APPEAL NO. 950374

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 27, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were:

1. Whether the appellant (claimant herein) sustained a compensable injury in the form of an occupational disease on or about (date of injury).

2.Whether the claimant timely reported a work-related injury of (date of injury), and if not, whether good cause exists for such failure.

3.Whether the claimant had disability.

The hearing officer determined that the claimant did not sustain a compensable occupational disease as claimed; that he, without good cause, failed to timely notify his employer of his claimed injury; and that he did not have disability. The claimant appeals these determinations arguing that they are based on faulty or insufficiently supported findings of fact. The respondent (carrier herein) replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The claimant worked as a cement truck driver for 18 years for both his present employer and predecessor companies. He testified that he was diagnosed with diabetes in 1986. He said that beginning in 1990 or 1991, he started getting ulcers or open sores on his right foot. He stated that he would routinely be excused from work while the ulcers healed and he would be returned to work by his treating doctor. According to the claimant, this pattern continued until early 1994 when he was again off work because of his foot condition. He returned to work sometime in February 1994, but said the more he worked, the worse his foot condition became until towards the end of (month year), he said his foot was too sore to work. He was taken home from work early on (date of injury), and the next evening went to an emergency room. He was admitted to the hospital where, on May 10, 1994, the second toe on his right foot was amputated because of an infected ulcer at the base of the toe.

The claimant's position at the hearing was that the ulcer at the base of his right toe was "pretty much" healed by the time he returned to work and that the repetitive trauma on the right foot from operating the brake and gas pedals on the cement truck caused the ulcer to reappear requiring the eventually amputation of the toe. He contends that this ulcerous condition, with resulting amputation, was a compensable occupational disease. He said that he only developed an ulcer once on his left foot and that all his other ulcer

problems concerned his right foot which was the foot he used to work the truck pedals. He contends that the date of this occupational injury was (date of injury), and said he told his supervisor, (Mr. H), on this date that he hurt his foot from driving the truck. He also testified that he has not been able to work since (date), because of the condition of his right foot.

In support of his position that his use of the right foot while driving the cement truck caused the right foot ulcer, the claimant introduced records of (Dr. D), his treating doctor. In a progress note of April 30, 1994, from the hospitalization, Dr. D wrote "at this time discussed with the patient the need to find another job, where there isn't so much pressure put on the metatarsal region of his foot."

A typed office note of Dr. D on July 12, 1994, reads:

> Patient has had resection of the R. 2nd metatarsal for osteomyelotitis [sic] due to repeated trauma from his driving and pressure from foot pedals. Patient developed chronic osteomyelotitis [sic] which was aggravated and required amputation of that bone."

Other hand written notes of this date reflect that the claimant "states he's here on business" and reflect that he declined to have his vital signs read. In a letter of September 15, 1994, Dr. D recounted the claimant's history of "multiple episodes of hospitalizations for cellulitis of R. foot." He further stated that "[a]t this time [May 10, 1994], it was felt that the continuous trauma of the foot pedal to the foot aggravated this condition, along with history of Diabetes." In a letter of January 23, 1995, Dr. D wrote:

> It is my opinion that [claimant's] toe amputation is related, not directly related, to his job as a truck driver. Most specifically, the trauma and constant pressure on the plantar surface of the foot at the level of the joints or points of stress. Due to his job, the ulcer developed at the plantar surface of the foot . . . . This continous [sic] treatment of this ulcer and continous [sic] trauma from his work, lead [sic] to the amputation of 2nd metatarsal. The repeated episodes of infection of the ulcer and plantar surface of foot lead to an illness called osteomyelitis, which is an infection of the bone of the 2nd metatarsal. Since this operation, patient's condition has improved drastically, has not required hospitalization. Also, predisposing factors of trauma have diminished and this has lead to less problems with his right foot.

The claimant completed an "Employees Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41) on June 23, 1994. It was received by the Texas Workers' Compensation Commission (Commission) on July 5, 1994.

At the carrier's request, (Dr. R) reviewed the claimant's medical records and pertinent professional literature and provided his opinion as to whether the claimant's right foot ulcer, which led to the amputation of the second toe on the right foot, was caused by his work as a cement truck driver. Dr. R also testified at the hearing. He described the claimant as having a "long history of poorly controlled" diabetes. He stated that the claimant developed neuropathic ulcers on his right foot because of decreased pain sensation typical of those with diabetes. According to his review of the medical literature, he concluded that ordinary walking can generate sufficient pressure to "induce such ulcerations." He testified that high blood sugar levels can lead to a thinning of the muscle and fat pads in the feet, claw foot deformities and callus formation. His review of x-rays of the claimant's right foot revealed claw foot deformity and callus formation. Based on reasonable medical probability, it was his opinion that these factors together with poor compliance in treating his diabetes led to the ulcers, infection, necrosis and amputation. Although he admitted in his testimony that he found no medical literature that put truck drivers with diabetes at greater risk of amputation, he concluded:

> Any pressure from pressing a foot pedal is minuscule compared to weight bearing and is also distributed over the sole of the foot broadly. This does not create significant pressures to cause or aggravate a diabetic neuropathic foot ulcer.

He did not believe the ulcer was caused by or aggravated by work activities, but was caused by chronic elevation of blood sugar levels combined with normal walking activities. He admitted, however, that he never discussed this case with Dr. L, nor did he examine the claimant, or inspect the truck to determine what pressures were generated in operating the foot pedals.

Mr. H testified that he knew the claimant had diabetes. He said he recalled giving the claimant a ride home on (date), because work was cancelled that day due to rain. He said the claimant never tied his foot pain to a specific activity, but told him that working was making his foot hurt worse.

The claimant requests review of the following findings of fact and conclusions of law, arguing that they are wrong or unsupported by sufficient evidence:

FINDINGS OF FACT

6.Chronic elevation of blood sugar will cause foot ulcers to develop in a diabetic.

8.Walking . . . caused an ulcer because it created from 7 to 100 times the normal pressure at the very point where Claimant's foot ulcer was located under the right second metatarsal head.

9.The ulcer became infected because of Claimant's elevated blood sugar level.

12.Claimant's foot ulcer was not caused by nor aggravated by pushing the foot pedals while driving a cement truck.

13.The pressure generated by pushing the foot pedals while driving a cement truck is different from and not as great as normal walking pressure because it is a horizontal force and not a vertical force.

14.Claimant's foot ulcer did not originate with his work.

18.Claimant first gave notice that his foot condition was caused by his employment on July 5, 1994, when he first filed his claim.

CONCLUSIONS OF LAW

3.Claimant's foot ulcer was caused by his uncontrolled diabetic condition.

4.Claimant's foot ulcer was not caused by his employment as a truck driver for Employer nor was it significantly aggravated by his employment.

5.Claimant did not suffer a compensable injury in the form of an occupational disease on or about (date of injury).

6.Claimant failed to report his foot ulcer as a work-related injury within 30 days of when he knew it was work related on (date of injury).

7.Claimant failed to show good cause exists for his failure to timely notify Employer.

8.Claimant suffered no disability as the result of a compensable injury of (date of injury).

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 preexisting 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 the ulceration) 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.

As was suggested at the hearing, this case came down to a "battle of experts." Each side tried to impeach the credibility and persuasiveness of the other's expert by pointing to alleged deficiencies in their analyses and conclusions. For example, claimant makes much of the failure of Dr. R to personally examine the claimant and investigate the operation of the truck he was driving and could, in the claimant's view, give no explanation why the ulcers appeared regularly only in the claimant's right foot and not in his left. Claimant also points out that Dr. R was paid by the carrier for his services. In a similar vein, carrier submits that Dr. L has a financial interest in this case; that even though the typewritten treatment note of July 12, 1994, posits a causal connection between the claimant's work and his right foot condition, his claim for payment with the claimant's health care provider lists the condition as not work related; that there is no evidence that Dr. L ever reviewed the medical records or opinions of other doctors involved with the claimant; and that Dr. L's "medical opinion on causation is weak." 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 medical 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. R more persuasive in his medical opinion about the cause of the claimant's foot ulcer. His testimony and written report provided sufficient evidence to support the findings of fact and conclusions of law on the issue of whether the claimant suffered a compensable injury and we decline to reverse those determinations on appeal. *Compare* Texas Workers' Compensation Commission Appeal No. 950205, decided March 28, 1995, where the evidence established that a puncture wound caused an infection which resulted in the amputation of the toes of a diabetic claimant.

In his appeal, claimant also describes certain findings of fact of the hearing officer as "wrong." While some findings, e.g., Finding of Fact No. 6 quoted above, may be

considered overstated generalizations, it does not detract from the sufficiency of the other findings that are directed to this specific claimant. The claimant also objects to other findings, for example Finding of Fact No. 13, quoted above, as not supported by any evidence produced by the carrier. We need only note that the claimant had the burden of proving that use of the truck pedals was sufficient, in the context of the claimant's other normal activities, to cause the ulcers.

The date of injury of an occupational disease is the day on which the claimant knew or should have known that the injury may be work related. Section 409.001(c). The position of the claimant at the hearing was that he knew on (date of injury), that his truck driving was making his foot condition worse which led to his hospitalization the next day. Section 409.001 also provides that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so relieves the employer and carrier of liability in the absence of actual knowledge of the injury by the employer or upon a finding by the Commission of good cause for failure to give such notice. The claimant contended both at the hearing and on appeal that he notified his employer of the injury on (date of injury), when he told Mr. H that driving the truck was making his condition worse. The hearing officer found that the first notice to the employer that the claimed injury was work related was on July 5, 1994, when the Commission received the claimant's TWCC-41. Mr. H testified that when he took the claimant home on (date of injury), because the weather prevented work that day, the claimant told him "working was making it hurt worse." Mr. H said that he knew claimant was a diabetic and had a history of leaves of absence and returns to work because of this condition. He said that in his conversation, the claimant did not relate the increased pain to any particular activity at work.

Whether notice of a work-related injury is timely given is a question of fact for the hearing officer to decide and notice is sufficient if it reasonably apprises the employer of the general nature of the injury and that it was work related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). The dispute as to notice in this case depended on whether the claimant's testimony that he told Mr. H that driving caused the increased foot pain was more credible than Mr. H's testimony that the claimant was complaining generally about how work was affecting his foot against a background of a long history of problems brought on by the diabetes. The hearing officer resolved this credibility issue against the claimant. Given our standard of review, we will not overturn this determination 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 decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge