APPEAL NO. 93560

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on June 22, 1993, (hearing officer) presiding, to determine whether the appellant's (claimant) current back problems were causally related to her (date of injury), injury, and what periods of disability she had after she stopped working in June 1991 for the employer she was working for when injured. Finding, among other things, that "claimant's testimony and that of her roommate did not rise to the level of professional knowledge required to make a connection between the injury and the current problems," the hearing officer concluded that claimant's current back problems are not causally related to her (date of injury), injury, that she has not had disability since January 1, 1993, and that she is not entitled to temporary income benefits (TIBS). Claimant's request for review, in essence, challenges the sufficiency of the evidence to support the hearing officer's adverse determinations. The respondent (carrier) has replied urging the sufficiency of the evidence to support the decision and seeking its affirmance.

DECISION

Being unable to conclude that the hearing officer based his decision upon a correct application of the law, we reverse and remand.

Claimant testified that she was working as a grocery bagger and carry-out person for (Employer A) when she hurt her back on (date of injury), as she lifted a 40 pound bag of dog food from a grocery cart. After her injury, which was not disputed, claimant said she was off work for approximately six weeks and was paid TIBS for the period after her injury through March 31st, that she returned to work, that she was paid additional TIBS for the period April 16th through May 21st when she was again off work, and that she continued to work for Employer A from May 22nd through June 17th when her employment terminated. Carrier's record showed claimant was paid benefits from January 22nd to March 31, 1991, and from April 16th to May 21, 1991. She said she missed no time from work with Employer A due to her injury after returning to work on May 22nd. Claimant stated that on June 17th she was terminated by Employer A and approximately one week later commenced working for (Employer B) first as a dog bather and later as a cashier until December 31, 1992, when she was terminated for cause. She said she missed no time off due to her injury while working for Employer B, except for thrice weekly one hour periods from late July 1992 to September 1992 when she received chiropractic treatments. She was never asked nor did she indicate whether at any time after her injury her wages were less than her preinjury wages as a result of her injury. *See* Article 8308-1.03 (16). Claimant stated she seeks TIBS only from and after January 1, 1993, and that she has not attempted work since that date because her pain would prevent her from working.

Claimant further testified that on the day of her injury she commenced treatment with (Dr. C). Dr. C's records indicate he diagnosed lumbosacral strain and treated her with medications and physical therapy (PT). Claimant said that Dr. C later referred her to an

orthopedic surgeon, (Dr. T). Dr. T's March 26, 1991, report stated that a CT scan was read to show some disc bulging which he did not find "impressive" and felt was "normal." The March 21st CT scan report showed minimal to mild central annular bulging at the L4-5 and L5-S1 levels without significant mass effect. Dr. T's impression was "low back pain," and he released claimant to return to work. On April 16, 1991, Dr. T took claimant off work and started her on a PT program. Dr. T's records reflect he kept claimant on the PT program until May 16, 1991, when he intended to release her to return to work. Claimant testified that she was released to return to work at full duties on May 21st. Dr. T next saw claimant on April 28, 1992, when she reported increasing back and buttock pain over the previous six weeks. Dr. T felt her symptoms may be aggravated by her work and suggested she be fitted with a back support. On March 24, 1993, claimant called Dr. T who referred her to Dr. Neely for another opinion.

She said she began chiropractic treatments with (Dr. F) on July 27, 1992, stopped them for financial reasons in September 1992, and has not seen a doctor since that time. She also said that when she contacted the carrier about further treatment, she was told her file was closed. We note that the 1989 Act provides for an injured employee to have all health care reasonably required by the nature of the compensable injury as and when needed. Article 8308-4.61(a).

Claimant's friend, SD, testified she had taken claimant to the minor emergency clinic on the day of her accident at work, that she was unaware of claimant's having had another accident or reinjuring her back, that claimant has had pain daily since her accident, and that she has attempted to obtain further medical treatment.

The disputed issue unresolved at the Benefit Review Conference was "whether the claimant's current back problems are causally related" to her compensable injury of (date of injury). At the suggestion of the carrier, and with the parties' subsequent consent, the hearing officer added disputed issues concerning whether claimant had any disability after May 21, 1991, and if so, for what periods, and to what TIBS payments, if any, is claimant entitled. Notwithstanding this articulation of the additional disputed issues by the hearing officer on the record, he stated in his Decision and Order that an additional disputed issue was whether claimant had any disability "since January 1, 1993." This statement of the disability issue may have been prompted by claimant's testimony that she worked for Employer B to the end of 1992 and was seeking TIBS from and after that date. The carrier had averred, again without contradiction by claimant, that the statutory 104 week period to reach maximum medical improvement (MMI) would have run on January 22, 1993. This averment had obvious reference to the provision in Article 8308-1.03(32)(B) that MMI is reached after the expiration of 104 weeks from the date income benefits begin to accrue. For entitlement to TIBS, claimant must not only have disability as defined by Article 8308-1.03(16), but must also not have reached MMI. *See* Article 8308-4.23(a).

With respect to the issue of disability, the hearing officer concluded claimant has not "sustained" disability since January 1, 1993. In support of that conclusion, the hearing officer found that claimant claims disability from January 1, 1993, and indeed that is how she explicitly testified. However, the hearing officer then found that claimant did not provide any medical information to show she had disability on and after that date. While that finding may be an accurate assessment of the evidence, we are concerned the hearing officer may have misperceived that medical evidence is required to prove disability. We have often held that disability may be proven by the testimony of the claimant alone and that objective medical evidence is not required. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992; Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992; Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992; and Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. While doctor's reports returning claimants to work are evidence to be considered on the issue along with the claimants' testimony and other evidence, they do not, in and of themselves, effectively end disability. *See* Texas Workers' Compensation Commission Appeal No. 92206, decided July 6, 1992.

Respecting the issue of whether claimant's current back problems are causally related to her (date of injury), injury, we have a similar concern for the hearing officer's requirement of medical evidence and, in contrast to the disability issue, his discussion leaves little doubt about his perception. In the Statement of Evidence portion of his Decision and Order, the hearing officer states:

"The Claimant has the burden of proving, through a preponderance of the evidence, that her current back problems are causally related to the injury of (date of injury). Her testimony and that of her roommate do not rise to the level of professional knowledge required to make a connection between the injury and the current problems.

Where the matter of causation is not in an area of common experience, as is the situation under the facts of this case, expert or scientific evidence can be essential to satisfactorily establish the link or causation between the work related incident and the claimed disability.

There must be proven a link between employment and an ultimate disability or disease, and the mere possibility that such a causal connection exists is not sufficient. Scott v. Liberty Mutual Insurance Co., 204 S.W. 2nd 16 (Tex. Civ. App.-Austin 1947, writ ref'd n.r.e.)

Expert testimony may be required where a claimant alleges that employment caused a disease and the fact finder lacks ability, from common knowledge, to find a

causal connection. Parker v. Employers' Mutual Liability Insurance Co. of Wisconsin, 440 S.W. 2nd 43 (Tex. 1969)

In this case the most recent medical information about the Claimant's condition is a one page listing of computer codes showing a "date of onset" as "(date)."

There might well be a causal connection between the injury and the Claimant's current injury. However, absent any current or even recent medical evidence of that factor, the Claimant cannot prevail. There must be some expert medical testimony to establish a causal link between the injury and a subsequent disease when the matter, as here, is not within common knowledge. The Claimant did not show that there is a causal relationship between her injury of (date of injury), and her current back problems.

The hearing officer went on to find that the testimony of claimant and her roommate did not rise to the level of professional knowledge required to make a connection between the injury and the current problems, that the most recent medical information concerning her condition is a one page computer code printout showing a "date of onset" of "(date)," and that claimant did not show there was a causal relationship between her injury of (date of injury), and her current back problems.

We do not decide whether there was sufficient evidence to support the hearing officer's conclusion that claimant's current back problems are not casually related to her injury of (date of injury), because we believe the hearing officer misperceived the law as requiring that claimant prove the causation of her current back problems with expert medical evidence. While the absence of medical evidence linking claimant's current back problems to her compensable injury could certainly be appropriately considered by the hearing officer in weighing all the evidence on the issue, we are unaware of a requirement that back injuries be proven by expert medical evidence.

Our decision in Texas Workers' Compensation Commission Appeal No. 91022, decided October 3, 1991, is instructive. There the claimant contended he injured his back and legs on the job lifting a gas cylinder from the back of a pickup truck and the carrier asserted the absence of medical evidence to support the finding that the claimant sustained an injury. In citing Texas Employers' Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. App.- Houston [1st Dist.] 1981, writ ref'd n.r.e.), we observed that the Thompson court "stated that the law is fairly well settled in Texas that, as a general rule, the trier of fact may accept or reject medical testimony in whole or in part, and that issues of injury and disability may be established by testimony of the claimant and other lay witnesses, notwithstanding the fact that such lay testimony is contradicted by the unanimous opinions of medical experts, and cited several cases supporting this proposition. The Court also stated that, usually, the testimony of medical experts is considered the only probative evidence where

the case deals with the cause, progression and aggravation of disease, and particularly cancer, citing Houston General Insurance Company v. Pegues, 514 S.W.2d 4298 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.)." We then said that "[b]ased on the cited authority, we disagree with appellant's implied assertion that medical evidence was necessary to support a finding of injury in this case."

See also Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992, a case involving a repetitive trauma back injury to a delivery truck driver, where we did not find the facts to fit the "narrow exception" requiring expert testimony, namely, where the claimant asserts that the injury caused or aggravated cancer or a disease, or where an injury to a specific part of the body is alleged to have caused damage to another, unrelated part of the body." And *see* Texas Workers' Compensation Appeal No. 92160, decided April 27, 1992, where expert medical evidence was not required to prove a back injury which manifested itself several months after surgery for a compensable hernia injury.

Compare Texas Workers' Compensation Commission Appeal No. 92085, decided April 16, 1992, where the claimant failed to establish a reasonable probability of causation between her employment and her disease (hepatitis C); Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992, a case involving an inguinal hernia and the lack of medical evidence of a causal connection with the work activity; Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992, a case involving alleged "noxious fumes" in the work place; and Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992, a case involving the work relatedness of bunions and corns and the necessity for medical evidence.

Although we have held that, in the proper set of circumstances, unnecessary findings may be appropriately disregarded (Texas Worker's Compensation Commission Appeal No. 91109 (Docket No. AU-A061449-01-CC-AU41) decided January 21, 1992), we can not resort to that ruling in this case where it is apparent that an erroneous standard and/or application of the law likely occurred. This is buttressed by the state of the evidence as discussed above.

Inasmuch as the decision appears to be on the wrong footing, we are compelled to reverse and remand for further consideration, not inconsistent with this opinion, and, if deemed necessary by the hearing officer, development of evidence.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later that 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See*

Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

DISSENTING OPINION

I respectfully dissent. I would affirm the decision of the hearing officer under the particular circumstance of this case. I readily agree with the majority opinion in indicating that cases are legion which hold that lay testimony alone can establish an injury and can also be sufficient to establish the necessary linkage between an injury and the employment. That said, situations can arise where linking an injury that normally might be considered within common experience and general knowledge of a lay person becomes a matter needing professional or expert medical opinion. The hearing officer here made clear that the particular facts of this case gave rise for the need of professional or expert opinion. True, the case involves a relatively common back injury occurring on (date of injury). The problem with which the hearing officer was confronted was a claim that the current asserted back problem almost two year later was causally connected to the earlier injury. The intervening circumstances occurring during the two year period which are particularly important here are: (1) the claimant's continued employment in a new job from June 17, 1991, until her termination at the end of December 1992, a period over one and a half years, (2) the hiatus of over a year during which there was no medical treatment being rendered, (3) after almost 11 months of not seeing a physician, the claimant saw her original treating doctor and indicated she was experiencing increased back pain over the previous 6 weeks, and (4) her doctor, in April 1992, indicated that her back was possibly being aggravated by her job and he recommended a back brace. These circumstance, I believe, led the hearing officer to conclude that expert medical testimony was necessary to provide the critical linkage of the current back problem with the two year old incident. I do not read, and would not endorse, his Decision and Order to indicated that a back injury, per se, requires expert medical evidence to establish linkage: only, when the unique circumstances take it out of the realm of common knowledge and experience. Appeals Panels have previous held that

a back injury or condition that is asserted to have arisen from employment requiring long period of sitting may need expert medical evidence to prove the necessary linkage for a compensable injury. Texas Workers' Compensation Commission Appeal No. 93461, decided July 19, 1993; Texas Workers' Compensation Commission Appeal No. 92272, decided August 5, 1992; Texas Workers' Compensation Commission Appeal No. 92340, decided September 3, 1992. I believe the same rationale applies to the unique circumstance in this case as determined by the hearing officer.

Stark O. Sanders, Jr.
Chief Appeals Judge