APPEAL NO. 002798

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 7, 2000, a hearing was held. The hearing officer decided that the respondent/cross-appellant (claimant) had sustained a compensable sprained ankle on _____, but that the claimant's transverse fracture of the distal fibula (the fracture) was not a part of the compensable injury. The claimant appealed, asserting that the hearing officer's determination that the fracture was not a part of the compensable injury was against the great weight of the evidence. The appellant/cross-respondent (self-insured) appealed the hearing officer's determination that the claimant had sustained a compensable sprained ankle on _____, asserting that the mechanism of injury, walking down stairs, was insufficient as a matter of law to support the finding of a compensable injury in the course and scope of employment, citing cases in which we have found that "mere walking" is not an activity endemic to the workplace. Each party requests that we reverse the hearing officer's decision and render a new decision favorable to it or, alternatively, to affirm the hearing officer's decision.

DECISION

Reversed and rendered.

The claimant was employed by the self-insured as a teacher and testified that on _____, while on her way to lunch after a morning in-service training session, she experienced the onset of immediate pain as she was walking down a flight of stairs. The claimant described the mechanism of her injury as follows:

> I was walking down normally and then I stepped on the step and my foot went down like that . . . it went off the edge . . . like you would normal. I stepped and my foot went down off the step.

The claimant testified that she experienced pain from her ankle up through her calf and required assistance in descending the remainder of the flight of stairs. That testimony is supported by statements from her coworkers.

The day after the injury the claimant saw her doctor, Dr. C. Dr. C had been treating the claimant for diabetes and related problems for many years. Dr. C diagnosed an ankle strain. He did not take any x-rays of the claimant's ankle. After seeing Dr. C, the claimant continued to work for the next two months, attempting to stay off her ankle as much as possible. Dr. C has also stated that, although he initially diagnosed only a sprained ankle, it is his opinion that the claimant's later-diagnosed fracture was sustained on _____, as the claimant was descending the stairs at school.

The self-insured disputes that an injury, much less an injury in the course and scope of employment, occurred on _____. The self-insured notes the proposition that pain alone does not constitute an injury and that the claimant did not prove that she sustained

a sprain or the fracture in the course and scope of her employment because simply walking down steps is an activity to which the general public is exposed and is not endemic to the workplace. We have previously held that walking up stairs is more than "merely walking" and can support the finding of an injury in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 992193, decided November 17, 1999. We see no reason that walking down stairs is any less removed from our cases which have held that mere walking is not an activity, which would support a claim for an injury in the course and scope of employment. We have also stated on a number of occasions that pain, while in and of itself is not a compensable injury, can be indicative of an injury. *See* Texas Workers' Compensation Commission Appeal No. 000257, decided March 24, 2000. In this case, the diagnosis of an ankle sprain is sufficient to support the hearing officer's finding of an injury.

The claimant testified that she continued to have severe pain throughout the two months after seeing Dr. C and in late October 1999 scheduled an appointment with Dr. W, an orthopedic doctor, to have her ankle examined. The claimant saw Dr. W on October 28, 1999. Dr. W had x-rays taken and diagnosed the fracture. Dr. W prescribed a walking boot which helped to relieve the claimant's symptoms. The claimant returned to Dr. W on December 6, 1999. Dr. W had more x-rays taken and, because there was no evidence of any healing of the fracture, ordered an external bone stimulator. When the claimant returned to Dr. W on December 29, 1999, she had been unable to obtain the bone stimulator and there was, again, no evidence of healing. The claimant was ultimately able to obtain the bone stimulator on or about January 6, 2000. The claimant returned to Dr. W on February 3, 2000. Dr. W's notes indicate that there was still no evidence of healing, but noted that it would take approximately six weeks for the effects of the bone stimulator to be noticed. In a letter dated February 7, 2000, Dr. W stated that it was his opinion that the claimant's fracture was a result of the incident at work on _____.

The self-insured requested that the claimant see Dr. G for an independent medical examination. In a report to the self-insured dated May 16, 2000, Dr. G, after interviewing the claimant and reviewing the serial x-rays from Dr. W, characterized the claimant's injury as a nondisplaced right lateral malleolus fracture and stated that the claimant had "exhibited a fracture that in her age group represents a subset of a lateral malleolus fracture which is slow to heal and is consistent with her described injury."

In contrast to the opinions of Dr. C, Dr. W, and Dr. G, the self-insured offered the testimony of Dr. M, an orthopedic surgeon who had reviewed some of the claimant's medical records, that the fracture could not have occurred as a result of the incident described by the claimant. Dr. M also opined that the fracture found in Dr. W's x-rays of October 28, 1999, was of recent origin and, had the fracture been the result of the _____, incident that there would have been evidence of osteoclastic activity at the time of the October 28, 1999, x-rays, but there was not. Dr. M testified at the hearing that in order for a transverse distal fracture of the fibula to occur there must be some leverage of the ankle and that the normal mechanism associated with such a fracture is a downward motion of the foot with inversion of the ankle to the midline of the body. He testified that

the claimant's testimony that she stepped down and her foot went downward to the step below could not have resulted in the fracture. Dr. M acknowledged that the latest medical records available to him were from early February 2000 and that he had not seen any medical records from Dr. G.

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). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's 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). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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 Finding of Fact No. 3, that the claimant's incident on the stairs did not cause the fracture, is so against the great weight of the evidence as to be clearly wrong. The only difference between the claimant's testimony of how the injury occurred and the classic mechanism outlined by Dr. M is the absence of testimony of an inversion of the ankle. Although the claimant did not recall a twisting of her foot, it is something that a reasonable person would expect to happen under the circumstances. Dr. M's opinion is based upon two facts, the absence of a twisting motion and the absence of a need for medical care for approximately two months, which are contradicted by the undisputed evidence and common experience. The credibility of Dr. M's opinion is further undermined by the facts that Dr. M did not examine the claimant, nor did he obtain a history from her, but rather relied exclusively on incomplete medical records. Although the claimant had been sent to Dr. G by the self-insured before the self-insured sought Dr. M's opinion, Dr. M testified that he was not even aware that Dr. G had seen the claimant and had rendered an opinion that the incident on the stairs was the cause of the fracture.

In direct conflict with Dr. M's opinion were the opinions of Dr. C, the claimant's long-time doctor; Dr. W, an orthopedic surgeon; and Dr. G, the self-insured's doctor who had been asked to give an opinion on the cause of the fracture. These doctors were of the opinion that the incident on the stairs is the cause of the fracture. It is noted that Dr. W

disagreed with Dr. M that early signs of healing would be evident on the October x-ray, that the claimant's ankle had not been immobilized until after she saw Dr. W in October, and that healing was noted in the x-rays only after several months of immobilization of the claimant's foot.

The hearing officer accepted that the claimant had sustained an ankle strain on _____, but rejected that the incident resulted in the fracture. The hearing officer evidently based her rejection of the fracture as a part of the injury sustained on _____, upon Dr. M's opinion which was predicated on facts unsupported by the evidence. When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497 (Tex. 1995). Where we conclude, as we do here, that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be manifestly unjust, there exists a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We therefore reverse the determination of the hearing officer that the claimant's compensable injury is limited to an ankle sprain and render a new decision that the claimant sustained a compensable transverse fracture of the distal fibula on _____.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge