APPEAL NO. 93972
FILED DECEMBER 8, 1993

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held in _____, Texas on October 15, 1993, before hearing officer. With regard to the issues in dispute, the hearing officer determined that the claimant was injured in the course and scope of her employment and reached maximum medical improvement (MMI) on July 2, 1992, with a 14% impairment rating. The hearing officer further found that the claimant was not bound by an agreement of February 26, 1993, concerning her date of MMI and her impairment rating. The claimant appeals the impairment rating found by the hearing officer because, she contends, that rating in essence penalized her for not being able to pass the straight leg raising test due to muscle weakness which had developed since the injury. She also contends that the 1989 Act's reliance on outdated American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) is unconstitutional. The carrier has filed a cross-appeal in which it contends that the hearing officer's findings of fact and pertinent conclusion of law concerning claimant's having been injured in the course and scope of her employment are supported by no, or insufficient, evidence, and that the hearing officer incorrectly applied the law. In its response to claimant's request for review the carrier requests that, should the appeals panel affirm the hearing officer's determination on injury in course and scope, we affirm the determination that the claimant's impairment rating was 14%.

DECISION

We affirm the hearing officer's decision and order.

The claimant testified that she was employed as a claims adjuster with employer on (date of injury). On that day, around 12:30 p.m. she was called into the claims manager's office and terminated from her employment; she said she was told they wanted her to clean out her desk and be out that day. She said that her work day ended at 5:00 p.m. but that she asked whether she could leave early and have the remaining time taken out of her pay check. However, she said it was agreed that she would receive her full pay for that day and that her day would be officially over at 5:00 p.m., but that she got her check and actually left about 12:45 p.m. The claimant injured her back when she struck it on a desk while cleaning out her office. At the time she was injured, she said she had been taking personal items out of her desk drawer and also putting stickers on files and putting the files in order for the claims manager.

The medical evidence in the record indicates that the claimant was originally seen by Dr. W on March 27, 1991, although the claimant testified that the date was

actually March 19th. Dr. W noted claimant's complaints of pain in the low back, buttocks, and pain radiating up the right side of her body, but stated that he found no tenderness or signs of trauma. However, no x-rays or other tests were performed. The claimant said Dr. W referred her to Dr. K who apparently ordered tests--including EMG-nerve conduction studies, lumbar spine MRI, lumbar myelogram, and lumbar discogram followed by lumbar CT scan--and physical therapy. Dr. K certified that claimant reached MMI on December 10, 1991, with a 10% impairment rating, based upon moderate-severe degenerative changes at L5-S1. Subsequently, Dr. K revised his opinion to reflect an MMI date of July 2, 1992, with a 15% impairment rating, after reviewing the opinions of other doctors who had "suggested a 15 percent disability."

A Report of Medical Evaluation (Form TWCC-69) signed by Dr. Kl found the claimant reached MMI on April 6, 1992, with a 15% impairment rating. Claimant's original impairment rating had been 11%, but had been adjusted upward in the strength category, due to quad/hamstring strength measurements and circumference measurement indicating atrophy.

Dr. O was appointed by the Texas Workers' Compensation Commission (Commission) as designated doctor. On August 14, 1992, he wrote that the claimant had obvious muscle wasting and weakness in the upper leg, marked degenerative narrowing at the L3-4 and L4-5 levels (with the latter being the primary level of abnormality), as well as abnormalities in the L5-S1 dermatome. He noted, however, no herniated disc. Dr. O also wrote that he felt the claimant would require surgical fusion, and that he did not believe she had reached MMI. However, he said that if the claimant decided against surgery she would be considered to have reached MMI with 14% impairment.

On August 5, 1993, Dr. O wrote that claimant had returned to see him and that repeat range of motion tests had been performed (the benefit review conference report reflects that the benefit review officer sent claimant back for further assessment by Dr. O). Once again, Dr. O wrote that the tests were invalidated. On August 25, 1993, Dr. O in a letter to the Commission said he agreed with Dr. K's MMI date of July 2, 1992, and that he would give claimant a 14% impairment rating. At the hearing, Dr. O, who testified by speaker telephone, stated that he stood by this MMI date and impairment rating, which was based on the fact that claimant had not had surgery. (The claimant testified that she had never refused surgery, but that three of her four doctors had advised against it.) Dr. O said that he had evaluated claimant's quadriceps weakness, to which a maximum 34% impairment could be given, with a ratio of 20% because, he explained, the claimant still had some strength in that area in that she could walk and get around. Dr. O also testified that he had re-evaluated the claimant after her range of motion measurements were invalidated pursuant to the AMA Guides.

The claimant had also been seen by Dr. B who wrote on May 1, 1992 that claimant was not exhibiting a great deal of pain and that she had had normal strength in her legs. He also stated that he recommended against surgery. On August 3, 1992, Dr. C wrote that he would recommend a back rehabilitation program prior to contemplating surgery. Dr. C also stated that his examination revealed full straight leg raising, no weakness, no wasting, no pinprick sensation change, and equal reflexes. The claimant testified, however, that the weakness in her leg became worse after she had a discogram, which was performed in August of 1992.

I.

Whether the Claimant Suffered a Compensable Injury in the

Course and Scope of Her Employment

In his discussion of the evidence the hearing officer wrote that the claimant was still in the course and scope of her employment at the time of injury because she had the reasonable belief that she was performing activities which were required by her employer. The findings of fact and conclusion of law challenged by the carrier are as follows:

FINDINGS OF FACT

> 3. The claimant injured her back on (date of injury), when she stood up and backed into another employee while she was in the process of cleaning out her desk and placing notes on files.
>
> 4. At the time the claimant injured her back she had been terminated by the employer but was still on the employer's premises and was under the reasonable belief that she was performing a function required by her employer.

CONCLUSION OF LAW

> 2. On (date of injury), the claimant was injured in the course and scope of her employment.

The carrier contends on appeal that at the time of injury the claimant had already picked up her final paycheck and was no longer an employee; that she was not engaged in any activity that had to do with and originated in the work of her employer, nor was she performing any task on behalf of her employer or engaged in or about the furtherance of the employer's affairs or business; and that she was terminated from a place of safety. Carrier further contends that there is no objective medical evidence of

an injury in the course and scope of employment on (date of injury); that claimant could not have been injured by backing into a person, and that she had been involved in automobile accidents and had only a degenerative disease.

The carrier's latter point is not supported by the evidence. The carrier cites the report of Dr. W which stated it found no objective evidence of an injury. However, Dr. W's examination predated the examinations and reports of other doctors, as well as diagnostic testing performed on the claimant, which support the existence of an injury arising from the incident claimant described. While the claimant testified that she was involved in, and treated for injuries from, two motor vehicle accidents after (date of injury), she stated that such accidents did not cause injury to her back; no medical records documenting treatment from the accidents were in the record. We would further note that a claimant's own testimony, if credited by the trier of fact, can support a finding of injury in the course and scope of employment. Highlands Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. App.-Eastland 1980, no writ).

We find, however, that the evidence does not support the statement in Finding of Fact No. 3 that claimant was injured when she backed into another employee. The claimant testified, and it was uncontroverted, that she "smacked" her back against "the protruding corner of the desk." Medical records show claimant gave the same history when seeking treatment for her injury. We therefore reform Finding of Fact No. 3 to reflect that claimant backed into a desk.

In support of its argument that claimant was not an employee nor engaged in any activity originating with employer's work, the carrier cites the case of Ellison v. Trailite, Inc., 580 S.W.2d 614 (Tex. App.-Houston [14th Dist.] 1979, no writ), wherein an employee was injured by another employee immediately after being terminated but while on the employer's premises to pick up her pay check. In holding that the injured employee's personal injury action against her employer was not barred on the ground that her injuries were covered under the workers' compensation law, the court stated as follows:

> We hold that once employment is terminated by resignation or by the employee's being fired, no injury thereafter incurred is received within the course of his employment, for purposes of workmen's compensation law. This rule is limited to those cases where the resignation or firing occurs in a place of safety and the parties are not subject to the inherent hazards arising from the employment itself. Id. at 615.

The holding in Ellison was tempered by the court in another post-termination case, Bryant v. INA of Texas, 673 S.W.2d 693 (Tex. App.- Waco 1984) aff'd, 686 S.W.2d 614 (Tex. 1985), which distinguished Ellison as "not truly a workers'

compensation case" as it involved a defense to a personal injury action against the employer. The employee in Bryant had been laid off and was injured when she returned to employer's premises to pick up her pay check. In reversing a summary judgment and holding that a substantial fact issue existed as to whether the employee had been instructed by her employer to return for her check, the court of appeals stated that,

> There is authority for the rule that when employment is terminated and wages remain unpaid, the employer's obligation under the contract of hire remains unfulfilled . . . it is consistent with the intent and purpose of our Worker's Compensation Act to hold that a terminated employee instructed to return to the employer's premises in order to pick up his final paycheck remains an employee of that employer for that purpose, and that an injury suffered by him on the employer's premises acting under the instruction is received in the course and scope of his employment. Id. at 695 (citations omitted).

And in affirming, the Supreme Court stated,

This injury is of a type which originated in the business of the employer. Clearly, being paid for work done is within the employment relationship and contract . . . . If plant practice required Bryant to return to pick up her pay, then her injury would have occurred in the course and scope of employment. We hold that when an employee is directed or reasonably believes from the circumstances she is required by the employer to return to the place of her employment to pick up her pay after termination and an otherwise compensable injury occurs, then such an injury is reasonably incident to her employment and is incurred in the furtherance of the employer's affairs. 686 S.W.2d at 615.

And see Royalty Indemnity v. Magrigal, 14 S.W.106 (Tex. Civ. App.-Beaumont 1929, no writ) ("workman who has ceased his work for the day and who is on his way to the office of the employer to obtain his pay, or after obtaining such pay is leaving the premises of his employer and is injured on the premises of his employer, will be held entitled to compensation."). *Compare* McCoy v. Texas Employers Insurance Association, 791 S.W.2d 347 (Tex. App.-Fort Worth 1990, writ denied) (employee's injury incurred while picking up her pay check before her shift began held not compensable where evidence showed she was not directed by employer to pick up check in person).

While the instant case was not one in which an injury occurred as the claimant was engaged in picking up her check, the reasoning of Bryant and other similar pay

check cases can be read consistently with the activities she performed on the employer's premises prior to leaving. As Professor Larson has said,

> Compensation coverage is not automatically and instantaneously terminated by the firing or quitting of the employee. He is deemed to be within the course of employment for a reasonable period while he winds up his affairs and leaves the premises.
>
> * * * * *
>
> Collecting one's personal effects on leaving employment is logically no different from collecting one's pay, since both are necessary incidents of an orderly termination of the employment relation.

Larson, The Law of Workmen's Compensation, Volume 1A, 1992, § 26.10, page 5-132, § 26.40, page 5-340.

We find that the record below contains sufficient evidence to support the finding that claimant's injury occurred while she was in the process of, essentially, winding up her affairs and that she was under a reasonable belief that she was performing a function required by her employer. Claimant's testimony in this regard was uncontroverted and we believe that the hearing officer's determination on this point was not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

II.

What is the Claimant's Correct Impairment Rating

The claimant's position at the hearing was that she had reached MMI only statutorily, on March 15, 1993, and that her impairment rating should be 15%. In her appeal, she contends that the law is penalizing her for not being able to pass the straight leg raising test due to muscle weakness which was caused by nerve root compression which developed since her injury on (date of injury), and which is borne out by her medical records. She reiterated that she continues to have severe pain and numbness which has prevented her from working in a job which requires sitting.

The 1989 Act provides that the report of a designated doctor appointed by the Commission, such as Dr. O, is entitled to presumptive weight and that the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). Upon review of the evidence in the record, the hearing officer in this case determined that the great weight of the

other medical evidence in this case was not contrary to Dr. O's report concerning impairment rating.

Our review of the record does not convince us that we should overturn the hearing officer's determination. This panel has previously noted that the AMA Guides contemplate that range of motion tests will be invalidated if they fall outside the validity criteria, and we have held that the Guides do not state that valid results are required before a whole body impairment rating can be assigned. Texas Workers' Compensation Commission Appeal No. 92494, decided October 29, 1992. We note that the documentation attached to Dr. KI's TWCC-69 states that certain range of motion tests had been found to be invalid by the evaluator. With regard to muscle atrophy, Dr. O's report and his testimony indicate that this was taken into consideration in assigning claimant an impairment rating. We thus affirm the hearing officer's determination that claimant's impairment rating was 14%.

With regard to claimant's contention that the 1989 Act is unconstitutional because it is "supported by old and outdated AMA guidelines," (i.e., the AMA Guides, third edition, second printing, dated February 1989, as required by Section 408.124(b)), we observe that this panel has ruled that it lacks jurisdiction to rule on the constitutionality of state statutes. *See* Texas Workers' Compensation Commission Appeal No. 92094, decided April 27, 1992.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas Knapp
Appeals Judge