APPEAL NO. 001825

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 14, 2000. The issues at the CCH were phrased as whether the "right hip" was a part of the respondent's (claimant) compensable injury of _____, and whether the appellant (carrier) waived the right to contest compensability within 60 days of being notified of the injury. She determined that the carrier had not waived the right to dispute compensability and there is no appeal of this finding.

The hearing officer held that the "right hip" was part of the claimant's compensable injury. The carrier has appealed this determination, asserting that there is no probative medical evidence, required in this case, upon which to base either a caused or aggravated avascular necrosis (AVN) of the claimant's right hip. The claimant responds by asserting that the determinations made were within the fact finding powers of the hearing officer and should not be reversed.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant was employed for several months to clean. She said that her two duties involved mopping floors and carrying trash bags. The claimant said she worked for 13-1/2 hours a day, 7 days a week. According to the claimant, she had mopped for one hour on _____, apparently slightly bent, and when she attempted to straighten up, she could not. The claimant had pain in her right waist and hip area. The claimant agreed that she did not fall.

She continued to work the next two months, with increasing pain, until sent to Dr. T, the company doctor, on April 27, 1998. Dr. T's report of that day says that the cause of injury is unclear but that the claimant reported "excessive" mopping. He suggested an MRI to rule out neurovascular necrosis and diagnosed hip and thigh sprain. Subsequent referrals followed. The claimant was eventually diagnosed with AVN of the right femoral head following an April 30, 1998, MRI of the bilateral hips. The claimant's treating doctor at the time of the CCH was Dr. B, who recommended a total right hip replacement by the time of the CCH.

The claimant was also earlier treated by Dr. S, an associate of Dr. B, who (according to Dr. B in his answers to interrogatories) specialized in back injuries. Both Dr. S and Dr. B were asked by the carrier to answer written questions under oath and did so.

The record has been reviewed for any medical records commenting upon causation or a relationship of the AVN to the claimant's work. They are as follows:

1. Dr. B wrote a "To Whom It May Concern" letter on January 21, 2000. He stated that he took over the claimant's care because Dr. S did not treat such problems. He further stated:

> [The claimant] has now had progressive changes on that x-ray studies and now is severely limited because of now complete collapse of the femoral head. It was noted back then when we first saw her that this is directly related and is direct causation of her injury. She had absolutely no evidence of any problems prior to that. [AVN] of this nature can develop and be present for a number of years before it causes problems to the point that the patient has to have surgery which is well documented in standard literature. This patient needs surgery for this and is now being denied that, and unfortunately it needs to be done and it is directly compensable to her injury.

This letter makes no other mention of the injury nor is purported causal connection further described.

2. On or about May 20, 2000 (the day before the first set session of the CCH, which was in turn continued), Dr. B answered questions (answers in bold type below) propounded by the carrier:

> Is it your medical opinion that the [AVN] was caused by [the claimant's] work activities as a custodian? In responding, please assume that [the claimant] worked for 9 months as a custodian at the airport. She worked on average over 50 hours per week mopping concrete floors and carrying large trash containers long distances to empty them. **Possible but not probable.**
>
> Is it possible to determine whether the [AVN] was a pre-existing condition when [the claimant] entered employment in August 1997? **Only if patient had previous complaints/ x-rays or MRI.**
>
> Is [the claimant's] right hip [AVN] an ordinary disease of life? **Can't answer this question in this form.**
>
> If the [AVN] was not caused by the work activities or if it is an ordinary disease of life, could the work activities have accelerated, enhanced, or worsened the condition? **Yes.**
>
> Could her posture in performing her work activities have accelerated, enhanced, worsened, or made symptomatic a previously unsymptomatic [AVN]? **Very little.**

Follow-up questions were also answered this same day. Dr. B agreed that AVN could be asymptomatic although existing for a year or so, that there were nontraumatic as well as traumatic causes, that the medical literature had yet to demonstrate a definitive causal link between repetitious activities and the condition, that he agreed that in the claimant's case nontraumatic causes of the condition had not been conclusively ruled out

as the cause, and that she had not been tested for all these causes because some would involve biopsy or clinical diagnoses. He also stated:

> Do you agree that, based on the information currently available, it cannot be said within reasonable medical probability that [the claimant] would not have developed the same degree of [AVN] at about the same time, regardless of her job related activities during the nine months she worked as a custodian at the airport? **Yes.**

He asserted in both sets of answers that they were based upon reasonable medical probability.

3. Dr. S also answered the same or similar questions. In response to the question asking if the claimant's AVN was caused by her custodial activities (making the same assumptions about the nature of her work as requested of Dr. B), Dr. S replied: **Unable to say definitively, but unlikely initiating insult.** He agreed that the claimant's work activities could accelerate, enhance, or worsen the condition, and that her posture "could" do likewise.

Significantly, Dr. S was asked:

> Can you, as a medical doctor, state within reasonable medical probability that it is more likely than not that [the claimant's] posture and activities at work accelerated, enhanced, worsened, or made symptomatic a previously non-symptomatic [AVN]? **The probability is in favor of work uncovering an existing problem.**

Dr. S also answered affirmatively that it could not be said that the claimant would not have developed her condition to the same extent at that time regardless of her work activities.

4. Finally, Dr. BH, for the carrier, stated that no specific incident at work was identified as causing the collapse, and that "any" standing activity could aggravate pre-existing AVN, including standing done in daily life.

This is a case that was perhaps confused from the outset by the broad wording of the issue as well as the failure of the parties and the hearing officer to clarify the nature and scope of the agreed-upon compensable injury. Notwithstanding the reference to the "right hip," the issue actually litigated was whether an AVN condition of the right hip was part of the claimant's compensable injury. Although no findings are specifically made with respect to this disputed condition, the discussion in the decision revolves around AVN and, within this discussion, the hearing officer stated: "Therefore, based upon the testimony and the medical evidence, I find that the Claimant sustained a compensable injury to her hip [AVN] on _____." It is this statement which should have been made as a finding

of fact in the decision, but we can use it as guidance to interpret the hearing officer's fact finding that the claimant sustained "an injury to her right hip on _____."

More elusive is the nature of the "compensable injury." The claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) claiming that she injured herself after an hour of mopping on _____--a specific injury. The carrier explained at the CCH that it had accepted a back and leg strain as the "compensable injury." However, the claimant presented evidence at the CCH as to her activities in general and over time, and the interrogatories of the carrier to two doctors in this case asked those doctors to assume a course of activities for nine months as the basis for concluding whether the claimant's AVN was, or was not, related to her employment. By contrast, many doctors' notes in the record recite a history of a work- related injury having occurred "on" _____. The carrier defended the claim in its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in part on the basis that AVN was an ordinary disease of life, and apparently treated this claim as one relating to an occupational disease rather than a specific injury.

Because AVN is a disease, we will analyze the decision in terms of the claim as one made for an "occupational disease." We first look to Section 401.011(34) in the 1989 Act for the definition of “occupational disease”:

> "Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

The Appeals Panel has stated that the etiology or aggravation of AVN is not a matter of common experience and must be proven through expert medical testimony that rises to the level of reasonable medical probability. Texas Workers' Compensation Commission Appeal No. 960678, decided May 17, 1996 (Unpublished) (hearing officer's determination that a strain did not give rise to AVN affirmed). Medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. *See* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers’ Compensation Commission Appeal No. 93774, decided October 15, 1993. Lay testimony is not sufficient evidence of causation of this disease. A review of Appeals Panel decisions shows that generally cases where aggravation of AVN has been found involve a blow or a fall: Texas Workers' Compensation Commission Appeal No. 93966, decided December 9, 1993 (Unpublished); Texas Workers' Compensation Commission Appeal No. 941563, decided January 5, 1995; Texas Workers' Compensation Commission Appeal No. 970349, decided April 14, 1997 (Unpublished); Texas Workers' Compensation

Commission Appeal No. 971646, decided October 6, 1997 (Unpublished); Texas Workers' Compensation Commission Appeal No. 981512, decided August 21, 1998 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 991236, decided July 22, 1999 (Unpublished); a sudden twist: Texas Workers' Compensation Commission Appeal No. 952178, decided February 9, 1996 (Unpublished), and Texas Workers' Compensation Commission Appeal No. 960823, decided June 11, 1996 (Unpublished); or lifting and a popping sensation: Texas Workers' Compensation Commission Appeal No. 992917, decided February 10, 2000, and Texas Workers' Compensation Commission Appeal No. 000733, decided May 30, 2000.

When an injury is asserted to have occurred by way of "aggravation" of a preexisting condition, there must be evidence that there was a preexisting condition and that there was "some enhancement, acceleration, or worsening of the underlying condition. . . ." Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994. The burden of proving that there is a compensable injury or aggravation of a preexisting condition is on the claimant.

We find the evidence as a whole insufficient to prove that AVN was either caused by or aggravated by the claimant's work "on" _____, as specifically found by the hearing officer. First of all, there was no opinion evidence directing the attention of a medical expert to the specific one hour of mopping on _____, that was alleged as the cause of (or aggravation of) the condition. Second, Dr. B's statement in his "To Whom It May Concern" letter that the condition was directly related to the claimant's injury cannot be plucked from the evidence as a whole, including sworn answers by Dr. B recited in this decision. The letter is no more than a mere scintilla of evidence when reviewed as a whole. We would observe that opinion evidence stronger than the medical evidence in this case has been rejected as probative of AVN. *See* Texas Workers' Compensation Commission Appeal No. 980049, decided February 17, 1998 (Unpublished). And a decision in favor of AVN was reversed in Texas Workers' Compensation Commission Appeal No. 970083, decided February 28, 1997, for the failure of medical evidence to rise to the level of reasonable medical probability.

Asked to assume that a nine-month course of activities gave rise to the condition, Dr. B's opinion, at best, rises to speculation or opinion that it was a possibility, rather than a probability, that the claimant's work caused or aggravated AVN. Dr. S stated that it was more probable that the claimant's work had uncovered an existing condition. Both doctors indicated that it was just as probable that her condition would have developed to its present state regardless of her activities at work.

Because the existence of a strain may be proven through lay testimony, and there is also medical evidence of a right hip strain occurring on _____, an outright reversal of the hearing officer's stated findings and conclusions is not in order. We reverse the decision to the extent it can be read as including the AVN by rendering the following finding and conclusion as substitutes for the same numbered findings and conclusions in the decision:

FINDING OF FACT

2. The claimant sustained a strain injury to her right hip on _____, while working in the course and scope of her employment, but this injury did not include or extend to [AVN].

CONCLUSION OF LAW

3. The claimant's compensable injury of _____, was proven to include a right hip strain but was not proven within reasonable medical probability to include [AVN]. which the claimant experienced as an ordinary disease of life.

The "Decision" is modified to state that the right hip strain is a part of the compensable injury.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent. There was certainly conflicting medical evidence in the present case. As the claimant points out in her appeal, evidence from any witness may be accepted or rejected in whole or in part by the hearing officer. *See* Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ); Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); and Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Even though the evidence from Dr. B may be somewhat conflicting, the hearing officer was still entitled to rely on Dr. B's letter of January 21, 2000. The majority indicates that it is unsatisfied with Dr. B's opinion because he does not further describe the causal connection between the claimant's injury and her avascular necrosis (AVN). Expert opinion evidence by its nature may be somewhat conclusory. This does not mean that the expert opinion evidence cannot be believed and accepted by the fact finder. I find no reason to find Dr. B's letter insufficient as a matter of law to prove causality or to dismiss it as a "mere scintilla." I would find it sufficient to support the decision of the hearing officer.

I also think that the statement in the majority's decision that medical evidence is necessary to prove AVN compensable is unnecessary to the decision as there was medical evidence in the present case. I view this statement as unnecessary *dicta*. I think whether or not medical evidence is required to prove the compensability of AVN may depend upon the circumstances and mechanics of an injury. In any case, I see no need to make a blanket statement on the subject in the present case.

I would affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge