APPEAL NO. 950221

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 October 17, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were:

1.Whether the appellant (claimant herein) sustained an injury in the form of an occupational disease, on (date of injury).

2.Did the claimant timely notify the respondent (city herein) of the injury or have good cause for failing to do so.

3.Did the claimant sustain disability.

The hearing officer determined that the claimant did not sustain a compensable occupational disease as claimed; that he timely notified his employer of the claimed injury; and that he did not have disability. A fourth issue concerning the claimant's average weekly wage (AWW) was resolved by stipulation of the parties at the hearing. The claimant appeals the determination of the hearing officer that he did not sustain a compensable occupational disease. The city replies that the decision and order of the hearing officer are supported by sufficient evidence and that the claimant's appeal did not meet statutory requirements for specificity under Section 410.202(c).

DECISION

We affirm.

The claimant, who was 60 years old at the time of the claimed injury, worked as a laborer for the city for the previous 14 years. His duties included filling potholes and directing traffic around work crews. It is not clear when he was first diagnosed with insulin dependent diabetes, but he testified that this was an inherited condition which he had to some degree for decades. He stated that he worked outside in extremes of heat and his job required standing on and working with hot asphalt. He admitted that he had lost all sensation in his feet because of his diabetes, but he said he took special care to inspect his feet on a daily basis to insure that he was not ignoring injuries he could not feel. He said he always bought his own work shoes and had never experienced blisters. The city in 1992 instituted a policy whereby the claimant and other workers were required to wear steel-toed work shoes. The city paid for the shoes, and the claimant was allowed to select a pair of his choice from a limited number of options. He began wearing the steel-toed shoes on October 28, 1992.

The claimant was treated by (Dr. MJ), an internist, for recurrent diabetic foot ulcers. He was hospitalized for this condition from February 9 - 14, 1993; from May 3-17, 1993, and

from August 26-31, 1993. During the last hospitalization, his right great toe was amputated as a result of gangrene. In a note of May 5, 1993, Dr. MJ wrote:

> I do not feel that [claimant's] medical problems involving his foot ulcers is work related. We have tried to explain to [claimant] that his foot problems are related to his uncontrolled diabetes and not any injury he may have received.

Also on May 5, 1993, (Dr. C), the surgeon who performed the amputation, provided a statement that in his opinion, the claimant's diabetes was a "contributing factor" to his infection. When asked if he thought the condition was in any way work related, Dr. C wrote: "In Feb '93 [claimant] indicated to me that he was hit by a car. He now states his work shoes bother him."

The claimant's position was that the steel-toed shoes required by the employer caused blisters which then became ulcers which made his toe gangrenous. He said that these shoes did not "breathe" and therefore the heat build-up, together with lack of sufficient drinking water supplied to the work crews by the city, caused the infection. He also introduced statements from numerous co-workers who say they also developed blisters from the work shoes. According to the claimant, none of those blisters became infected because none of the co-workers had diabetes. The claimant said he first noticed the blisters about two weeks after he started wearing the new work shoes.

The hearing officer also questioned the parties about where (date of injury), as the date of injury came from. Neither party could answer this question.

Based on this evidence, the hearing officer found that the claimant's foot problems, including the blisters, the abscesses and the gangrene were the result of the claimant's diabetes and there was insufficient evidence to establish a causal connection between the claimant's employment and an injury in the form of an occupational disease. For this reason he found that the claimant did not sustain a compensable injury on January 15, 1995, and he did not have disability.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he 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 401.011(26). Included in the definition of injury is an "occupational disease" (including a repetitive trauma injury) which is a disease arising out of and in the course and scope of employment as opposed to an ordinary disease of life to which the general public is exposed outside of employment. The appeals panel has also held that the aggravation of a pre-existing condition may be a compensable injury in its own right. Texas Workers' Compensation Commission Appeal No. 94819, decided August 4, 1994. Whether there exists the necessary causation between a claimed occupational disease (in

this case a repetitive trauma injury) and the employment activities is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93420, decided July 16, 1993.

The claimant points to no specific trauma or event that caused his blisters or the infection, but asserts that the wearing of the work shoes over at least a two week period caused the blisters. His case is thus distinguishable from other cases which found the complications of diabetes (amputation) compensable where evidence established that the infection was caused by a specific incident at work. *See* Texas Workers' Compensation Commission Appeal No. 950206, decided March 28, 1995, involving a puncture wound, and Texas Workers' Compensation Commission Appeal No. 941328, decided November 11, 1994, involving a fall and a twisted ankle. We have also on numerous occasions addressed the question of whether standing or walking in the course of one's employment can constitute a compensable repetitive trauma injury and concluded that unless there is evidence establishing that the standing or walking exceeded that confronted by the general public or in employment generally the injuries caused by the standing and walking constituted non-compensable ordinary diseases of life. Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993, and cases cited therein.

Even if claimant's contention that his work shoes caused his foot problems were accepted at face value, we would be hard-pressed to conclude that his walking and standing activities produced more than an ordinary disease of life. The hearing officer, however, premised his decision, not on the nature of the claimant's walking and sitting, but on his failure to establish a causal connection between his current condition and the wearing of the work shoes. In this regard, Dr. JM was unequivocal in stating that the claimant's infection and subsequent amputation of the toe had nothing to do with the claimant's work, but were caused by the underlying diabetes which he considered not controlled by the claimant. The claimant was of the opposite view that his work shoes caused the infection and his diabetes was under control. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. It was his responsibility to resolve conflicts and inconsistencies in the evidence and judge 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 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). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming 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). The hearing officer obviously found

Dr. JM's explanation of the cause of the claimant's foot problem more persuasive than that of the claimant. Given our standard of review of factual issues, we find the evidence sufficient to support the determination of the hearing officer on this issue and decline to reverse it on appeal.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

The claimant in his appeal makes much of the perceived failure of the hearing officer to properly investigate his claim. A hearing officer is charged with preserving the rights of the parties and insuring the full development of facts. Section 410.163(b). However, a hearing officer is equally duty bound to be impartial. Texas Workers' Compensation Commission Appeal No. 941146, decided October 7, 1994. The claimant had the burden of proving he was entitled to the relief he sought. Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994. He does not meet this burden simply by charging officials of the Texas Workers' Compensation Commission with failure to investigate his claim.

Finally, the city contends that the claimant's appeal should be disallowed because not specific enough. We reject this contention. *See* Texas Workers' Compensation Commission Appeal No. 94431, decided May 23, 1994, and cases cited therein.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge