APPEAL NO. 92518

On August 21, 1992, a contested case hearing (CCH) was held. The hearing officer found that respondent, claimant herein, had sustained an occupational disease involving his left ankle in the course and scope of his employment with the (employer). Appellant, (carrier), appealed alleging as appealed issues: (1) that the hearing officer did not have jurisdiction to hear the claim because the alleged "injury" occurred in _____ and hence the "Old Law" would apply; and (2) the disability from which the claimant is suffering is not an occupational disease but is an ordinary disease of life. Claimant filed a response and alleged among other things that the carrier's appeal was not timely filed. The appeal is considered under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

DECISION

We find the hearing officer's decision that the claimant sustained an occupational disease to be in error as a matter of law and we reverse and render.

Of first consideration is the claimant's challenge of the jurisdiction of this panel by alleging that the carrier's appeal was filed "more than the 15 days allowed under the Rules." The CCH was held on August 21, 1992 and the hearing officer's decision was dated August 31, 1992. The Texas Workers' Compensation Commission, Chief of Hearings, mailed the decision and order to the parties on September 9, 1992. Article 8308-6.41 states, in part, a written appeal from the hearing officer's decision must be filed ". . . with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings . . ." The carrier states the decision was received on September 15, 1992. The written appeal was filed on September 30, 1992. There is no evidence provided that the receipt of the decision by the carrier was other than on September 15, 1992, as stated. Tex. W.C. Comm'n TEX. ADMIN. CODE. §143.3, as amended, provides in part:

> (c) A request made under this section shall be presumed to be timely filed or timely served if it is:
>
> (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and,
>
> (2) received by the Commission or other party not later than the 20th day after the day of receipt of the hearing officer's decision.

As noted above, and there being no evidence to the contrary, we accept the carrier's assertion that the hearing officer's decision was received on September 15, 1992. That being the case, the appeal was mailed on or before the 15th day after receipt

of the decision and was received before the 20th day after receipt of the hearing officer's decision. The appeal was timely filed. *See* Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992.

A preliminary matter not specifically appealed, but noted, is that the hearing officer in the written decision and order stated that carrier's exhibits CR-EX-A, CR-EX-B and CR-EX-C, being claimant's medical records from Dr. T(A), Hospital (B), and Dr. C (C) were admitted. Yet the tape transcript clearly reflects, in at least two places, that these marked exhibits were not admitted because of claimant's objection that they had not been exchanged after the benefit review conference or made available before the CCH. The hearing officer specifically inquired when the records were available to the carrier, ruled that no good cause existed for failing to provide those exhibits, and sustained claimant's objection to their admission. At the close of all the evidence, the hearing officer again refused the admission of these exhibits. Consequently, the medical records marked CR-EX-A, CR-EX-B and CR-EX-C will not be considered in this appeal.

Claimant was a 75-year-old male, employed by the employer as a toll booth operator from October 1987 to on or about _____, when he quit work on the advice of his doctor. Claimant's employment required him to stand in the toll booth eight hours a day. Although a stool was present, claimant testified he was not able to use it much.

Claimant has a rather long history of medical problems including a heart condition, possible high blood pressure, partial removal of a lung, arthritis in his hands, and a venous insufficiency. Claimant, in _____, sustained a cut or laceration on his left ankle while at work. At the time, he treated himself with home remedies and did not miss any time from work. Claimant first sought medical care for his ankle laceration on August 21, 1990 from Dr. T, an internist. Claimant had some swelling and was placed on medication. Claimant continued to work. He next saw Dr. T on September 24, 1990 when Dr. T noted:

> ". . . He has developed a new ulcer on his medial lt [left] ankle. I think this may be from scuffing one shoe against his ankle when he is walking. He continues to have swelling of that ankle. He has chronic venous insufficiency. He has been going (sic) much better since seeing Dr. C. He has some form of a cream that he puts on this area to make it heal better.
>
> IMP 1) chronic stasis secondary to venous insufficiency, at lower leg. He has stasis ulcer as well.
>
> RECOMMEND: Consultation with Dr. C again. Are x-raying the lt [left] ankle today."

Claimant had been referred to Dr. C, a dermatologist, some time in late July or August 1990. Dr. C notes in a September 4, 1991 (sic) report that claimant has stasis dermatitis with an accompanying eczema. It was further noted that the stasis dermatitis

has worsened by standing and there is probably some underlying venous problem. Claimant continued working through latter 1990 and early 1991. The ankle would get better, and according to claimant, almost get well, and then get worse. Subsequently, in March 1991, claimant was referred to Dr. S, a wound care specialist at the (Hospital).

According to claimant, Dr. S tried several procedures with no particular degree of success. Finally, on _____, Dr. S advised claimant to quit work and stay off his left leg. Claimant quit work on _____ on Dr. S's advice. Dr. S, in a letter dated May 2, 1991, was of the opinion that claimant's condition was work-related and exacerbated by continued work. The doctor also stated that prolonged periods of standing "creates such an indigenous disease process." After claimant quit work, his leg condition healed completely by June 1991.

Claimant filed a workers' compensation claim alleging an occupational disease. The issue framed at the CCH was "whether claimant sustained an occupational disease in the course and scope of his employment with [employer]." The carrier challenged the hearing officer's jurisdiction by asserting the claimant's initial injury occurred in _____ and therefore was not cognizable under the 1989 Act which became effective January 1, 1991. The hearing officer found that "by January of 1991 his (claimant's) ankle wound was almost healed." In his discussion the hearing officer found that claimant's chronic condition had nearly healed and ". . . was then exacerbated by long periods of standing as a toll booth operator and that claimant's condition on and after March 19, 1991, satisfied the definition of an injury under Article 8308-1.03(27)."

Article 8308-1.03(27) states:

> "Injury" means damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm. The term also includes occupational diseases.

Article 8308-1.03(36) defines occupational disease as

> "Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. The term includes other diseases or infections that naturally result from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. The term includes repetitive trauma injuries.

As noted by the hearing officer and supported by the evidence, the initial cut to the ankle sustained in _____ had on occasions nearly healed. Claimant did not miss any work as a consequence of the initial laceration. Claimant has apparently made no claim for that injury as such.

The issue framed at the CCH was "whether claimant sustained an occupational disease. . . ." As found by the hearing officer and supported by the evidence, claimant sustained some type of cut or laceration to his left ankle (ankle wound) in _____. The treatments by home remedy and treatments by Dr. T, Dr. C and finally Dr. S, were for the aggravation and complications of the _____ ankle wound. The hearing officer in his findings of fact found no injury or disease other than the _____ ankle wound. The hearing officer appears to have attempted to skirt this fact by Finding of Fact No. 3, which stated that ". . . by January of 1991 his ankle wound was almost healed." (Emphasis added.) "Almost healed" is not the same as completely healed. The ankle wound was not completely healed until June 1991. While the ankle wound was "almost" healed no new disease or injury was found to have occurred in or after January 1991 to change the situation from what it was previously, i.e., exacerbation and complication of the _____ ankle wound.

Of interest is the fact that the opinion of Dr. S, the wound care specialist, never refers to the original _____ ankle wound and simply refers to claimant's medical history as ". . . hx [history] of a fx [fracture] of that ankle many years ago and has developed an ulcer over the medial malleolus and over the lt [left] lower leg." Photos, and other portions of the admitted medical records, would show the injury to be on the inside left ankle, the approximate site of the _____ ankle wound. Had there been no _____ ankle wound and had the lesions and ulcers of the lower left leg appeared over a period of time, we may have been faced with the question whether such lesions or ulcers constituted an occupational disease. But that is not the evidence. Claimant clearly testified, and the hearing officer found, that claimant's ankle problems were directly and causally related to the original _____ job-related ankle wound. Apparently, the _____ ankle wound history was not given to Dr. S since his May 2, 1991 report doesn't specify claimant's ankle "condition." If the term "ankle wound" were substituted for "condition," in Dr. S' report, the report would be just as accurate. The report would read "claimant's (ankle wound) is work related and exacerbated by continued work." We do not disagree. Although Dr. S, in his report, states there is "a causal connection between the job and the disease state," he never identifies the "disease state."

In Finding of Fact No. 3 the hearing officer finds "claimant first injured his ankle in _____ but by January of 1991 his ankle wound was almost healed." Clearly at this point the injury sustained in _____ had not, as of January 1991, completely healed. In Finding of Fact No. 4 the hearing officer finds "[c]laimant's ankle wound became worse and required intensive treatment . . . between March 19, 1991 and May 20, 1991." Here the hearing officer is still clearly referring to the _____ ankle wound, finding that it had become worse. Then in Finding of Fact No. 6 the hearing officer introduces the concept of aggravation of a preexisting condition by finding "[s]tanding . . . caused aggravation to Claimant's preexisting ankle wound." Then the hearing officer concludes that ". . . Claimant sustained an occupational disease to his left ankle. . . ." Thus, the hearing officer's findings lead us from the original work-related ankle injury in _____ (which got better, then worse) to a preexisting ankle injury, finally to an occupational disease. While claimant's venous insufficiency may have constituted a preexisting condition, we cannot

jump the hurdle that claimant first had an ankle wound which never healed, and which at some later time became a "preexisting ankle injury" and eventually became an occupational disease.

Both the _____ ankle wound and the venous insufficiency were considered by the hearing officer to constitute a preexisting condition. We cannot agree. As noted by the hearing officer, we have held in Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992, that "[t]o defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977)." That situation is not applicable because in the instant case there is no evidence that anything other than the initial _____ ankle wound was the cause of claimant's present incapacity. This does not amount to an occupational disease. It is noted that claimant's ankle wound was completely healed within two months of leaving work.

Although the carrier did not articulate its position clearly in the CCH and indeed its "Point of Error No. 1" discusses the date of injury for an occupational disease, it does hit the crux of the issue by stating "[t]his claim arose from an alleged `injury' to claimant's leg (from a cut on his leg) in _____." Further, the carrier argues that claimant ". . . repeatedly stated that the ulcers in his leg were a result of a cut he received in _____, and as such, the Hearing Officer had no jurisdiction to hear any evidence." For reasons stated in this opinion, we agree that it was the 1990 ankle wound which should have been the basis of the claim, if any. Because this is dispositive of the case, there is no need to discuss carrier's second "Point of Error" as to whether claimant's condition is an ordinary disease of life.

This case is somewhat analogous to Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992, where claimant in that case injured her knee in May 1991, sought treatment, surgery was performed and she was released to go to work even though claimant had never totally recovered. Subsequently after returning to work in September 1991, claimant suffered renewed pain in her knee. The Appeals Panel in that case held the overwhelming weight of the medical evidence to be that claimant's renewed pain and inflammation in September was a consequence of her May injury. It was held that claimant's pain in September was a natural post-surgery occurrence with "no showing of a subsequent accident or a repetitive trauma. . . ." We find in the instant case that the ankle wound was the consequence of claimant's original _____ injury and there was no subsequent injury or accident.

The hearing officer's decision and order are reversed and rendered that claimant is not entitled to workers' compensation benefits under the 1989 Act for his injury of _____.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge