

APPEAL NO. 000033

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 8, 1999, a hearing was held. The hearing officer determined that the respondent's (claimant) compensable injury of _____, which included injury to the thoracic and low back plus the right ankle, also included injury to the right foot and calf. Appellant (carrier) asserts that allegations of pain do not constitute an injury; that claimant was required to use "expert medical testimony" to show causation; and that claimant has waived "her right" to "raise a dispute concerning extent of injury." The appeals file does not contain a reply from claimant.

DECISION

We affirm.

Claimant worked for (employer). She testified that on _____, she was "dumping beer"; as she raised a container overhead, she felt pain and she twisted "to keep from dropping the case." She testified that she went to an emergency room (ER). The ER records, however, indicate the date of her visit was June 21, 1994. Her complaint was said to be pain in the back from lifting. ER personnel noted that she was observed to be limping. Another ER form stated that while working for employer loading 30-pound boxes, she began having mid and low back pain "plus right ankle pain since yesterday." ER personnel observed her right ankle to be tender with edema. Her ankle was wrapped and she was given crutches. Her diagnosis included an ankle sprain.

The hearing officer was correct in commenting that little medical evidence was provided. We note that the injury was over five years old at the time of the hearing. We note also that claimant testified that she had not received treatment for her right calf for six months but that carrier had been paying for treatment to her calf for "five years." On cross-examination, she was asked, "[a]nd the carrier has paid for treatment for your right ankle; is that right?"; claimant replied, "[y]ou paid for all my injuries until recently." Carrier did not contradict that statement and did not offer any evidence that it had not been paying for all treatment. In making this observation, we do not imply that payment for medical care necessarily decides the issue, but point out that this evidence indicates that claimant did not necessarily delay bringing an extent of injury issue.

Carrier states that an allegation of pain does not constitute an injury; this is true in regard to evidence in which there is only an allegation of pain. Here, however, the hearing officer observed in her Statement of Evidence that claimant was noted to have had "swelling and tenderness" in the right calf and foot. Carrier did not take issue with these comments by the hearing officer. The reference to swelling and tenderness was contained in a letter from Dr. M, dated April 30, 1999, in which he referred to treatment provided her on August 15, 1996, and April 28, 1999. (The record does not contain Dr. M's notes from August 15, 1996.) Dr. M referred to claimant's complaints in 1996 as pain, muscle spasms, and tenderness to her back and "pain, swelling and tenderness to the right calf, right ankle,

and right foot area." He did not say what he observed or what his physical examination showed from the visit in 1996; he did report that his physical examination in 1999 showed certain signs relative to the spine, but merely referred to the leg area by saying claimant "continues to complain of pain from torn ligaments in the right calf and right foot areas, which was initially diagnosed by [(Dr. Mo)] in '1994.'"

While swelling is certainly more than "mere pain," the reference to swelling and tenderness in the above context of what claimant reported (as opposed to what the physician observed) is questionable as support of a finding of injury. However, Dr. M does refer to torn ligaments when stating what Dr. Mo determined. In addition, the record does contain a letter from Dr. Mo, dated February 21, 1995, which said that claimant was being treated for her cervical spine, which was referred to as claimant's "old injury," and for "her right ankle, foot and calf, and right side lower back which is the new injury." That letter referred to a date of injury of _____, and named employer also. (There was no issue that carrier did not timely controvert compensability. See Section 409.021.) Taken together, Dr. M's and Dr. Mo's statements provide sufficient evidence to support a reasonable inference that Dr. Mo was treating an injury to the claimant's calf and foot, not just that claimant had radiating pain to those areas. We note also that Dr. Mo's letter of February 21, 1995, does not imply that any part of the injuries he listed had only been treated for a short while.

Carrier asserted also that claimant should have provided expert medical testimony. It cited Texas Workers' Compensation Commission Appeal No. 990453, decided April 14, 1999, and Texas Workers' Compensation Commission Appeal No. 982649, decided December 23, 1998. Appeal No. 982649 dealt with an allegation of repetitive physical trauma at work where symptoms arose three months after that claimant had stopped work. The Appeals Panel said that "medical evidence" was needed to show the connection of the symptoms to the work. It did not say that expert medical testimony must have been provided. Appeal No. 990453, *supra*, dealt with a compensable neck strain with the issue of whether a cervical herniated disc was compensable; it cited Appeal No. 982649, *supra*, and stated that while it was not a repetitious trauma case, it too involved symptoms that were delayed two and one-half months. The claimant in that case developed symptoms of a herniated disc (tingling) after he had returned to work from the compensable strain and had been released from medical care; plus he had a prior history of neck problems. The herniated disc was found to be part of the injury by the hearing officer but the Appeals Panel remanded, in part, because the physician who provided evidence of causation had not been told of the prior neck problem.

We do not agree that claimant had to prove her foot and calf injuries by expert medical testimony. There was no testimony by any physician at this hearing, but medical evidence, as discussed, was provided in this record. The amount of weight to give that medical evidence was for the hearing officer to decide. See Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. In the case under review, the evidence does not show that claimant only developed symptoms of a calf and foot injury several months after the _____, injury. Dr. Mo's February 1995 letter does not

indicate a recent onset of symptoms. In addition, the ER record from June 21, 1994, shows that claimant did have a right ankle injury at the outset; that the ankle was wrapped; and that she was given crutches, which the evidence shows she used. The cases cited by carrier do not control the case under review. The evidence sufficiently supports the determination that claimant's compensable injury includes injuries to the right calf and right foot.

Carrier also states that claimant has waived her ability to "raise a dispute concerning extent of injury." Carrier cited Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994; Texas Workers' Compensation Commission Appeal No. 972300, decided December 29, 1997; and Texas Workers' Compensation Commission Appeal No. 982961, decided February 3, 1999. All of these cases dealt with issues of the amount of impairment rating (IR). Texas Workers' Compensation Commission Appeal No. 991369, decided August 12, 1999, pointed out that while a "new development" may not compel a reopening of the amount of an IR, whether a claimant has a particular compensable injury, for which the 1989 Act provides necessary medical care, is "not waived." As stated, in this case, the evidence does not show that the right calf and right foot are a "new development" and, if there is a concept of waiver which could be attributed to claimant as to extent of injury, evidence that carrier had been paying for medical care for the injury in question until recent months would be relevant.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge