APPEAL NO. 93577

Pursuant to 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 8, 1993, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) injured her right foot in the course and scope of her employment on (date of injury), that she aggravated her compensable injury on (date), that her foot conditions of "Morton's neuroma" and "causalgia syndrome" were compensable injuries, and that she had disability based on her compensable causalgia from January 22, 1993, to the date of the hearing. Appellant (carrier) appeals urging error in the admission of an untimely exchanged doctor's report, in the hearing officer's finding that the claimant's foot problems were related to the (date of injury) accident, in the hearing officer's finding that the claimant suffered disability after January 18, 1993, and in the hearing officer's finding that the claimant sustained a second injury on (date), since it was not an issue at the hearing. Claimant asks that the decision of the hearing officer be affirmed.

DECISION

Finding error in the findings and conclusions of the hearing officer, we reverse and remand.

It was not disputed that the claimant suffered a compensable injury on (date of injury), when she slipped and fell on a wet floor landing on her right side. Although there was some conflict in the evidence on this point, the claimant asserts that she injured her entire right side from her shoulder to her foot. The most immediate injury turned out to be to her knee which eventually required arthroscopic surgery in October 1992. Claimant states that although she was having foot pain and told her doctor about that, he was more concerned with getting the knee injury resolved. (The first medical reports addressing a foot problem were rendered in December.) In any event, the foot problem continued, was diagnosed as being "Morton's neuroma," which was excised in December 1992, a procedure apparently approved by the carrier. The claimant continued to experience considerable foot pain but was returned to work in mid January 1993. The second day back she states that as she was mopping she felt a terrible pain, "like something was torn," and she was not able to continue working. She subsequently saw several doctors who rendered somewhat different opinions. Her treating doctor, (Dr. T) indicated a diagnosis of a recurrence of "Morton's neuroma," a carrier selected doctor, (Dr. L) mentions "hypertrophic scarring has an excellent chance that it is causing more impingement on the nerve than before" and recommended a diagnostic injection followed, if indicated, by "a re-exploration and re-excision," and a referral doctor, (Dr G), seen by the claimant but refused by the carrier, who rejected the diagnosis of neuroma and gave an assessment of "probable causalgia syndrome right foot," and indicated the claimant could not work. None of the medical reports specifically relate the right foot problem to the earlier on-the-job injury. However, the carrier requested doctor states that it is probably not related to the "job accident related to the knee" and observes, in so stating, that the claimant "has no history of a specific incident involving the foot and Morton's neuroma is one of chronic difficulties of being on one's feet and her primary cause for her Morton's neuroma is probably her weight."

The hearing officer, pursuant to request, took official notice of *The Merck Manual of Diagnosis and Therapy*, 16th edition, 1992, and *Dorland's Illustrated Medical Dictionary*, 27th edition, 1988. Definitions in these references generally indicate that neuroma and causalgia may result from injury or trauma.

At the outset, the parties agreed that the only two issues before the hearing officer where whether the claimant's compensable injury of (date of injury) caused her present foot condition and, if so, whether the claimant has disability. As part of the claimant's case, she introduced a report from Dr. G, which had not been exchanged with the carrier until four days before the hearing. It was admitted by the hearing officer, over objection, upon a finding of good cause for not exchanging the document earlier. The claimant testified that she had only gotten the report the same day she "faxed" it to the carrier. She stated she had repeatedly requested the report, which was signed on May 11, 1993, but apparently had been told it was not ready to be sent. She stated they finally faxed it to her because "they couldn't have it ready in time for me." She provided a copy to the carrier as soon as she got it. The hearing officer found this set of circumstances to be good cause for the untimely exchange. The carrier urges on appeal that this was error and argues that since the report was apparently signed on May 11, 1993, the claimant did not establish diligence on her part and that she might have gone to the doctor's office to pick up a copy. We do not find merit to this claim of error and find sufficient support for the hearing officer's determination of good cause. As we stated in Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991, "[t]he appropriate test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence as an ordinary prudent person would have exercised under the same or similar circumstances." And, the determination of good cause is a decision best left to the discretion of the hearing officer. In Appeal 91009, *supra*, there was an exchange made the same day as the hearing where the offering party had only received the document that day from a distant location and because the witness could not appear, we stated that "[a]lthough the showing in this case appears minimal at best, we do not find it so lacking as to conclude the hearing officer abused his discretion in accepting the evidence." (citations omitted).

The carrier asserts that the claimant failed to prove a causal relationship between her foot problem and the accident of (date of injury), and that the hearing officer erred in finding a relationship. Carrier also complains that the hearing officer determined an issue clearly not before her, namely, that the claimant suffered an aggravation of (which can be an injury in its own right) her (date of injury), injury on (date), which caused the claimant's current condition of causalgia syndrome, also a compensable injury. We find merit in these assertions of error which causes us to reverse and remand. While it is generally accepted that an aggravation of a preexisting injury can give rise to and become a compensable injury, that was not the issue at the hearing, was not the theory advanced by either party and but for a passage in the claimant's testimony, was not a part of the evidence in the case. In this latter regard, the claimant stated that on the second day back at work and while performing her usual mopping duties, she "felt like something had torn" in her foot and she "couldn't walk no more." (Not being an issue, this was not further developed and as is apparent in Texas Workers' Compensation Commission Appeal No. 92463, decided

October 14, 1992, the matter can be a close factual question as to whether an injury is continuing to manifest itself or is a "new" aggravation injury). In her decision, the hearing officer determined this to be an aggravation of the claimant's (date of injury) injury and that such aggravation together with the (date of injury) injury caused the causalgia syndrome, the claimant's current compensable injury. We have held that whether a compensable injury is an aggravation of a previous injury and an injury in its own right or merely the continued manifestation of the original injury is a question of fact for the fact finder. Texas Workers' Compensation Commission Appeal Nos. 92654 and 92655, decided January 22, 1993. Of course, where the carrier changes between the two events, the matter becomes more critical. That is not the situation here. However, as in the case before us, where the hearing officer bases a decision, to some significant degree, on an issue that a party has not been given any opportunity to offer evidence, refute or otherwise answer, corrective action may be necessary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (TWCC Rule 142.7) covers the statement of disputes before a contested case hearing and does not provide for the consideration of or a determination on an issue by the hearing officer acting alone. Of course, one of the reasons behind having issues stated and known is to give affected parties notice of what they must meet or defend against. While we recognize that the hearing officer's findings traced back to the injury of (date of injury), clearly she embraced the subsequent aggravation, and her finding thereon, as leading to the causalgia syndrome that resulted in the "claimant's present condition." We cannot determine from the state of the record if this aggravation issue can be severed from the stated issue and still result in the same determination. If, on remand, the matter of aggravation is to be adjudicated, then the parties should be given the opportunity to present necessary and desired matters.

Also of concern to us in this case is the state of expert medical evidence linking the current foot condition (causalgia syndrome) to the injury of (date of injury). We do not find any reference to casual connection in the various medical records in evidence save the report of Dr. G who commented that it would appear that the foot condition was not related to the job accident related to the knee. In so commenting, Dr. G twice references "no history of a specific incident involving the foot" and "no incident involving her foot." This tends to indicate to us that he may not have been aware of the events surrounding the initial accident. However, Dr. G does state the "the nature of a Morton's neuroma is one of chronic difficulties of being on one's feet and her primary cause for her Morton's neuroma is probably her weight." At best, this tends to confuse the relationship of the accident and the foot condition, particularly when the other evidence on the matter is considered, that being the hearing officer's notice of the several definitions from medical treatises which indicate that the conditions of Morton's neuroma and causalgia can find their inception in injury or trauma. This state of the medical evidence does not allow us to make an informed decision in passing on the correctness of the hearing officer's determination that link the foot condition to the (date of injury) accident. And, given the technical and complex medical condition surrounding the foot condition and its causes and effects, we are unwilling to determine it is a matter of common experience or that it is something that lay testimony is competent to establish for purposes of meeting the necessary casual relationship. While lay testimony alone can be sufficient to establish the occurrence of an injury in the course and scope of employment, expert medical opinion may be required to establish causation where the injury

or illness is not an area of common experience. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Hernandez v. Texas Employers' Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ); Texas Workers' Compensation Commission Appeal No. 93358, decided June 23, 1993; Texas Workers' Compensation Commission Appeal No. 93032, decided February 26, 1993; Texas Workers' Compensation Commission Appeal No. 92269, decided August 5, 1992. Under the circumstances present in this case, including the various opinions as to the nature of the claimant's foot problem, the length of time before the foot problem became a matter of medical concern following the accident (*see* Texas Workers' Compensation Commission Appeal No. 92108, decided May 8, 1992) and the limited value of a general, unexplained, and unfocused definition from a medical treatise to determine causation, we conclude that the evidence needs further development to enable an informed decision. *See generally* Texas Workers' Compensation Commission Appeal No. 93464, decided July 12, 1993, where we rejected general descriptions of side effects of various drugs from the Physician's Desk Reference to establish such occurred in the claimant.

Because of our reversal and remand as set forth above, and because the remaining claim of error, that is, whether the claimant suffered disability after January 18, 1993, depends on the resolution of the above matters, the issue of disability must be readdressed to accord with any potential new determinations by the hearing officer. The decision of the hearing officer is reversed and the case is remanded for further consideration and development of the evidence, not inconsistent with this opinion. 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 whowishes to appeal from such new decision must file a request for review not later than 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.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge