dr. F's x-ray films are presently unaccounted for. Spoliation of evidence, or the remedy therefor, is not provided for in the 1989 Act and it is questionable whether the hearing officer could have imposed some kind of remedy (other than finding against the claimant on the merits). We review the hearing officer's action on an abuse of discretion standard, which the carrier quite accurately cites in its brief, and find that the hearing officer did not abuse her discretion in refusing to add spoliation as an issue at the CCH and failing to make specific findings regarding that matter. The record of the carrier's request is clear and the carrier is free to request judicial review on this issue.

The carrier also contends that the interlocutory order entered by the benefit review officer (BRO) failed to specify the maximum period it would be in effect "thereby illegally transforming" the interlocutory order "into a permanent injunctive order." We disagree. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.6(a)(1) (Rule 141.6(a)(1)) provides that such orders are binding until reversed or modified by agreement or settlement "or by a decision rendered after a subsequent commission [Texas Workers' Compensation Commission] proceeding." The CCH was such a proceeding.

The carrier argues that the hearing officer lacked jurisdiction to order payment of benefits in conformity with her decision and that the hearing officer exceeded her authority in adding the phrase "as opposed to being the result of a new injury" to her decision. We disagree. *See* Section 410.168 and Rule 142.16(a).

In regard to the carrier's reply to the claimant's response, as the carrier notes, the 1989 Act is silent and makes no provision for replies to replies and we have reviewed the Appeals Panel decisions that the carrier cites for the proposition that we have considered replies to responses and determine that not to be the case. We have considered reply briefs (responses) to appeals as provided for in Section 410.202(b), but not replies to responses. We decline to consider the carrier's reply to the claimant's response brief.

On the merits, as we previously indicated, the expert medical evidence was conflicting and subject to differing interpretations and it is for the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve factual matters that are in conflict. *See* Section 410.165(a) and Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As such, the hearing officer's decision is supported by sufficient evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge