APPEAL NO. 92220

On April 23, 1992, a contested case hearing was held in. The hearing officer decided that the claimant, appellant herein, failed to sustain her burden of proof by failing to show that her bunions and corns arose out of her employment with her employer, the (employer), and by failing to show that the date she knew or should have known of the work-related connection of her condition was on or after (date claimant should have known of the work-related connection). Accordingly, the hearing officer decided that the (employer), respondent herein, a self-insured political subdivision, is not liable to appellant for workers' compensation benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that the hearing officer erred in finding that appellant failed to sustain her burden of proof on the issues of injury in the course and scope of employment and date of injury. Appellant also contends that the hearing officer erred in excluding an x-ray from evidence. Appellant asks that the decision of the hearing officer be reversed and a new decision rendered, or that the decision be reversed and the case remanded for another hearing.

Respondent contends that appellant's appeal is not timely and that appellant failed to establish a causal connection between her infirmity and her workplace, and further failed to show that her condition, if work-related, occurred on or after (date claimant should have known of the work-related connection). Respondent asks that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

Respondent contends that appellant's request for review was not timely filed. We disagree. A party has 15 days from the date it receives the hearing officer's decision to file an appeal with the appeals panel. Article 8308-6.41(a). A request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and it is received by the Texas Workers' Compensation Commission (the "Commission") not later than the 20th day after the date of receipt of the hearing officer's decision. Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 143.3(c) (Rule 143.3(c)). The transmittal letter from the Division of Hearings & Review sending the decision to the parties is dated May 6, 1992. However, Commission records show that the transmittal letter with the decision attached was actually mailed on May 7, 1992. There is no indication of when appellant received the decision. Rule 102.5 sets forth the general rules for written communications to and from the Commission. Rule 102.5(h) provides in part that: "the Commission shall deem the received date to be five days after the date mailed." Consequently, appellant is deemed to have received the decision on Tuesday, May 12, 1992. Under Rule 143.3(c), appellant had to mail her request for review to the Commission by Wednesday, May 27, 1992, and the request had to be received by the Commission by June 1, 1992, to be presumed to be timely filed.

Appellant mailed her request for review by U.S. Postal Service two day priority mail. There is no postmark on that portion of the U.S. Postal Service priority mail package that was attached to appellant's request for review after receipt by the Commission. However, the request for review contains a certificate of service indicating that it was served on respondent on May 27, 1992. Rule 143.3(a)(4) provides that the request for review must be served on the other party on the same day it is filed with the Commission. Thus, the certificate of service is some indication that the request for review was mailed to the Commission on May 27th, the same day it was served on respondent. The Commission received the request for review on May 29, 1992. Considering the certificate of service dated May 27th, and the fact that the Commission received the request for review on May 29th by use of two day priority mail, which is some indication that the request for review was mailed two days prior to receipt, we conclude that appellant timely mailed her request for review on May 27, 1992, and that it was received by the Commission within the time provided by Rule 143.3(c). Consequently, appellant's request for review is presumed to be timely filed.

The first issue at the hearing was whether appellant sustained an occupational disease to her feet as a result of her work as a building attendant for the employer. This was the unresolved issue from the benefit review conference. Appellant claims that she sustained a repetitive trauma injury to her feet from standing and walking at work for 8 to 10 hours each workday, or that the condition of her feet was aggravated by walking and standing at work. Respondent asserts that the evidence fails to establish a causal connection between appellant's foot condition and her employment.

The 1989 Act defines injury to include "occupational diseases," occupational disease to include "repetitive trauma injuries," and defines repetitive trauma injury to mean "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(27), (36), and (39). An occupational disease 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. Article 8303-1.03(36). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). To recover for a repetitive trauma injury, one must not only prove that repetitious, physical traumatic activities occurred on the job, but also prove that a causal link existed between the activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. *See* Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

Appellant, who is 61 years of age, testified that she has worked for the employer as a janitor for the past 11 years, and, beginning in 1987, performed her janitorial work at the employer's airport facility. Prior to her job with the employer and prior to getting married

and having children, she had worked for a while as a professional dancer. She said that her feet did not hurt when she was employed as a dancer, and that her feet were in perfect condition when she began working for the employer. Appellant testified that her job at the airport requires her to walk between six and nine miles a day on concrete floors during an eight hour shift. She said that although she wore proper shoes, the walking steadily caused her feet to get worse and worse until she had to have an operation on them in September 1991. Appellant said that she does very little shopping, does not dance, and does not go anywhere because her feet hurt. She also said that her feet have bothered and hurt her all the time for the last five years, that her feet hurt her more when she was walking at work, and that she had known since 1988 that "it couldn't be any other way my feet would hurt unless it was on the job because I didn't do that much walking anywhere else." She said that the first time she told her supervisor about her foot condition was when she filled out an accident report in _____. Appellant said she returned to work with the employer in April 1992 after having been off work for six months after the operation on her feet.

In a written report of injury to her employer dated August 21, 1991, appellant gave the date of injury as _____, and described the injury as ingrown corns and severe bunions on her feet. Appellant also stated in this report that her feet had been hurting for the past five years due to bunions and bone spurs and that this had been aggravated by her having to walk and stand on concrete for long periods of time.

Medical reports of (RB), M.D., revealed that appellant was seen by him on June 11, 1991, for complaints of bilateral foot pain, and that an examination and x-ray showed "bilateral hallux valgus with prominent bunions." Dr. RB noted in his report that "She [appellant] works and is on her feet for a significant period of time during the (sic)." In a physician's report dated August 22, 1991, Dr. RB gave as the date of appellant's injury "undetermined - long standing problems," and noted that appellant stated that the cause of injury was standing on her feet at work. Dr. RB stated in an admission report for appellant's surgery that "[h]er [appellant's] problem seems to be progressive in nature, she is 61 years at this time." On September 19, 1991, appellant had an operation consisting of bilateral bunionectomies.

According to Dorland's Illustrated Medical Dictionary, 27th Edition (W.B. Saunders Company 1988), a bunion is an abnormal prominence of the inner aspect of the first metatarsal head, accompanied by bursal formation and resulting in a lateral or valgus displacement of the great toe. A bunionectomy is the excision of an abnormal prominence on the mesial aspect of the first metatarsal head.

In Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ) the claimant alleged that her asthmatic condition was caused by dust, lint, and chemical dyes present at her workplace in a clothing and sewing plant. The issue before the court on appeal from an instructed verdict in favor of the

insurance carrier was whether there was any evidence of a causal connection between the claimant's asthma and her employment. The claimant testified the plant floor was littered with lint, that lint accumulated in the air, that the plant had no ventilation system for dissipating the lint, and that she began experiencing symptoms such as sneezing, nasal drainage, wheezing and shortness of breath about nine years after she began working at the plant. Her doctor diagnosed her as having asthma and allergic rhinitis, and testified that asthma is a hyperactive airway disease which is affected by both hereditary and environmental factors. The doctor further testified that the claimant's symptoms could be triggered by many different things from a wide variety of sources, including the home, environmental factors, exercise and stress. The doctor said that these factors merely bring about the manifestation of asthmatic symptoms; they do not cause the disease itself. The doctor also testified that the cause of asthma is unknown.

On appeal the court stated that the fact that the claimant's symptoms occurred during a period in which she was employed does not mandate the conclusion that her employment was the cause of the claimant's ailments. The court said that since there was no medical evidence that the condition of the workplace contributed to the claimant's asthma, the issue was whether the claimant's testimony as to the onset of the disease coupled with the condition of the workplace constituted any evidence of causation. The court recognized that, generally, lay witness testimony is sufficient to establish a causal connection where, based upon common knowledge, the fact finder could understand a causal connection between the employment and the injury. The court also recognized that this is true even where the claimant's testimony is in direct conflict with expert testimony. However, in holding that the trial court properly granted the instructed verdict for the carrier in the absence of expert medical testimony linking the claimant's asthma to her employment, the court stated that:

"However, expert testimony may be required where a claimant alleges that employment caused or aggravated a disease and the fact finder lacks ability, from common knowledge, to find a causal connection. (Citation omitted). Since the cause of disease is more difficult to ascertain than the cause of a physical injury, it is less likely that a jury will have the common knowledge that is required to establish causation. (Citation omitted). The cause, progression, and aggravation of disease, requires expert testimony to establish a "reasonable probability" that the disease is causally connected to employment. (Citation omitted). The majority of cases in this area involve the cause of cancer, and there are no cases which specifically address asthma.

As applied to the instant case, expert medical testimony is required due to the uncertain nature of the cause of asthma. When experts cannot predict probability of causation of a disease, it is improper to allow the jury to do so. (Citation omitted). There is no expert medical testimony that linked

Hernandez' inhalation of lint particles at work to her developing asthma."

In the present case there is no medical evidence that appellant's work activities contributed to the appellant's "bilateral hallux valgus with prominent bunions." Appellant's doctor noted that appellant's problem was progressive in nature and was longstanding. There was no medical evidence whatsoever as to the possible cause or causes of the diagnosed condition. Appellant's testimony to the effect that her symptoms occurred during a period in which she was employed did not mandate the conclusion that her employment was the cause of her foot problems. Hernandez, *supra*. Where a condition is within the general experience and common sense of persons generally, it is appropriate to allow the fact finder to know or anticipate that the condition could reasonably follow the specific events, and expert medical testimony is not required to establish causation. Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 896, 901 (Tex. App.-Corpus Christi 1989, writ denied). We do not believe that to be the situation in the instant case. In our opinion, expert medical testimony is required in the instant case to establish that appellant's work activities caused or aggravated her condition because we do not believe that her condition is within the general experience and common sense of persons generally so that the trier of fact would be able to understand a causal connection between her condition and the employment based on common knowledge. We hold that the hearing officer's decision that appellant failed to show that her bunions and corns arose out of her employment to be supported by the evidence and that such decision is not against the great weight and preponderance of the evidence.

Appellant's second point of error is that the hearing officer erred in finding that appellant failed to show that the date she knew or should have known of the "industrial connection" of her condition was on or after (date claimant should have known of the work-related connection). The date of injury was added as an issue to be determined at the hearing upon respondent's request and upon the hearing officer's determination that good cause existed for the addition of such issue. Appellant does not complain about the finding of good cause for adding the issue, but asserts that the evidence showed she sustained disability on September 19, 1991, the day of her operation. The 1989 Act was generally effective on January 1, 1991. Article 8308-17.18. Under the 1989 Act, the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Article 8308-4.14. Appellant testified that she had known since 1988 that her foot condition was related to her employment. In light of that testimony, we cannot conclude that the hearing officer's finding concerning the date of injury to be against the great weight and preponderance of the evidence.

Appellant also asserts that the hearing officer erred in excluding an x-ray from evidence. We disagree. The x-ray was offered for the purpose of showing the extent of appellant's injury and did not have any interpretive medical report accompanying it. Respondent objected to the introduction of the x-ray on the grounds that it had no applicability to the issues to be determined and that an expert would be needed to interpret

the film. The hearing officer sustained the objection. Ordinarily, in order to obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, appellant must first show that the trial court's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. App.-San Antonio 1981, no writ). Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983. writ ref'd n.r.e.). In this case, respondent did not dispute the fact that appellant had a foot condition that required surgery, but disputed the claim based on the date of injury and whether the condition was work related. The x-ray did not bear on either issue. Moreover, medical records had already been admitted into evidence which described appellant's condition and the surgery required to correct the condition. Furthermore, without interpretive medical commentary the x-ray would be of little benefit to the trier of fact in assessing what is shown by the x-ray. Appellant's contention regarding exclusion of the x-ray is overruled.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge