APPEAL NO. 001930

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 27, 2000. The hearing officer determined that on _____, the appellant (claimant) injured the top of his left foot in the course and scope of his employment; that the claimant also suffered an ulceration in the form of a blister on the side and sole of his left foot that was caused by his diabetes and not by the trauma of being struck by a shoring jack; that the respondent (carrier) timely contested the compensability of the claimed injury on the seventh day after receiving written notice of the claimed injury; that the claimant's average weekly wage is $1,014.90; that the claimant was not unable due to the compensable injury to the top of the left foot to obtain and retain employment at wages equivalent to his preinjury wage; and that the claimant did not have disability. The claimant filed an appeal signed by him, and an attorney also filed an appeal for the claimant. In the appeals, the claimant urges that the evidence supports determinations that the compensable injury does include the ulceration and that he did have disability, and requests that the Appeals Panel reverse the determinations of the hearing officer that are adverse to his interest and render a decision that his compensable injury includes the ulceration and that he had disability. The carrier responded, urged that the great weight and preponderance of the evidence supports the appealed determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We affirm.

The claimant testified that he has been a diabetic since 1973; that he uses insulin and generally is able to control his diabetes; that in 1996 he injured his right foot, the area became infected, and part of his right foot was removed; and that he had no problems with his left foot before he injured it on Sunday, _____. He said that a jack weighing about 30 to 50 pounds fell across his left foot at about 3:00 p.m.; that he continued working; that he and his foreman shared temporary living facilities; that that night he showed his foreman dent marks on the top of his foot; that he had a pinch mark like a blood blister on the bottom of the ball of his left foot; that on Monday the blister was a little larger, but he was able to work; that on Tuesday he limped a little more, took his boot off at about 3:00 p.m., noticed that the blistered area had broken open, and was taken to the safety office; that Ms. D, the safety lady, and Mr. K, the safety manager, told him that it was a diabetic ulcer; that he called a (VA) hospital where he had been treated and was told to come to the podiatry clinic; that he was seen on March 1, 2000, hospitalized the next day, had surgery, and was released on April 7, 2000.

The ombudsman assisting the claimant wrote to Dr. B, the chief of podiatry at the VA hospital, asking him several questions. Dr. B responded in a letter dated June 28, 2000, stating:

> Question # 1, concerning the rate of advancement of infection following an injury to the foot. Trauma, especially in the face of penetrating trauma can indeed progress rapidly. The foot is poorly vascularized and is in general, in an unsanitary environment. Question # 2, pertaining to the appearance of the wound and if it was consistent with a five-day injury. He had extensive edema, redness, and heat with a dorsal and plantar ulceration. There was also significant drainage plantarly. I would find it honestly difficult to state the age of the injury solely on the appearance alone. The infection was extensive and the salvage of the limb at that point was questionable. Question # 3, questions the possibility of dorsal trauma and its effect plantarly. Again, I can only speculate, but an object dropped from a height could cause through and through injury. The patient may recoil forcibly, or the lack of plantar cushion, common in diabetic patients could allow greater trauma than one would ordinarily suspect. A relatively minor trauma in a normally sensate foot can and often does lead to marked damage and sequelae in a poorly vascularize, poorly sensate diabetic patient. I see patients who "turn their foot" show up with severe midfoot and ankle fractures. So in summation, it is within the realm of possibility for the events to have occurred as stated and present in such a fashion. Admittedly, fairly rapid progression, but definitely within the parameters of time and history from falling object.

At the request of the carrier, Dr. H examined medical records of the claimant. He testified that in his opinion a blow to the foot serious enough to have caused damage to the bottom of the foot would have resulted in broken bones, or at least severe bruising to the top of the foot; that records he reviewed revealed a classic description of a diabetic ulcer; that it is hard to know how fast the ulceration formed; that VA records indicated that the claimant's blood sugar was out of control; that the claimant's diabetic ulcer is not causally related to the blow to the top of the claimant's foot; and that the blow to the top of the foot did not aggravate the claimant's condition.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The hearing officer's determinations that the claimant's ulceration on his left foot was not the result of his foot being struck by the jack and that the claimant did not have disability are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the appealed determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Susan M. Kelley
Appeals Judge