

## APPEAL NO. 92340

A contested case hearing was held at (city), Texas, on July 2, 1992, (hearing officer) presiding as hearing officer. He determined that the respondent sustained a repetitive trauma injury on (date of injury), and awarded benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges error in the admission of medical reports and testimony, and argues the "record contains no evidence supporting damage or harm to the physical structure of the body as a result of a repetitious physical traumatic activity at work." No response was filed.

### DECISION

Finding the evidence does not support the decision reached by the hearing officer, we reverse and render a new decision.

The respondent worked as a dispatcher for the (city), Texas Fire Department. Although he had worked with the Fire Department in various capacities over the years, following back surgery in November 1988, he commenced duties as a dispatcher. Dispatcher duties consist of handling emergency calls and dispatching ambulances, fire and rescue personnel. Lengthy shifts necessitated long periods of sitting although there is a degree of movement in the area as the dispatchers wear head sets with some length of cord and take breaks.

The respondent states that approximately mid-January 1992 new chairs came on the floor to replace high back "lazy-boy" type chairs which "they had a problem with this chair, it caused injury so they decided to change." The respondent, and apparently others, did not like the new chair and voiced their opinion but nothing was done. Respondent testified the new chair was very uncomfortable, presented problems and caused his injury as a result of repeatedly having to use it to sit in. Respondent went to his "chief" on (date of injury) and told him "I can't tolerate this chair, we've got to do something about this chair." Respondent stated his "chief" did not give him "any hope of any kind of a compromise," and he, the respondent, did not go to work on (date) and stayed off work until June 28, 1992. He indicated his position for not going to work was a result of an injury at his employment.

A statement of Captain (GJ) dated (date) to Chief (MP) indicated that the chairs were causing back problems for some, if not the majority, of the dispatchers. Also in evidence was a short deposition of (Dr. C), which sets out in pertinent part:

Question 7. When is the first time you treated (respondent)?

Answer: November 1, 1988.

Question 8. What was the nature of the treatment to (respondent) commencing on

the date mentioned above?

Answer:Diagnostic testing.

Question 9.What was the date of injury with reference to the treatment in your answer to No.8?

Answer:March 18, 1988.

Question 10.Did you treat (respondent) on (date)?

Answer:Yes.

Question 11.Please assume the definition of repetitive trauma injury is 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 employer (sic)." Did (respondent) sustain a repetitive trauma injury?

Answer:Yes.

Question 12.If the answer to No. 11 is yes please answer this question. Did (respondent) sustain any disability from his repetitive trauma injury?

Answer:Yes.

Question 13.If the answer to No. 12 is yes then answer this question. When did (respondent's) disability begin?

Answer:Somewhere between mid-January and (date of injury).

(Ms. T), the workers' compensation manager for the employer testified that the chairs placed in the dispatch office in January 1992 were "ergonomically correct chairs" and that they were high back leather chairs. She stated the "guys" liked the old "lazy-boy" chairs but they were broken and people got hurt. She stated they did a lot of research and decided to buy the new ones.

Appellant introduced a report from (TC) hospital which showed the respondent was admitted "on 10/15/91 complaining of multiple weaknesses in the musculature, mid back pain, low back pain, neck pain extending into the trapezius muscles with also a lumbar radiculopathy." He was treated with serial manipulation under anesthesia and was to follow up in the doctors office on 10/23/91.

As indicated, the hearing officer found that the respondent injured his back by the

repetitive sitting in a chair while working as a dispatcher for the Fire Department. We cannot uphold this key finding on the evidence in the record.

An "occupational disease means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. The term includes other diseases or infections that naturally result from the work-related disease. The term 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 occupation disease. The term includes repetitive trauma injuries." Article 8308-1.03(36), 1989 Act. Repetitive trauma injury is defined as "damage or harm to the physical structure of the body occurring as the result of repetitious, physical traumatic activities that occur over time and arise out of and in the course and scope of employment" Article 8308-1.03(39), 1989 Act.

In Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex.App.-Houston [14th Dist] 1985, writ ref'd n.r.e.) the court indicated that to recover an for occupational disease caused by repetitious physical traumatic activities required by an employee's job, it must be proven not only that the activities occurred on the job, but also that there is a causal link existing between the activities on the job and the incapacity, that is, the disease must be inherent in that type of employment as compared with employment generally. The evidence in the case before us falls far short in making this essential linkage. Initially, we observe that sitting in a chair at work, as opposed to sitting in a chair at home or anywhere else for prolonged periods of time or sitting to drive a motor vehicle, has not been established as being inherent in the respondent's type of employment as compared with employment generally. That is, that the respondent's job activity of sitting in a chair for lengthy periods is not otherwise somewhat commonly experienced in employment generally. In this regard, we observe that the deposition of Dr. C, while opining that the respondent sustained a repetitive trauma injury during his employment, in no way related such to any work activity or any particular activity of the respondent at all.

It is recognized that expert testimony may not be required to make the critical linkage between employment and injury in situations where a layman could, from his general experience and common knowledge, understand the causal connection. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). However, in a situation as found in this case, we do not believe a layman could provide the necessary linkage that a debilitating back injury resulted merely from prolonged sitting in a chair at his job. Texas Workers' Compensation Commission Appeal No. 92272 (Docket No. redacted) decided August 6, 1992. Dr. C's deposition does not provide the necessary linkage as it is devoid of any etiology of the treatment of the respondent on "(date)," does not relate any injury to sitting at work and provides no "reasonable medical probability" as opposed to possibility, speculation or guess, of a causal connection between any injury and work-related activity. See Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1990); Hernandez v. Texas Employers' Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ).

In Appeal No. 92272, *supra*, the appeals panel reviewed previous cases concerning

repetitive trauma injury and observed that in those cases there was distinct evidence of repetitious, physical traumatic activity that resulted in the particular injury. In this case, as in Appeal No. 92272 involving prolonged sitting in an old, worn out chair at work, there is a distinct lack of such evidence. And, as was observed in that decision, no Texas case authority has been cited or found "for the proposition that sitting in a chair at work, without more, constitutes repetitious, physically traumatic activities as contemplated by Article 8303-1.03(39)." See also Texas Workers' Compensation Commission Appeal No. 92314 (Docket No. redacted) decided August 28, 1992 where a claimed repetitive trauma injury to the back was not found to have been causally linked to prolonged sitting while driving a truck.

In the case before us we are simply unable to find sufficient evidence to sustain the decision of the hearing officer. The evidence does not establish the essential linkage between the claimed injury and the work activity nor does it establish that what the respondent was exposed to at work is anything more than "an ordinary disease of life to which the general public is exposed outside of employment."

We have reviewed the other matters raised on this appeal and do not find, under the particular circumstances, an abuse of discretion on the part of the hearing officer in his rulings either admitting or excluding evidence. We do note that the respondent's failure to answer or return interrogatories sent to him by the appellant because he was "under a lot of pain" should have been examined more closely to establish if there was indeed a medical reason causing a medical basis for his failure. We caution that disregard for discovery rules and procedures cannot be taken lightly and can result in limitations on the introduction of evidence. See Texas Workers' Compensation Commission Appeal No 91049 (Docket No. redacted) decided November 8, 1991.

The decision is reversed and a new decision rendered that the respondent is not entitled to benefits under the 1989 Act.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Joe Sebesta  
Appeals Judge