APPEAL NO. 94266

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 January 20, 1994. The issues at the hearing were whether the respondent's (claimant) injury (bilateral Morton's neuroma) arose out of and in the course and scope of her employment on _____, and whether she gave timely notice of her alleged injury. The hearing officer determined that the claimant sustained a repetitive trauma injury as alleged and that she gave timely notice of the injury to her employer. The appellant (carrier) appeals asserting that "as a matter of law, the Claimant did not sustain a compensable repetitive trauma injury . . . and further, that the Claimant failed to give timely notice to her employer of her . . . injury." The claimant replies that the decision of the hearing officer is supported by sufficient evidence, is correct as a matter of law and should be affirmed.

DECISION

The decision and order of the hearing officer are affirmed.

It is undisputed that the claimant sustained Morton's neuroma in both feet, which she contends was caused by repetitive trauma injury. The claimant testified that she worked as a nurse. She said her duties required her to stand on a hard floor for three to four hours a day until approximately the end of _____ at which time two other nurses resigned and were not replaced. Beginning in _____, she picked up the responsibilities of the other two nurses which required her to be on her feet eight to nine hours per day for at least four days each week. She stated that in _____ she began to feel the onset of pain in her feet, until, by the beginning of _____ she could no longer stand the pain. She admitted that over the years she had corns and bunions which gave her some discomfort, but nothing like she was then experiencing. She stated that, because of the pain, she made an appointment with Dr. P, D.P.M., who examined her on _____. He diagnosed Morton's neuroma (and hammertoe) and attempted to relieve the pain with a shot of cortisone. Another cortisone shot on July 21, 1993, also proved unsuccessful as a pain reliever and he excused her from work effective July 21, 1993.

On July 27, 1993, the claimant began treatment with Dr. G, a foot surgeon. Dr. G also diagnosed bilateral neuroma (together with bilateral plantar fascitis and a left interdigital clavus) which he excised on August 9, 1993. The claimant returned to work on October 11, 1993.

The parties stipulated that "[o]n _____, the Claimant became aware she had neuromas on her feet." At the hearing, the carrier agreed that on _____, the claimant notified her employer that her condition was work related.

Based on this evidence, the hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

4. Prior to _____, the Claimant was required to be on her feet three to four hours per day while performing her work related activities.

5. Subsequent to _____, Claimant was required to be on her feet up to nine hours per day while performing work related activities.

6. During late May and early June, 1993, Claimant began to feel slight pain on her feet. This pain gradually increased until _____, when Claimant advised her supervisor she was going to see a doctor about the pain in her feet.

7. On _____, Claimant was advised she had neuromas in her feet.

8. On _____, Claimant's doctor advised her the increased standing and walking on her job was the contributing cause to the development of her neuromas.

9. On _____, after a second visit to her doctor because of increased pain in her feet, Claimant advised her Employer that the pain in her feet was due to the increased standing and walking she was doing in the performance of her duties.

CONCLUSIONS OF LAW

2. Claimant sustained a compensable repetitive trauma injury in the course and scope of her employment.

3. Claimant became aware that the injury she sustained was caused by increased standing and walking on her job on _____.

4. Claimant gave timely notice to her Employer of her repetitive trauma injury.

A claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 410.011(26). Included in the definition of injury is an "occupational disease" which in turn includes a "repetitive trauma injury." A repetitive trauma injury means damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and

in the course and scope of employment. Section 401.011(36).

The claimant contends on appeal that the claimant's neuromas were, as a matter of law, an ordinary disease of life, that is, a disease to which the public is exposed outside the workplace and not compensable under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 93885, decided November 15, 1993. To the extent that this is tantamount to an assertion that the claimant's condition is inherently not compensable, we reject it. The Appeals Panel has held that to establish a compensable occupational disease, the evidence must show a causal connection between the employment and the disease, that is, that the disease is inherent in the particular employment as opposed to employment generally or at least present in an increased degree. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. In Texas Workers' Compensation Commission Appeal No. 931149, decided February 4, 1994, the Appeals Panel reversed and remanded a decision of a hearing officer which determined that the loss of one's voice through talking on the job was an ordinary disease of life, akin to hoarseness, and without further analysis was deemed not compensable. After reviewing existing case law and Appeals Panel precedent, the Appeals Panel in Appeal No. 931149 affirmed the proposition that "each claim for occupational disease must be judged on a case-by-case basis." The decision continued that "'ordinary' diseases to which even the general public is unquestionably exposed in some measure could be compensable in one context, although not in another" if, quoting Larson's Workers' Compensation Law § 41.33(b), the harm producing elements are present "in an unusual degree." This position is consistent with Hernandez v. Texas Employers Insurance Association, 783 S.W. 2d 250 (Tex. App.-Corpus Christi 1989, no writ), also cited by the carrier, which noted that the phrase "ordinary disease of life" in workers' compensation law is a term of art with a meaning distinct from its common meaning and that it does little good opining about whether a disease is an ordinary disease of life when the test of whether a disease is compensable is "if there exists a causal connection, either direct or indirect, between the disease and the employment." Id. at 252. Although some situations may be so tenuously connected to the workplace that they could only be attributed to the conditions and hazards inherent in ordinary life or employment in general, *see e.g.*, Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993, (cancer and second hand smoke in the workplace), the determination of compensability is ultimately a matter of whether the claimant can prove by reasonable medical probability that there is a causal connection between the claimed injury and the employment. Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993.

Whether the necessary causation exists is a question of fact for the hearing officer to decide. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston (14th Dist.) 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to

resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and 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 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).

Dr. P, in his initial diagnosis of neuroma, commented that the claimant "works on her feet all day." Although he did not directly tie this latter fact to her medical condition, it could be considered by the hearing officer to be of more than marginal significance, particularly in light of Dr. G's comments that long term standing and proper footwear were factors to consider in diagnosing the origin and course of this disease. In a note of August 3, 1993, Dr. G states:

> In my opinion, though her job did not cause these problems, it is aggravating them because it required full time standing, a condition which generally aggravates neuromas and relates to her need for surgery.

When specifically asked by the claimant's attorney for an opinion on causation, Dr. G in a letter of January 8, 1994, noted that "anatomical predisposition," nerve entrapment or repetitive trauma, and even improper shoe wear "can be" contributory to a neuroma. However, he concluded, with a different emphasis from his August 9, 1993, note:

> It is my opinion that repetitive standing and walking as a (sic) required during the scope of her employment has been contributory in the development of her neuromas. There does not have to be one singular traumatic event or any one particular identifying factor that will cause a neuroma. I can, therefore, say that probably the demands of extended standing or walking have contributed to her neuroma development. I cannot say that this was the sole cause nor can I say that she should have not developed neuromas if she had not been required to stand or walk so much.

The carrier did not appeal the hearing officer's findings of fact that in the _____ time frame, the claimant's requirements "to be on her feet" increased from three to four to up to nine hours a day. Instead, to defeat this claim the carrier relied on comments from the claimant to an adjuster and comments reported by Dr. G that she had experienced this new more severe pain before her increased standing requirements and that her medical condition was an ordinary disease of life not unlike the corns, bunions, and the hammertoe condition she had experienced for a long time.

While we have held that ordinary walking or standing is not enough to constitute repetitive trauma, *see* Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993, and Appeal No. 93420, decided July 16, 1993, and have reversed a finding of a hearing officer that Morton's neuroma was caused by an accident at work, *see* Texas Workers' Compensation Commission Appeal No. 93577, decided August

18, 1993, the outcome of these cases hinged on a failure of the claimants to meet their burdens of proof and the ambiguous state of the evidence presented. No. 931067, *supra*. We believe that the claimant's testimony about her working conditions and the onset of her pain and the January 8, 1994, statement of Dr. G quoted at length above was minimally sufficient evidence from which the hearing officer could conclude that there was a causal relationship between the injury and the employment. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the great weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Even though this evidence could certainly support contrary inferences, we cannot say that the determination of the hearing officer that the claimant sustained a compensable injury is subject to reversal or without a sufficient evidentiary basis in the record. Texas Workers' Compensation Commission Appeal No. 93620, decided September 7, 1993.

The carrier also contends on appeal that the hearing officer erred in finding timely notice based on a date of injury of _____. The date of a repetitive trauma injury is "the date on which . . . the employee knew or should have known that the injury may be related to the employment." Section 409.001(a)(2). The claimant's position is that she provided the required notice in a timely fashion on _____. We observe that the proceedings reflects that the parties agreed that notice was given on _____, and that the adequacy of that notice was not in dispute. We also note that the decision of the hearing officer contains a stipulation of the parties that "[o]n _____, Claimant became aware she had neuromas on her feet." Given the state of the evidence, we assume that the thrust of carrier's appeal on the notice issue is that she knew or should have known of her injury at least 30 days before _____, and that unless the notice was before _____, it was untimely.

Recently, in Texas Workers' Compensation Commission Appeal No. 94200, decided April 4, 1994, the Appeals Panel discussed the concept of the date of a repetitive trauma injury under Section 409.001(a)(2). There we pointed out that the test for determining when the employee knew or should have known that the injury may be related to employment was "whether the claimant, as a reasonable person, recognized the nature, seriousness and work-related nature" of the injury. This is a factual determination complicated by the inherent uncertainties in the area of medical causes. The claimant testified that even though she is a nurse, she had no knowledge of neuromas or that they had a connection with her work until she consulted with Dr. P. Carrier points to other suggestions that the claimant experienced this pain before she began her long hours of standing. This of course raises questions of the credibility of the claimant and the weight to be given all the evidence. It is the responsibility of the hearing officer to determine when, in fact, the claimant knew or should have known her neuromas may have been related to her employment. He could have found, based on the testimony of the claimant, that this occurred on _____, and that, for this reason, notice of the injury on July 22, 1993, was timely under Section 409.001. We will not substitute our judgement for that of the hearing officer where, as here, it is supported by sufficient evidence. Cain, *supra*; Pool, *supra*.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I reluctantly concur based on the standard of review to which this Texas Workers' Compensation Commission Appeals Panel adheres. The medical testimony in favor of claimant is weak. In addition, while I generally support the causation standard set forth in Hernandez v. Texas Employees Insurance Association 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), that case does not address a question of aggravation, which I read as the basis for the medical opinion of Dr. G herein. The opinion in this case on review did not exaggerate the level of evidence herein by calling it "minimally sufficient evidence." In regard to the notice issue, which is also very weak, Dr. G's record in July 1993, points out claimant's (who is a nurse) history of pain over a period of months. I also question reference by the opinion in this case to a "test" for determining date of injury. Texas Workers' Compensation Commission Appeal No. 94200 is cited as saying, "There, we pointed out that the test for determining the date of injury, in this case a repetitive trauma injury, was 'whether the claimant, as a reasonable person, recognized the nature, seriousness and work-related nature' of the injury." Appeal No. 94200 contains this phrase, but says that Texas Workers' Compensation Commission Appeal No. 92047 decided March 25, 1992, "approved this standard." To me, Appeal No. 92047, while citing Commercial Insurance Company of Newark, N.J. v. Smith 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.), did not "approve" the test in question. I do not agree that the test for determining date of injury of an occupational disease under the 1989 Act is as stated by the opinion in this case.

Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I am unable to conclude that the evidence in this case sufficiently removes the claimed injury from an ordinary disease of life to make it a compensable injury under the 1989 Act. We stated in Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993, a case involving a claimant who alleged she sustained a repetitive trauma injury by "being on her feet and walking around her department" for eight hours a day, that:

> Unquestionably, we believe, the general public is exposed to any "hazards" inherent in walking and standing, and that such activities are an attribute to employment generally (as well as of daily living). Although the claimant testified generally that she walked around her department and stood on her feet much of the day, there is nothing in the record indicating that such walking or standing, . . . amounted to a particular stress over and above that which would be encountered by the general public, or employment generally . . . .

Recovery of benefits has been denied where an alleged injury was attributed to the constant standing on a concrete floor (Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993) and where a flight attendant asserted foot problems were attributable to long hours of walking and standing. Texas Workers' Compensation Commission Appeal No. 93420, decided July 16, 1993. While we have not foreclosed common activity such as sitting, speaking, walking, etc. from ever being a basis for a compensable injury, a firm causal connection between the injury and the work is an absolute requisite to recovery of benefits. *See* Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992; Appeal No. 931067, *supra*. Although the majority find the opinion of Dr. G to be enough to make the necessary causal link, I conclude it amounts to no more than a statement of speculation. Clearly, all he says is that probably the demands of extended standing or walking have contributed to the neuroma development but that he can not say that "she should have not developed neuromas if she had not been required to stand or walk so much." To me, this is just not enough in a situation involving the very common activity of standing for long periods in the employment, something to which the general public might well be considered to be exposed to outside of the employment in issue. I would reverse and render for the carrier.

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Stark O. Sanders, Jr.
Chief Appeals Judge