APPEAL NO. 92593

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On September 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent, claimant herein, injured his back by falling while in the scope of employment and has disability that began on (date of injury). Appellant, carrier herein, asserts that the great weight of the evidence is contrary to this decision and points out that a witness who was not named was erroneously allowed to testify.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Claimant worked as a meat cutter for a large cafeteria chain for over 30 years. On (date), all parties agree that claimant was carrying a crate of chickens when he fell while working. He said that the floor was slimy and his feet went out from under him causing his back to hit the floor. Many employees were around and, immediately after the fall, his supervisor came to see how he was. He indicated that he took aspirin and went home early that day. He missed no work from the fall and saw his family doctor, Dr. G, two days after the fall for tiredness and depression, but said nothing about a fall or injury therefrom. He saw Dr. G at least four times in 1991 after the fall but said nothing about it or any kind of back or shoulder pain until May 5, 1992. Dr. G on May 5, 1992 wrote that claimant "sustained injuries to back and neck in a fall at work (date)."

Claimant during this period of time also had problems with his feet and indicated to his employer that he would need time off for surgery (similar to bunion surgery). There was evidence that claimant inquired whether the foot surgery could be handled under workers' compensation and was told that it could not. At the end of April 1992, as claimant was to begin a leave of absence to have surgery on his foot, he asserted that the fall in 1991 hurt his back, required medical care, and limited his ability to work. He testified at the hearing that he didn't tell his doctors or others of his continual back pain earlier because he was too "macho."

Carrier called three witnesses, two supervisors and another employee, who have worked with claimant. None said that he ever complained of back pain or the fall of (month year) beyond the day of the fall. One of the supervisors, Ms. G, was his boss in (month year) and had responded to the scene right after the fall; she said she inquired repeatedly for a week of how claimant felt, and he only said he had a stiff neck. One statement of another manager of a cafeteria, Mr. L, did say that claimant had told him his back was not feeling good in 1991.

Two MRIs dated May 29, 1992 and (date) show cord compression, bone spurs, degenerative disc disease, and bulging discs. Dr. G referred claimant to Dr. Z, a

neurosurgeon, who found limited range of motion in the back and objective evidence of back problems similar to that specified in the MRIs. He did not say that the claimant's injury at work caused or aggravated the back problem; he only says that claimant can recall no other accident, and he does not say that some type of accident was necessary to cause this type of problem. Dr. Z does indicate that he has no doubt that claimant's "pain has been getting worse with time." In a separate document, Dr. Z, on (date of injury), said that claimant should not work.

Claimant's wife was called to testify after claimant and carrier had rested. Her testimony was not offered in rebuttal and was given after she had been present throughout the hearing. She had never been identified as a person with knowledge of events and was not named in answer to interrogatories as a person who would testify. Under these circumstances she should not have been allowed to testify. *See* Article 8308-6.33(d) and (e) of the 1989 Act and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. § 142.13 (Rule 142.13). In this instance, her testimony was cumulative of that of the claimant and, while in more detail, was consistent with that of Dr. Z. With the other evidence before the hearing officer, we do not believe that the admission of her testimony of claimant's complaints of pain over a long period of time caused the rendition of an improper decision. The admission of this evidence was error but was not reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Following a number of cases that were developed under the prior worker's compensation law, Texas Workers' Compensation Commission Appeal No 92167, dated June 11, 1992, acknowledged that injury and disability can be supported by evidence of the claimant and other lay witnesses. The rationale often applied in such cases was not wholly met by claimant's actions, however. That rationale was reported in Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied), which said "[t]he lay proof of the sequence of events, his [the employee's] objective symptoms of pain and discomfort fortified by evidence of timely treatment, produced a logical, traceable connection between accident and result." Obviously from the facts related, timely treatment was in question. On the other hand, the appearance of the fall itself, the immediate discomfort coupled with supervisor's recollection of claimant's stiff neck later in the week provide a strong initial segment of the Daylin rationale. While the lengthy period without medical care raised bona fide questions upon which a trier of fact could have found an opposite result to the causation question, Dr. Z does inferentially address this delay by saying that claimant's pain from observable medical problems in his back would have gotten worse over a period of time. Dr. Z discusses trauma in relation to the back injury to an extent sufficient for the trier of fact to also infer that a fall such as claimant's could cause the medical problems observed. In this case a medical expert's opinion that the fall caused the back problem was not necessary. *See* Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist] 1987, no writ), which said that the need to have expert testimony to establish injury and disability is "a narrow one and is not to be applied unless the facts come strictly within it." The evidence of witnesses to the fall and the period immediately thereafter, the statement of Dr. Z, and the testimony of the claimant that the fall caused pain

to his back which continued and got worse provides a sufficient basis for the hearing officer to find a causal relationship.

Disability, just as injury, can be sufficiently supported by the testimony of the claimant. *See* Appeal No 92167, *supra*. The claimant said that he cannot work because of the fall. In addition, Dr. Z took claimant off work on (date of injury). Dr. Z's opinion as to claimant's ability to work is supported by the MRIs and Dr. Z's own description of claimant's spine.

Findings of Fact Nos. 8, 9, and 10 that state an injury occurred on (date), that it caused claimant's back, neck, and shoulder problems, and that this resulted in claimant's inability to work beginning on (date of injury), are sufficiently supported by the evidence. The decision and order are not against the great weight and sufficiency of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge