

APPEAL NO. 011058
FILED JULY 02, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 27, 2001. There were numerous disputed issues, resolved by the hearing officer by finding that the date of the respondent's (claimant) injury was _____; that she sustained an injury to her left lower extremity in the form of an occupational disease; that she did not make an election of remedies; and that she had the inability to work due to her injury beginning July 5, 2000, and continuing through the date of the injury. However, because the claimant failed to timely notify her employer of her injury without good cause, there was no compensable injury or disability.

Although relieved of liability for the claim, the appellant (carrier) has nevertheless appealed the determination that the claimant sustained an occupational disease, arguing the insufficiency of the evidence to show that the injury was not an ordinary disease of life. The carrier also appeals the factual determination that the claimant's inability to work was caused by her stress fractures. There is no response from the claimant.

DECISION

We reverse and render a finding that the claimant did not sustain an occupational disease.

The appellant carrier has prevailed; it is relieved of liability for the claim due to untimely notice by the claimant to her employer. The claimant has not appealed this determination and therefore may not raise this point in judicial review. Section 410.251. Nevertheless, Section 410.204(a) requires the Appeals Panel to issue a decision determining each issue on which review was requested.

Although moot by the hearing officer's holding on the notice issue, we would agree that the hearing officer erred in finding that the claimant sustained additional injury through repetitive standing and walking. The claimant testified as to longstanding problems with a stress fracture in her left ankle. She was in a walking cast from January 1999 (which she said was a nonwork-related injury) until she left work on June 5, 2000. The medical evidence is scant; there were no records from her treating doctor for the January 1999 injury, and, consequently, no comparison can be made as to the existence of "additional fractures." Letters from her current treating doctor, Dr. B, stated that the claimant's condition had been worsened by standing as a cashier at work but his assumption of how many hours (11 and 12 hours) were spent standing is not supported by the evidence; in fact, there is evidence that the claimant complained that she was not assigned a full schedule of hours.

Although Dr. B wrote on November 30, 2000, that the claimant had had “multiple” MRIs over the past year, none of these MRI reports are in evidence. Her consulting physician, Dr. D, noted in November 2000 that a repeat MRI showed residual findings of the stress fracture in the same location where it had been, as well as bruising in the left ankle tarsal bones. He noted that her earlier condition of a stress fracture continued, along with a bruised heel and a “possible” additional fracture, but there is no confirmation of this possibility. Dr. D noted that the claimant’s diabetes was a complicating factor in the healing of her fractures. He noted that this would continue to impact healing of her fracture although she had not worked since July 5, 2000.

The Appeals Panel has rejected similar evidence in other cases where the contention has been made that “standing” has exacerbated an underlying foot or leg condition. See Texas Workers' Compensation Commission Appeal No. 941018, decided September 12, 1994, and cases cited therein. Moreover, to the extent that the determination of aggravation was based on 11-12 hours of continuous standing, we would note that expert evidence based upon inaccurate underlying facts cannot support a verdict. Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995); Texas Workers' Compensation Commission Appeal No. 990591, decided April 30, 1999.

The decision that the claimant is not entitled to workers compensation benefits is not changed, but we reverse the determination that the claimant sustained an occupational disease.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge