

## APPEAL NO. 92701

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). On November 5, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, did not have a compensable injury as a result of an abscess at T4, the infection was not related to claimant's injury of (date of injury) or of his surgery on August 28, 1991, and claimant was not entitled to benefits under the Texas Workers' Compensation Act.

Claimant contends that the hearing officer misapplied the facts, and the law, and contends he was healthy up to the time of injury and surgery and that certain medical records were not researched. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

### DECISION

The decision of the hearing officer is affirmed.

The issue unresolved at the benefit review conference (BRC) and framed at the CCH was:

Is the T-4 abscess, suffered by Mr. Lara, related to his injury of (date of injury)?

The facts of what happened are virtually undisputed. Conversely, the medical issues of causation are extremely complex with various medical experts having different views. It is undisputed that claimant, while employed by (state) Best Corporation, the employer herein, on (date of injury) while in the process of unhooking a double trailer, stepped in a hole and injured his back. Claimant testified he had been in good health prior to this accident and had recently passed a company physical in December 1990. Claimant called the employer on (date), the next work day, reported the accident, and saw the employer's doctor, (Dr. S). (Dr. S) took x-rays and prescribed pain killers and muscle relaxants. Claimant continued to see (Dr. S) until he had an MRI, at which time he was referred to (Dr. B). (Dr. B) referred claimant to Dr. Sawyer to "check (claimant's) nerves." Eventually, claimant had an operation on August 28, 1991 for what claimant describes as a "pinched nerve." The hearing officer found, based on the medical reports, that claimant underwent surgery for a herniated disc at L4-L5 by doing a compressive laminectomy. Claimant continued to have pain and (Dr. B) told him he would continue to have pain for some three or four months. Claimant testified in March 1992 he began having chest pains, which he had never experienced before, and his legs were very weak. Claimant thought he was having a heart attack. Claimant went to the hospital where he was seen by (Drs. S and B). Their initial diagnosis was cancer or a tumor in the back. He was apparently scheduled for radiation treatment and saw another doctor. The doctor he saw was perhaps a (Dr. S), but this is not clear because (Dr. S) was never identified. Whoever the doctor

was, he stated he wanted a bone scan before beginning treatment. The bone scan revealed claimant had a spinal infection, or abscess, at the T4 level. The abscess was treated by medication and claimant apparently has improved somewhat since the March 1992 spinal abscess diagnosis. Since that time claimant has seen several different doctors for opinions as to the causal connection between the T4 abscess and the August 28, 1991 surgery and/or the (date of injury) injury. Claimant testified he is still not well, has been unable to work, is very disturbed by the misdiagnosis, and is unable to understand where the infection came from if not from the August 1991 surgery or the (month year) injury.

(Dr. W) did a neurological consultation and by report dated 10/05/92 states "[t]his is a very complicated situation." After discussing the decompressive laminectomy and subsequent spinal abscess, (Dr. W) states, "I cannot find direct relationship between the two in that they did not occur in any area near each other. Moreover, he was not septic or did not appear to have infection in between, consistent with sepsis which could have resulted in one causing the other." (Dr. W), apparently in an effort to arrive at some cause and effect, speculated that if claimant "had been on steroids postoperatively", claimant's immune system might have been compromised. There was no evidence that claimant was on steroids postoperatively but claimant in his appeal alleges the records should have been "researched."

(Dr. St) of the South Texas Medical Clinics, Impairment and Disability Evaluation Center, by report dated October 16, 1992, discussed claimant's impairment at length but states the T3-4 paraspinal abscess ". . . was felt to be most likely due to the patient's original injury and/or complications of his diskectomy." (Dr. St) further quotes from a letter written by (Dr. S) to the carrier (but never introduced) as saying "[w]e cannot pinpoint exactly when the injured T3-T4 disc space became infected, but it is well known that these infections can be very slow to cause symptoms that bring the patient to medical attention." (Dr. St) states that the ". . . disc space infection was related to (claimant's) accident/surgery."

(Dr. H), who the hearing officer noted is with the (College) of Medicine, Department of Medicine and Microbiology-Immunology, was contacted by "[Dr. S] of (Hospital)" for a consultation. (Dr. H) submitted a detailed, eight page report dated October 12, 1992, including claimant's history and physical, and discharge summary from (Hospital) in (city), Texas. Regarding the "T3-T4 intervertebral disc space infection and osteomyelitis", (Dr. H) opined that "[t]he organism presumably got to the spinal column through the bloodstream. We did not identify what the organism was nor the source of this infection. I am, therefore, unable to shed any light on the origin of this infection as related to previous injuries, surgery or infections. I am sorry that I cannot be of any more help but this is often the nature of vertebral osteomyelitis in that the source is not documented."

(Dr. B), who in essence is the treating doctor and who performed the August 1991 back surgery, in a report dated July 22, 1992 states:

Spinal abscesses have many causes. When they are caused by diskectomy,

the abscess is in the immediate vicinity of the surgery. This was not the case at all with (claimant), nor were there any indications of infection in him during the recovery from lumbar surgery. However, an independent opinion obtained by TMF from an independent neurosurgeon has already informed your office that the T4 abscess "was for an entirely separate problem rather than from the work related back injury. . ."

(TMF) submitted a report dated August 25, 1992 from (LA), Director of Review. That report references (Dr. S's) opinion, (which was not in evidence), and (Dr. B's) report. In discussing the medical opinions, facts, and rationale, Ms. Anderson states, "[i]nterspace infections following surgery would be expected to occur at or immediately adjacent to the operative site (meaning the L4-5 area) and not at some distant site, such as in the upper thoracic spine area." The TMF report goes on to state:

The accepted time from initiation of the infection and the onset of symptoms is somewhere between two to six weeks and at the very longest might be as long as two months. There is no way that I can conceive that an infection associated with the surgery on the 28th of August of 1991 would not have been symptomatic or shown changes long before early March of 1991 (sic).

The report concludes:

It is therefore my opinion that the hospitalization and subsequent surgery in March of 1992 are unrelated to (claimant's) back injury on the (date of injury) of (month) of (year).

The hearing officer, as evidenced in his detailed discussion, carefully reviewed and considered all of the medical reports submitted and the arguments presented at the CCH. Based on the evidence the hearing officer found that there was no causal relationship between the spinal infection at the T4 level and either claimant's (date of injury) injury or the August 28, 1991 surgery at the L4-L5 level. Claimant's appeal argues that since claimant was healthy before the (month year) injury and the August 1991 surgery, it would follow that his current problems with the spinal abscess were related to the injury and/or surgery, that additional research should have been done to determine whether claimant had been given postoperative steroids as speculated in (Dr. W's) report, and that insufficient weight was given to (Dr. St's) report which adopts (Dr. S's) statement that the type of infections claimant had can be "very slow in developing." Carrier in its response submits, as newly discovered evidence analogous to Article 8308-5.31(a), a follow-up report from (Dr. W), in which he refutes his prior speculation of postoperative steroid use. We note (Dr. W's) follow-up visit was apparently on October 15, 1992 and the CCH was November 5, 1992. In our opinion, without evidence as to when the report was dictated or prepared, carrier has failed to show that its failure to obtain this report before the CCH was not owing to want of diligence, and hence will

not be considered by us. See Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992.

Claimant emphasizes his prior good health and implies the abscess must be due to the injury and/or surgery. In complex medical cases, including those regarding causation of medical conditions, the Texas Supreme Court has held: "It is our view that such occurrence, or not, is a question of science determinable only from the testimony of expert medical professionals. (Citations omitted). Causal connection in such a fact situation must rest in reasonable probabilities; otherwise, the inference that such actually did occur can be no more than speculation and conjecture." Insurance Company of North America v. Meyers, 411 S.W.2d 710, 713 (Tex. 1966). Claimant's allegation is without merit.

We note, and the 1989 Act in Article 8308-6.34(e) provides, as we have repeatedly held, that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. See Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. In this case, there is some evidence which would support either of the claimant's or carrier's positions. (Dr. H), the immunological specialist, said he could not tell how the infection occurred. (Dr. B), the treating physician, and the TMF report strongly reject any connection between the infection and the accident and/or surgery. Only (Dr. St), adopting (Dr. S's) language, agrees there is a connection between the abscess and injury/surgery. Any conflicts or inconsistencies in the medical evidence are matters to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). The hearing officer also judges the weight to be given expert medical testimony and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. See Texas Workers' Compensation Commission Appeal No. 92056, decided April 3, 1992 citing Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we be warranted in setting aside the hearing

officer's decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio, 1983 writ ref'd n.r.e.). Applying these standards of review, we conclude that sufficient evidence exists to support the hearing officer's findings and decision.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Lynda H. Nesenholtz  
Appeals Judge