APPEAL NO. 92272

On May 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), appellant herein, was not injured in the course and scope of his employment, and denied him benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant disagrees with the decision, asks that we consider evidence not submitted at the hearing, and requests that we reverse the decision and render a new decision in his favor, or in the alternative, remand the case for another hearing. Respondent asserts that the hearing officer's findings are consistent with the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Appellant's position is that poor seating conditions at work contributed to his low back problem and that his low back problem constitutes a cumulative or repetitive injury. Since December 1988 appellant has been employed by the (employer). During the last several regular and special legislative sessions he worked many hours in excess of his regular work shift with few breaks in order to meet deadlines for bill analyses. Appellant said his work was very tedious work and done in front of a computer screen. Appellant and several of his coworkers described their office chairs as being old, worn-out, secretarial chairs with little or no back support, which were uncomfortable and which often broke and had to be repaired. They said they received the chairs because no other office wanted them. Appellant said that on Sunday, (date), his back became quite sore after he sat in one of those chairs and worked for 13 hours that day, and that he had to get up and stretch every 20 or 30 minutes towards the end of his shift in order to keep working. His back continued to hurt him, and on (date), after he sat in one of those chairs and worked for 16 hours his back became very painful again. Appellant said he thought he had a muscle spasm so he asked his doctor, (Dr. T), to refer him to a chiropractor. Medical records indicate that he was referred to (Dr. S)., who diagnosed "lumbalgia," noted the history of the low back pain as being associated with sitting long hours at a word processor, and recommended a conservative rehabilitation program. Appellant said that this treatment was not effective so he was referred to (Dr. M), who recommended a CAT scan. The CAT scan taken on August 22, 1991, showed a "small/medium size right/central L5-S1 HNP." Appellant said that (Dr. M) told him that he had a herniated disc and prescribed oral cortisone treatment which appellant said was also ineffective in relieving his back pain. Epidermal cortisone shots were also ineffective so (Dr. M) referred him to (Dr. D)., for consideration of back surgery. Appellant said he had a discectomy performed on October 7, 1991, and that he showed marked improvement following that surgery. While appellant testified that no doctor had told him that his back problem was definitely caused by the poor seating conditions at work, he said that (Dr. M) told him it was "definitely probable," and that other doctors said it was

"possible."

In signed written statements, appellant's coworkers confirmed that the chairs in the office were old, uncomfortable, and did not provide firm back support. They also confirmed that appellant worked long hours at the office. Appellant's supervisor during the Summer of 1991 stated in a signed written statement that appellant worked long hours during the Summer of 1991, that it was during that time period that appellant's back problems occurred, and that the chairs were old worn out secretarial chairs which were eventually replaced with new chairs. A picture of three of the old chairs and one new chair was introduced into evidence by appellant. Of the three chairs described as the old chairs, one is a straight back wooden chain, another is a padded office or executive type desk chair, and the third is a secretarial type chair. Appellant said he sat in all three old chairs at work, but used the secretarial chair the most until it broke in April 1991.

Appellant introduced into evidence an excerpt from an article entitled "Cumulative Trauma Disorders" issued by the (state) Department of Labor in which cumulative trauma disorders are defined as injuries to the muscles, tendons, bones, blood vessels, and/or nerves of the body that are caused, precipitated, or aggravated by repeated exertions or movements of the body. The article states that one of the conditions to avoid during work is working with back bent forward. An excerpt from another article entitled "Ergonomics" issued by the same department states that:

> Almost 50 percent of workers in the industrial world are thought to suffer from back problems, many of which originate from improper seating positions. Prevention of back problems from improper seating positions has come to be recognized as the most important phase in dealing with the problem.

The article goes on to state that "[i]t is most important that the chair give support to the lumbar region of the back." An excerpt from a third article, which appellant said was authored by (R M), states in part that "people with sedentary office jobs easily develop low back problems as they often sit with a rounded back for hours on end."

Letters from three doctors were introduced into evidence by appellant. In a letter dated January 17, 1992, (Dr. T) said that it is possible that long hours of sitting in a chair could contribute to a lumbar disc herniation. He noted that in studies of interdiscal pressure, it has been shown that the pressure is greatest when a person is bending forward and holding a weight, and that the second highest pressures are found when people are sitting. In a letter dated January 30, 1992, (Dr. M) noted that the mechanical pressure on the disc is greatest in the sitting position and not standing. He stated that "this prolonged flexed rotated position that occurred with him [appellant] created an increased pressure on his disc and certainly could set up a herniation." (Dr. M) added that the only requirements for this is to have a weak disc. He noted that it was important that appellant had no prior history of any significant back pain. In a letter dated December 12, 1991, (Dr. D) said that herniated discs can occur in many different settings including sitting, standing, lifting, bending, and twisting; that some patients will even herniate a disc with sneezing; and that it is, therefore,

impossible to identify exactly what causes it in any individual. He added that the history is the key component. In a follow-up letter dated February 27, 1992, (Dr. D) said that prolonged sitting in any chair can cause a disc to rupture, or, if the patient has a ruptured disc, that disc can become more symptomatic. He added that the sitting position tends to increase the intradiscal pressure, causing symptoms to become worse. (Dr. D) went on to state that:

> There has never been any literature that has shown that in any one particular individual sitting by itself will actually cause it to rupture. We don't know the exact cause of most disc ruptures, but we know certain activities that can make the symptoms worse. It is, therefore, impossible for anyone to say what might have caused this man's disc herniation. I (sic) can be said safely, however, that by prolonged sitting in a poor ergonomically designed chair that his symptoms could have been aggravated or exacerbated.

In Finding of Fact No. 7 the hearing officer found that "[t]here was no causal evidence to show that the Claimant's work caused his back problem." In the "Statement of Evidence" portion of the decision the hearing officer stated that "[i]n short, the Claimant's working conditions may have contributed to his back problem, but the evidence does not rise to the level of preponderance that it did so." Appellant asserts that Finding of Fact No. 7 is against the great weight and preponderance of the evidence, and that he did prove by a preponderance of the evidence that his working conditions contributed to his back problem.

A "compensable injury" means "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). "Injury" means "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm," and includes occupational diseases. Article 8308-1.03(27). The term "occupational disease" includes repetitive trauma injuries which means "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(36) and (39).

In order to recover workers' compensation benefits for a repetitive trauma injury the claimant is not required to prove that the injury was caused by an event occurring at a definite time and place. Aranda v. Insurance Co. Of North America, 748 S.W.2d 210, 213 (Tex. 1988). In the present case, appellant does not claim that his back problem occurred at a definite time and place, but instead claims that he sustained a cumulative or repetitious type of injury to his back as a result of sitting in old, worn-out, uncomfortable chairs that did not provide firm back support. In Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App. Houston [14th Dist.] 1985, writ ref'd n.r.e.), the court said that in order to recover for a repetitive trauma injury one must not only prove that repetitious, physically traumatic activities occurred on the job, but also prove that a causal link existed between these 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. In Davis, the claimant, a

flight attendant, testified as to the repetitious, physically traumatic activities inherent in her job: handling heavy carts and trash containers, twisting into awkward positions, and bending and twisting while trying to maintain balance in turbulent air. The claimant's doctor testified that these activities were reasonably likely to cause the claimant's pain, and that the activities were also a producing cause of her condition. In light of that evidence, the court held that the trial court abused its discretion in disregarding the jury's finding that the claimant suffered from an occupational disease and that the trial court should not have granted judgment *n.o.v*. In Texas Employers Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied), a repetitive trauma injury case, the claimant and her coworkers described the bending, twisting, and other types of maneuvers required to operate the low ironing board the claimant worked on and testified as to the problems caused by the manner in which the claimant had to operate the pedal and twist to hang items. The court held that the claimant's testimony and that of her coworkers was sufficient to establish a causal connection between the specific activities of her work and her lower back condition. The court said that the condition was within the general experience and common sense of persons generally, so that it was appropriate to allow the jury to know or anticipate that the condition could reasonably follow the specific events. The claimant's doctor confirmed that the claimant's work activities could cause a ruptured disc and aggravate such a condition if she had such a preexisting condition. In Standard Fire Insurance v. Ratcliff, 537 S.W.2d 355 (Tex. Civ. App.-Waco 1976, no writ), the claimant testified that she used her right knee to push against a lever to operate a sewing machine and that she experienced pain and swelling in the right knee where the knee pressed against the lever. The court said that the proof showed that the claimant's injury was caused by repetitious, physically traumatic activities which took place in the course of her employment; that is, by her having to constantly and repeatedly press her knee against the lever of the sewing machine.

The present case is distinguishable from the Davis, Ramirez, and Ratcliff cases in that in this case there is a distinct lack of evidence of repetitious, physically traumatic activities of the nature found in those cases. Appellant sat in old, uncomfortable chairs at work for long hours. Appellant has not cited any authority for the proposition that sitting in a chair at work, without more, constitutes repetitious, physically traumatic activities as contemplated by Article 8308-1.03(39) or as required by the above cited cases, and we have found no such authority in Texas case law. We note that in Texas Workers' Compensation Commission Appeal No. 92171 (Docket No. redacted) decided June 17, 1992, the appeals panel held that there was sufficient evidence to support the hearing officer's finding that the claimant sustained a repetitive trauma injury to his back as a result of driving his employer's logging truck. However, that case is distinguishable from the instant case in that the evidence showed that the poor condition of the truck's shocks and suspension resulted in the claimant's back being continually "beat" and vibrated over a period of several months. No evidence of a comparable nature was adduced in the instant case. In our opinion, appellant failed to prove that his back problem occurred as a result of repetitious, physically traumatic activities that occurred over time at work since there was no showing that repetitious, physically traumatic activities occurred on the job. *See* Davis, *supra*.

Were we to conclude that appellant's sitting at work constitutes repetitious, physically traumatic activities, or that appellant's claim of a cumulative back injury is a claim for an occupational disease other than a repetitive trauma injury, appellant would still have the burden to show that a causal connection existed between his employment and his injury. *See* Davis, *supra*; Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43, 45 (Tex. 1969). In cases in which a layman could, from his general experience and common knowledge, understand a causal connection between the employment and the injury, expert testimony is not required. *See* Ramirez, *supra*; Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). However, in cases where a layman would not, from his general experience and common knowledge, understand a causal connection between the employment and the injury, expert medical testimony is required. *See* Pegues, *supra*; Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ). In such cases, expert medical testimony showing a "reasonable probability" of a causal connection between the employment and the injury is sufficient to support submission of the issue to the trier of fact. *See* Hernandez, *supra*; Ramirez, *supra*.

In our opinion, a layman would not understand, from his general experience and common knowledge, how appellant's herniated disc resulted from merely sitting in a chair for long hours. We believe expert medical testimony is required to establish the causal connection between the sitting at work and the injury, and that such testimony would need to show a reasonable probability of a causal connection. The opinions of the doctors in this case that it was possible that long hours sitting in a chair could contribute to or aggravate appellant's lumbar disc herniation do not show a reasonable probability of a causal connection between appellant's employment and his injury. *See* Parker, *supra*. As stated in Parker: "A possible cause only becomes `probable' when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action." The fact that appellant's symptoms occurred during a period in which he was employed does not mandate the conclusion that his employment was the cause of his back problem. *See* Hernandez, *supra*.

Considering Finding of Fact No. 7 that there was no causal evidence to show that appellant's work caused his back problems, together with the hearing officer's statement that the evidence did not rise to the level of preponderance, it is apparent that from what evidence was presented at hearing the hearing officer determined that it was insufficient to show a causal connection between appellant's disc herniation and his employment. We conclude that the evidence was insufficient in the instant case to establish by a preponderance a causal connection between the employment and the injury, and therefore, affirm the hearing officer's determination that appellant was not injured in the course and scope of his employment. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

Appellant asserts that the hearing officer erred in excluding from evidence one letter he wrote to (Dr. D) asking for an opinion as to the cause of his back injury and two letters

he wrote to the respondent's claims representative concerning articles and doctors' opinions he had obtained. We find no error in the exclusion of these letters as they were not relevant to the issue at the hearing. 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.). The articles and the letters containing the doctors' opinions were admitted into evidence.

Appellant also asserts that the hearing officer violated Article 8308-6.34(b) by not advising him at the hearing that the medical documentation he introduced at the hearing was not sufficient. We disagree. Appellant had the burden of proof. From our review of the record, we conclude that appellant was given ample and fair opportunity to present his case, including the introduction into evidence of all medical evidence he desired to have considered. Moreover, appellant did not ask for a continuance in order to obtain additional medical evidence even after he heard respondent's position that it contested the sufficiency of the medical evidence as it related to causation. The hearing officer acts as an impartial judge of the facts and is not an advocate for any party.

Appellant attached to his amended request for review (which was timely filed) a letter from (Dr. D) dated June 16, 1992, and later filed a letter from (Dr. M) dated July 10, 1992. Neither of these letters were offered at the hearing nor made a part of the hearing record. Since our review of the evidence is limited to the record developed at the hearing, we decline to consider these letters. Article 8308-6.42(1); Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. redacted) decided April 27, 1992. We note that it appears that the information contained in the letters would have been available to appellant for presentation at the hearing if due diligence had been exercised. *See* Appeal No. 92092, *supra*. We further note that the letter from (Dr. M) could not be considered part of appellant's request for review as it was not timely filed with the request. Article 8308-6.41(a).

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I concur in the opinion above, except to the extent that it could be cited as a rejection of the proposition that prolonged sitting in a chair could be considered a repetitive trauma activity. The article submitted by the appellant from the (state) Department of Labor contains an entire page discussing that sitting in certain positions for prolonged periods of time could result in injury. While I agree that working for long hours and being provided only with uncomfortable chairs in which to sit does not *per se* prove a repetitious physical trauma, I would not reject out of hand the possibility that a repetitive trauma injury could result from sitting.

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Susan M. Kelley
Appeals Judge