APPEAL NO. 92241

On April 28, 1992, a contested case hearing was held in (city), Texas, to determine the extent of the claimant's injuries from a work-related accident and the period for which temporary income benefits (TIBS) were due. (hearing officer) presided as the hearing officer. The claimant, (claimant), appellant herein, contended that her work-related accident of (date of injury), caused a new back injury or aggravated her existing back injury, and that she was entitled to further TIBS from July 23 or August 30, 1991. Respondent, the employer's workers' compensation insurance carrier, contended that the accident of (date of injury), was confined to appellant's left knee, and that she was not entitled to TIBS after July 22, 1991.

The hearing officer determined that appellant did not sustain a compensable injury to her back on (date of injury), and that she was not entitled to workers' compensation benefits for her alleged back injury under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer further determined that appellant sustained a compensable injury only to her left knee; that disability due to her left knee injury ended on July 22, 1991; and that she was paid TIBS through July 22nd. Accordingly, the hearing officer determined that additional TIBS are not now due appellant for her left knee injury, but ordered that any future workers' compensation benefits relating to appellant's left knee injury are payable if and when due.

Appellant contends that the hearing officer erred in finding that (1) appellant did not introduce any evidence that causally connected her back injury to the on-the-job accident of (date of injury); and (2) appellant did not introduce any evidence that she had disability after July 22, 1991. Appellant also contends that the hearing officer erred in excluding from evidence a magnetic resonance imaging (MRI) report. Respondent did not file a response.

DECISION

Determining that the hearing officer's finding that appellant did not introduce any evidence that causally connected her back injury to the on-the-job accident of (date of injury), to be in error, and further determining that the hearing officer's finding that appellant did not introduce any evidence that she had disability after July 22, 1991, to be in error, we reverse and remand.

Appellant testified that she had been working for (employer), for just a few weeks when on (date of injury), she slipped on a tray while carrying two plants and fell on her knees on a concrete floor. A coworker gave a statement that, while she did not see appellant fall, she did help her up. Respondent does not dispute that the accident occurred as claimed. Appellant said that the next day she reported to her employer that her left leg hurt and that her employer referred her to (Dr. C), whom she saw that day. The parties stipulated that (Dr. C) was appellant's initial treating physician. She complained to (Dr. C) of left knee pain and he diagnosed a contusion of the left knee. He released her to return to work on July 15, 1991. Appellant was then seen by (Dr. S) on July 16, 18, and 19, 1991. (Dr. S)

practices at the same clinic as (Dr. C). It is not clear whether appellant was referred to (Dr. S) by (Dr. C) or whether (Dr. C) was not available to see appellant on July 16th, 18th and 19th so she saw (Dr. S) instead. She complained to (Dr. S) of left knee pain and numbness in her left leg, and (Dr. S) also diagnosed a contusion of the left knee and released appellant to return to regular work on July 22nd. Appellant said that (Dr. H), who had treated her for back and knee pain she sustained when she fell on her knees at a shopping mall in January 1991, gave her a note to stay home and rest her leg on July 23rd. That note was not in evidence. Appellant said that she did not experience back pain at work prior to her fall on (date of injury), and that it was not until a month or two after her fall that she started having back pain and that she then reported that pain to (Dr. C). (Dr. C) records showed that appellant first complained of back pain to him on August 20, 1991. In a note dated August 30, 1991, (Dr. C) noted that appellant complained of persistent pain in the area of the left calf and popliteal fossa, and advised her to stay off work for an additional week while further studies were pending. According to Dorland's Illustrated Medical Dictionary, 27th Edition (W. B. Saunders Company 1988) p. 657, "popliteal fossa" is the depression in the posterior region of the knee. All tests performed on appellant's left knee, including an x-ray and an MRI were reported as negative by (Dr. C). In a report dated April 15, 1992, relating to his treatment of appellant for her accident of (date of injury), (Dr. C) diagnosed appellant's condition as "1. Spondylosis lumbar spine aggravated by fall; 2. Contusion left knee." He noted that an MRI of appellant's lumbar spine taken in September 1991 demonstrated a bulging disc at L4-5 and L3-4. Appellant said that she believed her back condition was affected by her fall on (date of injury). She also said she has swelling in her left knee after she walks for 15 or 20 minutes and that she can not bend down.

Appellant further testified that in addition to her previous injuries from her fall at the mall in January 1991, she had also sustained a back injury in a work-related accident while working for another employer in 1988. An MRI of the lumbar spine done in 1989 was normal. Two medical reports were in evidence for the period between the January and (date) accidents. In April 1991, (Dr. B), a neurologist, examined appellant for low back pain and reported his impression as "S1 radiculopathy versus sciatic nerve irritation further out; in short, sciatica both clinically and electrically." He noted that the most common cause of sciatica is herniated nucleus pulposus L5-S1 with pressure on the S1 nerve root. In May 1991, (Dr. H) reported that he suspected that appellant had a herniated nucleus pulposus at L5-S1 and that she was in need of a CT scan of the lumbar spine to confirm that. He felt that appellant's back problem was a longstanding one and most likely due to her 1988 injury.

(Y E), who was the employer's office clerk at the time of the accident and who filled out the employer's first report of injury, testified that between the date of the accident and July 23, 1991, the date appellant was terminated for failing to return to work after being released to return to work by two doctors, appellant never mentioned any back pain. Appellant reported only an injury to her left knee.

At the hearing, appellant argued that, in addition to sustaining an injury to her left knee in her work-related accident of (date of injury), she also sustained a new injury to her

back or aggravated a preexisting injury. Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). Under the prior workers' compensation law it was held that an injury that aggravated a preexisting condition was compensable provided that an accident arising out of employment contributed to the incapacity. Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806, 807 (Tex. App.-Houston [1st Dist.] 1988, no writ). It was also held that the aggravation of a preexisting spondylothesis condition by a work-related accident was compensable. Oswald v. Texas Employers Insurance Association, 789 S.W.2d 636 (Tex. App.-Texarkana 1990, no writ); Texas Employers Insurance Association v. Thornton, 556 S.W.2d 393 (Tex. Civ. App.-Fort Worth 1977, no writ). The Appeals panel has held that under the 1989 Act the aggravation of a preexisting condition by a work-related accident is compensable. Texas Workers' Compensation Commission Appeal No. 92010 (Docket No. redacted) decided March 5, 1992. However, the claimant has the burden of proving that she was injured in the course and scope of her employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The testimony of a claimant alone may be sufficient to establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Company, 765 S.W.2d 394 (Tex. 1989).

In the instant case the hearing officer found that appellant did not introduce any evidence that causally connected her back injury to her on-the-job accident of (date of injury), despite appellant's introduction into evidence of (Dr. C) report of April 15, 1992, wherein he diagnosed "Spondylosis lumbar spine aggravated by the fall." Considering the report as a whole there is no question that the fall referred to was the accident of (date of injury). In addition, appellant testified that she believed her back condition was affected by her fall. We conclude that (Dr. C) diagnosis, as well as appellant's testimony, was some evidence causally connecting appellant's back injury to her work-related accident of (date of injury), and conclude that Finding of Fact No. 9 that appellant introduced no evidence on the matter of causal connection was made in error. Therefore, we reverse and remand the case for further development of the evidence, as appropriate, and reconsideration on the issue of the extent of the injury. In remanding the case, we recognize that pursuant to Article 8308-6.34(e) the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Our concern is the fact that the hearing officer must have completely ignored (Dr. C) diagnosis as well as appellant's testimony, in order to have reached his "no evidence" finding. We believe that this is borne out by the fact that the hearing officer failed to mention the "aggravated by fall" diagnosis in his statement of the evidence, and, in fact, gave only that part of the diagnosis relating to the left knee in Finding of Fact No. 8.

We also find merit in appellant's contention that the hearing officer was in error in making Finding of Fact No. 11 which is that appellant did not introduce any evidence that she had disability after July 22, 1991. Under the 1989 Act, "disability" is defined as the "inability to obtain and retain employment at wages equivalent to the preinjury wage because

of a compensable injury." It appears that the hearing officer totally ignored the August 30th note from (Dr. C) wherein he advised that appellant was to stay off work an additional week after noting appellant's persistent pain in the left calf and "popliteal fossa." We conclude that this was some evidence that appellant had disability from her knee injury of (date of injury) after July 22nd. Again, while we acknowledge the hearing officer's responsibility to weigh the evidence, we base our decision on the fact that the hearing officer must have totally disregarded the August 30th doctor's note in order to have reached his "no evidence" finding. We note that the hearing officer did not mention the August 30th doctor's note in his statement of the evidence. The trier of fact can not totally ignore the evidence of a workers' disability. *See* Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). Accordingly, we also reverse and remand for further development of the evidence, as appropriate, and for reconsideration on the issue of the period for which TIBS are due.

Finally, we find no abuse of discretion by the hearing officer in finding that appellant did not have good cause for failing to exchange the September 26, 1991, report on the MRI of appellant's lumbar spine with respondent in accordance with Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 142.13(c), and in excluding the report from evidence. To obtain reversal of a judgment based upon error of the trial court in the 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 the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. App.-San Antonio 1981, no writ). Appellant's counsel's representation that he thought he had exchanged the report did not amount to good cause. We do not reach the issue, as urged by appellant, of whether the exchange of such a medical report at the benefit review conference (BRC) would amount to good cause for failing to exchange it after the BRC because the question of whether the report was exchanged at the BRC was sharply disputed by the respondent at the hearing. Furthermore, the BRC report, which was in evidence, does not show that the report of September 26th was one of the medical documents considered by the benefit review officer in arriving at his recommendation, which would indicate that the report itself was not available at the BRC, notwithstanding the fact that appellant's attorney indicated at the BRC that diagnostic studies done after the date of injury indicated a herniated disc. We also note that error, if any, in the exclusion of the report was harmless in that the results of the September 1991 MRI were set out in (Dr. C) report of April 15, 1992, which was in evidence. Thus, the September 26th report was cumulative of other evidence on the same matter which was before the hearing officer.

The decision of the hearing officer is reversed and remanded for further development of the evidence, as appropriate, and for reconsideration not inconsistent with this decision. Pending resolution of the remand, a final decision has not been made in this case.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge