APPEAL NO. 94015
FILED FEBRUARY 11, 1994

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On August 25, 1993, a contested case hearing was held in (City), Texas, with (hearing officer), presiding, to determine whether claimant, (claimant), who is the respondent, who was injured on (1992 injury), in the course and scope of her employment with (employer), experienced a condition in (1993 injury) that caused disability for the period from February 22, 1993, through March 8, 1993. The record closed September 3, 1993.

The hearing officer determined that the claimant's upper back, neck, and shoulder condition she experienced in (1993) was caused by her (1992 injury), compensable injury. He further found that she had disability for the period from February 22, 1993, through March 8, 1993.

The carrier appeals, arguing that this decision is against the great weight and preponderance of the evidence, most especially because there is no medical evidence in support of her contention. The carrier further argues that it has had to pay additional temporary income benefits because of the late filed decision of the hearing officer. There is no response from the claimant.

DECISION

We affirm the hearing officer's decision.

The claimant was a mixologist for the employer, working late night and early morning hours. She stated that her job required an excessive amount of bending, in that she was responsible for stocking of beverages. She stated that she often would lift as much as 40 cases of beer a night and estimated that a case of beer weighed around 15 pounds.

Claimant stated that on (1992 injury), as she reached into a beer cooler, she experienced a sudden pain between her shoulder blades. This became enough by June 17, 1992, to cause her not to be able to fully move her upper body; she advised her supervisor of the injury and was sent to the emergency room of the hospital used by the employer (Hospital A). Claimant stated that she was off work for two days, and that the hospital did not have a concrete diagnosis, but that she was told it could be a slipped disc, pinched nerve, or a pulled muscle. X-rays taken at the time showed a normal cervical spine, but claimant was not given an MRI or other test.

Claimant said that in order to return to work she needed a work release from a doctor. (This was corroborated by (Ms. B), the employer's personnel director). She went to see (Dr. D). She said he did not examine her but asked her if she was still in pain and

she said she was not, so she was released back to work effective June 30, 1992, with no restrictions.

Claimant said that she continued to have episodic pains between her shoulder blades but it was nothing she could not live and work with. On the morning of (1993 injury), a Sunday, she awoke and found herself in severe pain just like that she experienced at her (1992) injury. She called one of her supervisors to seek permission to go to the hospital near her, because (Hospital A) was too far away. She was authorized to go to the emergency room at (Hospital B). (Again, corroborated by Ms. B). Claimant was again taken off work. She showed up on February 24th to go back to work, and, according to Ms. B, stated she had been advised to see a neurologist. Ms. B advised that she should do this before coming back to work. She arranged for claimant to go to (Hospital A), which set up an appointment for her with (Dr. G), for March 1st.

The claimant said she was examined by Dr. G, who recommended that she have physical therapy and further testing, including an MRI. However, the carrier at this point denied the claim, according to claimant, and she never received the tests. The claimant said to her knowledge, Dr. G was not provided with medical records from her (1992 injury) injury. She said that she kept contacting Ms. B about coming back to work, because her pain was again subsiding and she had four children to support. She stated that Dr. G faxed a memo to the employer which released her to work effective March 8th.

On both occasions, claimant was prescribed anti-inflammatory and pain medication. She self-medicated with Advil or Tylenol in the period of time between (1992 injury) and (1993 injury).

Ms. B affirmed that it was the employer's preference that their injured employee go to a (Hospital A), preferably the (Hospital A). She affirmed also that the employer preferred injured employees to get a release detailing any restrictions before they were allowed to return to work. She stated that claimant did not complain of pain between the two episodes, and did not seek time off. Ms. B agreed that claimant was a hard worker.

Medical records indicate the following:

- (1992 injury), hospital records record diagnosis of strain or sprain. Dr. D's initial medical report dated July 2, 1992, also opines a left trapezius strain. This is based upon a visit on June 30, 1992, and noted that she continued to have residual pain although she had resumed work.

- March 1, 1993, report by Dr. G stated cervical fibromyalgia, soft tissue irritation and intermittent cervical nerve root irritation as an impression. He recommended MRI and EMG to clarify the diagnosis and rule out radiculopathy. In his history, he noted that her current problems dated back to last (1992 injury).

- A March 3, 1993, letter from Dr. G (apparently to the adjuster) stated that he still recommended an MRI and EMG, and could not truly say whether the (month 2) back problem was related to the (1992 injury) injury. His answer to a deposition on written questions states he examined unspecified medical records and cannot relate her condition to her (1992 injury) injury. He states that this would be "merely speculative," but based on the information he has, it is unlikely.

The irony of carrier's position is that because claimant didn't remain off work for the months between (1992 injury) and (1993 injury), and because she doesn't have the results of medical tests for which carrier denied coverage, that she has failed to carry her burden of proof that her essentially similar condition in (1993 injury) was related to her (1992 injury). The inference from carrier's position is that were claimant seeking temporary income benefits for an unbroken period of months, rather than two weeks, her case would be stronger. We do not agree that claimant failed in her burden.

Contrary to the carrier's assertion that claimant was required to submit medical evidence to corroborate her assertion, we have repeatedly stated that the testimony of a claimant alone is sufficient evidence to support that claimant sustained injury. *See* Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). There is nothing about this injury that is beyond common experience such that medical evidence would be required. To the contrary, claimant's testimony regarding her injury, the similarity between the two episodes she experienced, and her ability to tolerate it and work through it, would be well within the common experience of a trier of fact. Medical reports from Dr. D indicated that claimant continued to have pain after she returned to work in (month 1). Regarding Dr. G's statements, the trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). It is certainly arguable whether a doctor referred by an emergency provider selected by the employer became claimant's treating doctor, as the carrier asserts. *See* Section 408.022, *as well as* Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.7 (now repealed), 126.9(c).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Contrary to carrier's assertion that a decision is insupportable and absurd, we do not find this to be the case here, and accordingly affirm the hearing officer's determinations, as based upon sufficient evidence.

While we agree that the administrative rules of the Texas Workers' Compensation Commission set up guidelines for rendering a decision, the decision does not become void, nor may the carrier be relieved of liability, when it is issued later than those guidelines

provide. Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992. Moreover, we note that carrier's assertion that it has had to pay additional benefits to the claimant for a period of delay is not the case here. The decision finds disability for a period of two weeks. While the carrier would, of course, be liable for periods of disability that occurred after the hearing, such liability would be unrelated to the delay in issuance of this hearing officer's decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Thomas A. Knapp
Appeals Judge