

APPEAL NO. 040735
FILED MAY 25, 2004

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 March 8, 2004. The hearing officer determined that the respondent (claimant herein) "sustained a compensable injury to his right great toe that subsequently directly resulted in the amputation of that toe," and that the claimant had disability from January 27, 2003, to the date of the CCH.

The appellant self-insured (carrier herein) appeals, contending that the amputation of the toe was due to an ordinary disease of life; that the hearing officer erred by admitting an untimely exchanged medical report over the carrier's objection; and that because, in its view, the claimant did not have a supportable compensable injury, the claimant did not have disability. The file does not contain a response from the claimant.

DECISION

Affirmed.

The facts are not much in dispute. The claimant, a county road worker, spilled some "oil emulsion" mixture on the toe of his right "tennis shoe" on _____. The claimant, who was a diabetic and possibly had a vascular insufficiency, developed a blister on his right toe where the mixture had spilled. Initially the claimant self treated the blister, and did not work over the holidays and the wound developed a scab which was growing progressively smaller. In mid January, while working in the bed of a dump truck, the claimant in twisting his foot tore the scab off the healing wound, and the right toe became infected, ultimately developed gangrene and was amputated. Both the treating doctor and the surgeon are of the opinion that the mixture caused the blister which became infected after the scab was torn and resulted in the amputation. The carrier's peer review doctor thought the ulcer "could have been caused by the claimant's diabetes or peripheral vascular disease without any precipitating event."

The carrier's first argument is that the initial blister had "essentially healed but for a small scab" and the infection developed due to the diabetes and peripheral vascular disease. Certainly there was conflicting evidence on this point and it is for the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve the conflicts and determine what facts have been established. The fact that a scab remained from the original wound would indicate that the original injury had not in fact, completely healed. We further note that an employer takes the employee as he finds him or her. An incident may indeed cause an injury where there is preexisting infirmity and where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963).

The carrier also objected to the untimely exchange of a medical report from the treating doctor. The claimant explained what had been done to timely obtain the report and the hearing officer found good cause for the late exchange. We review the hearing officer's ruling on the admission or exclusion of evidence on an abuse-of-discretion standard. We find no abuse of discretion and the hearing officer did not err in admitting the report. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The carrier's appeal of the disability issue is predicated on a finding that the ulcer infection and subsequent amputation of the right great toe are not compensable. Affirming the hearing officer's determination on the extent-of-injury issue (see the agreed on issue), we also affirm the hearing officer's disability determination.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not erroneous as a matter of law or 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 affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **self-insured through the TEXAS ASSOCIATION OF COUNTIES WORKERS' COMPENSATION SELF-INSURANCE FUND** and the name and address of its registered agent for service of process is

**EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Edward Vilano
Appeals Judge