Opinion issued November 3, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01122-CV

VICENTE A. MENCHACA, Appellant

V.

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. C-2017-04354

MEMORANDUM OPINION

Appellant, Vicente A. Menchaca, was injured on the job in 1994. Although he received workers' compensation benefits for the portion of his injuries related to his wrists, the Texas Department of Insurance Division of Workers' Compensation determined that the compensable portion of his injuries did not extend to and include

injuries to his neck. After exhausting his administrative remedies, Menchaca, proceeding pro se, brought the underlying lawsuit against his employer's workers' compensation carrier, the Insurance Company of the State of Pennsylvania ("ICSP"), seeking judicial review of the Texas Department of Insurance Division of Workers' Compensation decision. The trial court granted summary judgment in favor of ICSP.

In five issues, Menchaca argues that the trial court: (1) lacked jurisdiction to determine whether the compensable injury included injuries to his neck; (2) erred in granting ICSP's traditional and no-evidence motion for summary judgment; (3) erred in failing to issue findings of fact and conclusions of law; (4) erred in excluding his motion for sanctions; and (5) erred in refusing to consider Menchaca's additional issues related to his neck injuries, depression, and request for lifetime income benefits.

We affirm.

Background

Menchaca was employed as a machinist for Baker Hughes, Inc. when he suffered a work-related injury on January 18, 1994. At the time of the injury, ICSP was the workers' compensation carrier for Baker Hughes. On December 22, 1995, the Texas Workers' Compensation Commission (the "Commission") determined that Menchaca sustained a compensable injury and ordered ICSP to pay benefits in accordance with that decision.

In 2016, Menchaca sought benefits for injuries related to a cervical injury, contending that the 1994 compensable injury included C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy. ICSP disputed that the compensable injury extended to or included C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy.

A benefit review officer with the Division of Workers' Compensation held a benefit review conference with the parties on May 16, 2016 to mediate resolution of the disputed issue. Because the parties were unable to reach an agreement, a contested case hearing was held on September 13, 2016 to decide the following disputed issue: "Does the compensable injury of January 18, 1994 extend to and include C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy?"

After the hearing, the Hearing Officer determined that Menchaca had the burden to establish the compensability of the disputed cervicothoracic conditions and diagnoses by a preponderance of the evidence. The Hearing Officer determined that the disputed cervicothoracic conditions and diagnoses were so complex that a factfinder lacked the ability based on common knowledge to find a causal connection and thus expert medical evidence was necessary to establish a causal connection to the compensable injury. The Hearing Officer concluded that although Menchaca relied on his medical records, these medical records were insufficient to show how

C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy were either caused or aggravated by Menchaca's activities at work or the compensable injury. Thus, the Hearing Officer found that Menchaca failed to establish the compensability of C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy, found that the compensable injury did not extend to or include these conditions, and found that Menchaca was therefore not entitled to benefits for these conditions. On December 12, 2016, Texas Workers' Compensation Commission Appeals Panel ("Appeals Panel") upheld the decision.

On January 23, 2017, Menchaca filed the underlying Request for Judicial Review of the administrative decision. Menchaca later filed an amended petition setting forth the specific determinations by which he claimed he was aggrieved, including:

1. [ICSP's] argument there is no waiver;
2. Hearing Officer's conclusion that "[t]he disputed issue required expert medical evidence to establish causation";
3. Hearing Officer's finding of fact #1(D) that ICSP has accepted a compensable injury on this claim to include bilateral hand/wrist tendinitis and depression;
4. Hearing Officer's finding of fact #3 that Menchaca's C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy were neither caused nor accelerated, enhanced or worsened by Menchaca's activities at work or the compensable injury of January 18, 1994; and

5. Hearing Officer's conclusion of law #3 that the compensable injury of January 1, 1994 does not extend to or include C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy.

Menchaca also sought lifetime income benefits.

ICSP filed a no-evidence and traditional motion for summary judgment alleging that there was no evidence that: the compensable injury extended to or included Menchaca's cervical conditions; Menchaca's cervical conditions were caused by his compensable injuries; Menchaca was entitled to lifetime income benefits; and Menchaca exhausted his administrative remedies on the issues of waiver and lifetime income benefits. And, ICSP argued that it was entitled to judgment because it established as a matter of law that there was no genuine issue of material fact that the injury did not extend to or include the cervical conditions. Menchaca responded, attaching various medical records as summary-judgment evidence. The trial court granted summary judgment in favor of ICSP and subsequently entered a final judgment on September 21, 2018.

Jurisdiction

In his first issue, Menchaca argues that "ICSP[']s right to contest the . . . compensability of injury should be dismissed because the trial court did not have jurisdiction" because the Commission had previously adjudicated the matter in 1995. Specifically, Menchaca asserts that, in its 1995 decision, the Commission found that his "bilateral hand wrist tendinitis/coupled with cervical outlet syndrome" injury

"was the principal and sole compensable injury" and that ICSP had "waived its right to contest extent of injury."

To the extent that Menchaca's first issue can be read as one challenging the trial court's subject matter jurisdiction to hear this case, we conclude that the trial court had jurisdiction. Though phrased as if it was ICSP who was challenging the administrative ruling, it was Menchaca himself who invoked the trial court's jurisdiction by filing his petition for judicial review of the Commission's decision. *See* TEX. LAB. CODE § 410.251 ("A party that has exhausted its administrative remedies under this subtitle and that is aggrieved by a final decision of the appeals panel may seek judicial review . . . .").

We also reject Menchaca's argument that the trial court lacked jurisdiction to allow ICSP to contest the compensability of Menchaca's injury because that issue had been previously adjudicated by the Commission in 1995. Menchaca is correct that the issue of compensability was previously adjudicated by the Commission; however, as demonstrated below, the issue of the *extent* of the compensable injury, not whether there was a compensable injury at all, was what was before the Commission in 2016.

In the 1995 decision, the Hearing Officer considered whether ICSP "contest[ed] compensability on or before the 60[th] day after being notified of the injury" and whether Menchaca "sustain[ed] a compensable injury on January 18,

1994." Without including specific findings of fact or conclusions of law, the Hearing Officer determined that ICSP "did not contest compensability on or before the 60[th] day after January 18, 1994" and that Menchaca "sustained a compensable injury on January 18, 1994."[1] The Hearing Officer did not include any findings or conclusions related to the extent of the compensable injury.

Here, ICSP does not dispute that Menchaca suffered a compensable injury in 1994. In fact, in the Commission's decision in 2016, the Hearing Officer noted that the "parties stipulated that [Menchaca] sustained a compensable injury on January 18, 1994." ICSP did, however, dispute that this compensable injury extended to include C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy and, therefore, the sole issue before the Commission in 2016 was whether "the compensable injury of January 18, 1994 extend[ed] to and include[d] C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy."

In *State Office of Risk Management v. Lawton*, the Texas Supreme Court clarified the difference between a dispute regarding a compensable injury and a dispute regarding the extent of an injury:

> When a carrier disputes the extent of an injury, it is not denying the compensability of the claim as a whole, it is disputing an aspect of the

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[1] We conclude that there is nothing in the Commission's 1995 decision to support Menchaca's claims that the Commission found that his "bilateral hand wrist tendinitis/coupled with cervical outlet syndrome" injury "was the principal and sole compensable injury" and that ICSP had "waived its right to contest [the] extent of [his] injury."

> claim. . . . [A] dispute involving extent of injury is a dispute over the amount or type of benefits, specifically, medical benefits, to which the employee is entitled (i.e. what body areas/systems, injuries, conditions, or symptoms for which the employee is entitled to treatment); it is not a denial of the employee's entitlement to benefits in general.

295 S.W.3d 646, 649 (Tex. 2009) (citing 25 Tex. Reg. 2096, 2097 (2000)). It is clear that while the issue of compensability had been previously determined by the Commission, the extent of the injury (i.e., specifically whether it included C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy) had not. The trial court therefore had jurisdiction to consider this extent-of-injury issue.

Relatedly, because the sole issue before the Commission in 2016 was whether the compensable injury of 1994 extended to and included C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy, we do not address Menchaca's argument that ICSP "waived" its right to contest compensability or extent of injury.

"The Workers' Compensation Act vests the Workers' Compensation Division with exclusive jurisdiction to determine a claimant's entitlement to medical benefits." *In re Liberty Mut. Fire Ins. Co.*, 295 S.W.3d 327, 328 (Tex. 2009) (orig. proceeding); *see also In re Metro. Transit Auth.*, 334 S.W.3d 806, 811 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding [mand. denied]). When an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review of the agency's action. *See Subaru of Am., Inc. v. David*

McDavid Nissan, Inc., 84 S.W.3d 212, 221 (Tex. 2002). "The exhaustion requirement ensures that the administrative agency has the opportunity to resolve disputed fact issues within its exclusive jurisdiction before a court addresses those issues." *In re Metro. Transit Auth.*, 334 S.W.3d at 811.

The Texas Workers' Compensation Act provides a four-tier system for the disposition of claims. *Subsequent Injury Fund v. Serv. Lloyds Ins. Co.*, 961 S.W.2d 673, 675 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see generally* TEX. LAB. CODE §§ 410.002–410.308. The first tier is a benefit review conference conducted by a benefit review officer. *Subsequent Injury Fund*, 961 S.W.2d at 675; *see* TEX. LAB. CODE §§ 410.021–.034. From the benefit review conference, the parties may seek relief at a contested case hearing. *Subsequent Injury Fund*, 961 S.W.2d at 675; *see* TEX. LAB. CODE §§ 410.151–.169. The hearing officer's decision is final in the absence of an appeal. TEX. LAB. CODE § 410.169. At the third tier, a party may seek review by an administrative appeals panel. *Subsequent Injury Fund*, 961 S.W.2d at 675; *see* TEX. LAB. CODE ANN. §§ 410.201–.209. In the fourth tier, a party aggrieved by a final decision of the appeals panel has the right to seek judicial review of the appeals panel decision. TEX. LAB. CODE § 410.251; *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000); *see also In re Tex. Workers' Comp. Ins. Fund*, 995 S.W.2d 335, 337 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding [mand. denied]).

A party may not raise an issue in the trial court that was not raised before an appeals panel. TEX. LAB. CODE § 410.302(b); *In re Metro. Transit Auth.*, 334 S.W.3d at 811. A trial is "limited to issues decided by the appeals panel and on which judicial review is sought," and the "pleadings must specifically set forth the determinations of the appeals panel by which the party is aggrieved." TEX. LAB. CODE § 410.302(b). A party waives judicial review of any issue not raised before the appeals panel and identified in a timely request for judicial review. *Zurich Am. Ins. Co. v. Debose*, No. 01-13-00344-CV, 2014 WL 3512769, at *6–7 (Tex. App.—Houston [1st Dist.] July 15, 2014, pet. denied) (mem. op.); *Thompson v. Ace Am. Ins. Co.*, No. 01-10-00810-CV, 2011 WL 3820889, at *4 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, pet. denied) (mem. op.).

Here, the only issue before the Hearing Officer was the following: "Does the compensable injury of January 18, 1994 extend to and include C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy?" The Hearing Officer's decision does not include any findings or conclusions related to waiver. The record also does not include Menchaca's request for review to the Appeals Panel, only the decision of the Appeals Panel determining that the Hearing Officer's decision was the final decision, so we are unable to determine whether Menchaca presented the issue of waiver to the Appeals Panel.

Further, Menchaca's First Amended Petition sets forth the following determinations by which Menchaca claimed he was aggrieved:

1. "[ICSP's] argument there is no waiver;"
2. Hearing Officer's conclusion that "[t]he disputed issue required expert medical evidence to establish causation;"
3. Hearing Officer's finding of fact #1(D) that ICSP has accepted a compensable injury on this claim to include bilateral hand/wrist tendinitis and depression;
4. Hearing Officer's finding of fact #3 that Menchaca's C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy were neither caused nor accelerated, enhanced or worsened by Menchaca's activities at work or the compensable injury of January 18, 1994; and
5. Hearing Officer's conclusion of law #3 that the compensable injury of January 1, 1994 does not extend to or include C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy.[2]

Although Menchaca references the issue of waiver in his First Amended Petition, it is in reference to an "argument" by ICSP, not in the context of any decision or finding by the Hearing Officer or the Appeals Panel. Menchaca has pointed to nothing in the record to demonstrate that the issue of whether ICSP waived its right to contest compensability or extent of injury was ever presented for consideration or decision in the administrative review process. Because a trial court

[2] Menchaca also states that he was aggrieved by the Hearing Officer's finding of fact #4, but there is no finding of fact #4 in the September 16, 2016 order.

is "limited to issues decided by the appeals panel and on which judicial review is sought," and we see no evidence that the issue of waiver was presented or raised before the Hearing Officer or the Appeals Panel, we hold that Menchaca has waived judicial review of this issue. *See* TEX. LAB. CODE § 410.302(b); *Debose*, 2014 WL 3512769, at *6–7; *Thompson*, 2011 WL 3820889, at *4.

We overrule Menchaca's first issue.[3]

Summary Judgment

In his second issue, Menchaca argues that the trial court erred in granting ICSP's no-evidence and traditional motion for summary judgment. In particular, Menchaca raises the following arguments, some of which are the same as those raised in connection with his first issue related to jurisdiction: (1) the no-evidence motion was premature because an adequate time for discovery had not passed; (2) the issue of compensability and extent of injury had already been adjudicated; (3) ICSP waived its right to contest compensability; (4) Menchaca was not required to designate or present expert testimony because the issue of extent of injury had already been adjudicated; (5) Menchaca's summary judgment response presented more than a scintilla of evidence on all elements; and (6) ICSP failed to comply with

[3] In connection with his first issue, Menchaca also argues that he was not required to present expert testimony on causation. As this argument is relevant to determining whether the trial court properly granted summary judgment in favor of ICSP (as opposed to whether the trial court had jurisdiction), we address that argument in connection with Menchaca's second issue.

Labor Code section 410.258 and, therefore, the trial court had no plenary power to render a final judgment. Because we have already addressed arguments two and three in disposing of Menchaca's first issue, we do not address them again here.

A. Standard of Review

When a party moves for summary judgment on both traditional and no-evidence grounds, as XTO did here, we first address the no-evidence grounds. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). If the non-movant fails to produce legally sufficient evidence to meet his burden as to the no-evidence motion, there is no need to analyze whether the movant satisfied his burden under the traditional motion. *Id.*

We review no-evidence summary judgments under the same legal sufficiency standard as directed verdicts. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). Under that standard, we consider evidence in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). The nonmovant has the burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of its cause of action. TEX. R. CIV. P. 166a(i); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206 (Tex. 2002). A no-evidence challenge will be sustained when

> (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.

King Ranch, 118 S.W.3d at 751 (internal quotation omitted).

To prevail on a "traditional" summary-judgment motion asserted under Rule 166a(c), a movant must prove that there is no genuine issue regarding any material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004). A matter is established as a matter of law if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller*, 168 S.W.3d at 816.

To determine if there is a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

B. No-Evidence Summary Judgment

In its no-evidence motion for summary judgment, ICSP argued that there was no evidence that the compensable injury extends to include C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy or that the

compensable injury was the producing cause of Menchaca's C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis or atrophy. ICSP also argued that there was no evidence to support Menchaca's claim for lifetime income benefits or that Menchaca had exhausted his administrative remedies as to any claim for lifetime income benefits. As the nonmovant, it was Menchaca's burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of his cause of action. TEX. R. CIV. P. 166a(i); *Johnson*, 73 S.W.3d at 206.

1. *Adequate time for discovery*

Menchaca first argues that the trial court erred in granting the no-evidence summary judgment because the motion was premature. A party may move for a no-evidence summary judgment only "[a]fter adequate time for discovery." TEX. R. CIV. P. 166a(i). The rule does not require that discovery must have been completed, only that there was "adequate time." *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In determining whether the trial court has permitted an adequate time for discovery, we generally consider the following non-exclusive factors: (1) the nature of the cause of action; (2) the nature of the evidence necessary to controvert the no-evidence motion; (3) the length of time the case has been active in the trial court; (4) the amount of time the no-evidence motion has been on file; (5) whether the movant has requested stricter time

deadlines for discovery; (6) the amount of discovery that has already taken place; and (7) whether the discovery deadlines that are in place are specific or vague. *Madison v. Williamson*, 241 S.W.3d 145, 155 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

In support of his contention that an adequate time for discovery had not yet passed, Menchaca points to the fact that the no-evidence motion was filed on May 25, 2018, before the close of discovery on June 15, 2018. We first note that although Menchaca argues that ICSP filed its motion before the close of discovery, the record does not contain a docket control order setting out the specific deadlines for discovery. Second, while a comment to rule 166a states that "ordinarily a motion . . . would be permitted after the [discovery] period but not before," *see* TEX. R. CIV. P. 166a cmt., we have previously concluded that this comment does not prohibit the filing of a no-evidence motion before the discovery period has ended. *See Singleterry v. Etter*, No. 01-16-00700-CV, 2017 WL 2545107, at *3 (Tex. App.—Houston [1st Dist.] June 13, 2017, no pet.) (mem. op.); *see also Elgohary v. Lakes on Eldridge N. Cmty. Ass'n, Inc.*, No. 01-14-00216-CV, 2016 WL 4374918, at *5 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.) (mem. op.) (affirming no-evidence summary judgment granted three months before discovery period expired); *Thibodeaux v. Toys "R" Us–Delaware, Inc.*, No. 01-12-00954-CV, 2013 WL 5885099, at *3–5 (Tex. App.—Houston [1st Dist.] Oct. 31, 2013, no pet.) (mem.

op.) (affirming no-evidence summary judgment granted three weeks before discovery period expired). Thus, even if the no-evidence motion was filed before the close of discovery, this does not automatically mean there has not been adequate time for discovery.

Further, Menchaca has made no effort to identify any specific evidence he needed to respond to ICSP's motion, nor did he move for a continuance in the trial court to allow for additional time for discovery. *See Madison*, 241 S.W.3d at 155 (holding that trial court did not abuse its discretion in determining that adequate time for discovery had passed based, in part, on plaintiff's failure to specify "the additional evidence she needed to respond to the motion, or the reason she could not obtain it during the discovery period"); *Lindsey Constr., Inc. v. AutoNation Fin. Servs., LLC*, 541 S.W.3d 355, 360 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("When a party contends it has not had an adequate opportunity for discovery before a summary-judgment hearing or that there has not been adequate time for discovery under Texas Rule of Civil Procedure 166a(i), the party must file either an affidavit explaining the need for further discovery or a verified motion for continuance.").

Here, Menchaca filed his petition for judicial review in January 2017. Sixteen months later, and less than two months before the trial date, ICSP filed its motion for no-evidence summary judgment. Menchaca did not specify below, or on appeal, any particular evidence that he was unable to obtain during the sixteen months the

suit was on file before ICSP filed its no-evidence motion. On the contrary, Menchaca argued in his summary judgment response that he "use[d] due diligence in obtaining discovery despite physical, mental and economic complications," and that he "meaningfully responded to discovery." Further, Menchaca's position below and on appeal is that he had no obligation to present expert or other testimony as to causation because the neck injuries had already been included as part of the compensable injury by the Commission in 1994. Under these circumstances, we conclude that Menchaca has failed to show that the trial court erred in granting the no evidence summary judgment because he did not have an adequate time for discovery.

2. *Expert testimony necessary to show causation*

Menchaca next argues that was not required to designate or present expert testimony because the issue of the extent of injury had already been adjudicated. Specifically, Menchaca argues that there was no need for expert testimony after these injuries were "diagnosed, treated, and diagnostic tests confirmed [the] extent of injury, followed by confirmation from [ICSP's] own assigned Medical Expert[, which] conclusively established [that the] injury of 01/18/1994 exten[ded] to and include[d] 'Cervical Thoracic Condition,' and requested a Cervical Laminectomy." Menchaca also argues that there was substantial medical evidence in the record that his 1994 compensable injury was the principal and producing cause of the "cervical

thoracic condition." Menchaca argues that, thus, he was not required to produce additional expert testimony as to causation.

As an initial point, we have already determined that the Commission did not previously adjudicate the extent-of-injury issue. Thus, the only question is whether expert testimony was needed to establish that the C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy were causally related to the compensable injury Menchaca suffered in 1994. We conclude that it was necessary.

As a general rule, expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors. *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007). In limited cases, however, lay testimony may support a causation finding that links an event with a person's physical condition. *Id.* at 666. This exception applies only in those cases in which general experience and common sense enable a layperson to determine the causal relationship with reasonable probability. *See id.*; *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984). In such cases, "lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation." *Morgan*, 675 S.W.2d at 733.

The types of injuries for which Menchaca sought compensation—C6-C7 foraminal encroachment, cervical radiculopathy, spondylolisthesis and atrophy—are

neither common nor basic. *See Kelley v. Aldine Indep. Sch. Dist.*, No. 14-15-00899-CV, 2017 WL 421980, at *3 (Tex. App.—Houston [14th Dist.] Jan. 31, 2017, pet. denied) (holding that claimant needed expert testimony to establish causal connection between work-related fall and additional claimed injuries, including multiple disc herniations, cervical radiculitis, and lumbar radiculopathy, because those injuries were not within jurors' common knowledge and experience); *Croysdill v. Old Republic Ins. Co.*, 490 S.W.3d 287, 294 (Tex. App.—El Paso 2016, no pet.) (concluding that expert testimony was necessary to determine whether several diagnoses—including lumbar disc displacement, chronic lumbar radiculitis, chronic sciatica, spondylolisthesis, bilateral nerve root irritation, anterior disc herniation, foraminal stenosis, facet arthropathy, and broad-based disc bulge contributing to moderate to severe bilateral neural foraminal stenosis—were causally related to claimant's compensable back injury); *City of Laredo v. Garza*, 293 S.W.3d 625, 632–33 (Tex. App.—San Antonio 2009, no pet.) (determining that lay testimony alone was not sufficient to prove medical causation of disc herniations and radiculopathy).

Moreover, even assuming that lay testimony was sufficient to link Menchaca's conditions to his on-the-job injury, Menchaca has not pointed to any lay testimony, from himself or other lay witnesses, that establishes a sequence of events providing a strong, logically traceable connection between his additional medical

conditions and his compensable injury. *See Morgan*, 675 S.W.2d at 733. Thus, this case is not one in which general experience and common sense enable a layperson to determine the causal relationship with reasonable probability and Menchaca needed expert testimony to establish a causal connection between his work-related injury in 1994 and his additional claimed injuries. *See Kelley*, 2017 WL 421980, at *3; *Croysdill*, 490 S.W.3d at 294; *Garza*, 293 S.W.3d at 632–33.

Having concluded that expert testimony was required, we turn to whether Menchaca satisfied his burden to produce at least a scintilla of evidence of causation in response to ICSP's no-evidence motion. It is here that Menchaca argues that he did not need to produce expert testimony as to causation because there was substantial medical evidence in the record establishing that the compensable injury was the producing cause of his cervical conditions.[4] It is undisputed that Menchaca

[4] We note that in support of this argument that there is substantial evidence of a causal connection in the record, Menchaca cites "Vicente A. Menchaca v. Insurance Co. of the State of Pennsylvania, DOCKET NO. HE 94-088955-06-CC-HE48, decided July 16, 2010; "APD 961449"; and "Tab B." We can find no reference in the record to any previous decision from the Commission in 2010. To the extent that such a decision exists and is relevant to the issues to be decided here, it was Menchaca's burden to include that in the record on appeal. *See Huston v. United Parcel Serv., Inc.*, 434 S.W.3d 630, 636 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Further, we presume that the reference to "Tab B" refers to Tab B of Menchaca's Appendix, which is a copy of his First Amended Petition. Because pleadings are not competent summary judgment evidence, we do not consider his amended petition as evidence. *See Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660–61 (Tex. 1995). Finally, the Appeals Panel Decision No. 961449 that Menchaca cites merely stands for the same proposition that in order for additional conditions to be compensable, the claimant must demonstrate a causal connection between the compensable injury and the additional conditions, i.e., that the compensable injury

presented no expert testimony and instead relied on medical records in his summary judgment response. Even if medical records alone could constitute the necessary expert evidence, the medical records relied upon by Menchaca do not establish that the cervical conditions were caused by the compensable injury Menchaca suffered in January 1994.

Here, Menchaca's medical records show that he was seen initially by a Dr. Robert J. McAnis, who diagnosed Menchaca in 1994 with tendinitis, as well as "bilateral cervical outlet syndrome." Dr. McAnis referred Menchaca to Dr. Brian A. Schulman, who performed an EMG and nerve conduction study on him due to complaints of pain, numbness and weakness in his right arm. Dr. Schulman noted that he believed that Menchaca had a C-7 radiculopathy. An MRI exam of Menchaca's cervical spine was then performed in February 1994, which found cervical spondylosis, spinal stenosis, and right neural foraminal attenuation. Finally, on March 8, 1994, Dr. J. Martin Barrash examined Menchaca, who noted that it was his impression that Menchaca has a C6-C7 foraminal encroachment causing C-7 radiculopathy.

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was a producing cause of the additional conditions. It in no way supports his argument that there is sufficient evidence in the record here to establish the necessary causal connection between his compensable injury and the additional cervical injuries.

However, the records attached to his summary judgment response also show that the only injury reported was tendinitis in both wrists—there is no mention of any cervical injuries. Further, nowhere in these medical records do any of the medical providers opine on the *cause* of the cervical conditions. In fact, Dr. Barrash described a previous neck injury Menchaca suffered in 1991 "when a heavy piece of metal pulled on his right arm pulling it down and [Menchaca] felt pain into the neck."

The medical records likewise do not contain any expert opinions as to how Menchaca's injuries to his wrists could and did cause the cervical conditions. To the contrary, the only statement related to causation found in the records attached to Menchaca's summary judgment response establish that these two conditions *were not* causally related. Dr. Barrash stated in a March 23, 1994 letter: "I do not feel that [Menchaca's] neck is related to his hands and that the hand problems are specifically stated as occurring without mention of [Menchaca's] neck." It is not enough for Menchaca to simply provide evidence that he suffered from or was diagnosed with these additional conditions. In order to receive workers' compensation benefits for these injuries, he needed to establish, through expert testimony, that the compensable injury was a *producing cause* of those additional conditions. *See Garza*, 293 S.W.3d at 629.

We cannot conclude that the medical records submitted by Menchaca established the necessary causal connection between the compensable injury and his

cervical conditions. *See, e.g.*, *Ballard v. Arch Ins. Co.*, 478 S.W.3d 950, 957–58 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that there was no evidence claimant's compensable eye injury extended to blindness absent expert testimony affirmatively stating that compensable injury aggravated claimant's preexisting glaucoma such that it caused blindness); *State Office of Risk Mgmt. v. Larkins*, 258 S.W.3d 686, 690–91 (Tex. App.—Waco 2008, no pet.) (holding that even if claimant's medical records could be considered expert testimony, records did not establish that claimant's depression, anxiety, and post-traumatic stress disorder were causally related to her on-the-job head injury where records did not explain how head injury could or did cause such diagnoses); *see also Kelley*, 2017 WL 421980, at *3 (holding trial court properly directed verdict in favor of school district where claimant failed to present expert testimony establishing that her work-related fall caused disc herniations, cervical radiculitis, and lumbar radiculopathy). Because the record contains no evidence of causation, the trial court did not err in granting ICSP's no-evidence summary judgment motion as to Menchaca's extent of injury claims.[5]

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[5] Menchaca also includes a brief argument alleging that, although he exhausted his administrative remedies, ICSP failed to follow the same process related to raising its defense of causation and, thus, should not be permitted to raise that argument here. We disagree. Included in the four-tier system set forth in the Workers' Compensation Act is the ability of an "aggrieved" party to seek judicial review of a final decision by the appeals panel. TEX. LAB. CODE § 410.251. A party who obtains a favorable result at the administrative level and against whom no adverse ruling was made need not affirmatively seek judicial review of the decision. *See, e.g.*, *Thompson v. Ace Am. Ins. Co.*, No. 01-10-00810-CV, 2011 WL 3820889, at *6 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, pet. denied) (mem. op.) (holding

Because we have concluded that the trial court properly granted ICSP's no-evidence motion, we do not analyze whether ICSP satisfied its burden under the traditional motion. *See Merriman*, 407 S.W.3d at 248.

3. *Lifetime income benefits*

In its no-evidence motion, ICSP also argued that it was entitled to summary judgment on Menchaca's claim for lifetime income benefits because there was no evidence he had exhausted his administrative remedies as to this claim. As stated above, a party may not raise an issue in the trial court that was not raised before an appeals panel. TEX. LAB. CODE § 410.302(b); *In re Metro. Transit Auth.*, 334 S.W.3d at 811. A party waives judicial review of any issue not raised before the appeals panel and identified in a timely request for judicial review. *Debose*, 2014 WL 3512769, at *6–7; *Thompson*, 2011 WL 3820889, at *4.

Here, the only issue before the Hearing Officer was whether the compensable injury extended to and included Menchaca's additional cervical conditions. The

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claimant not required to exhaust administrative remedies on issue of date of injury where claimant was prevailing party at both contested hearing and appeals panel and no adverse ruling was made against claimant); *In re Metro. Transit Auth.*, 334 S.W.3d 806, 811 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding [mand. denied]) (rejecting argument that claimant failed to exhaust her administrative remedies where claimant appealed hearing officer's adverse findings to appeals panel and received decision from appeals panel in her favor and, thus, did not file a petition for judicial review in district court). Here, ICSP was the prevailing party at the contested hearing and the appeals panel and there were no adverse rulings made against it. In fact, the Commission found in ICSP's favor on the issue of causation. ICSP, therefore, was not required to exhaust administrative remedies on the issue of causation.

record reflects that Menchaca sought to include additional issues to be considered at the contested hearing, including the issue of lifetime income benefits. ICSP opposed the motion, noting that this issue had already been litigated.[6] The Hearing Officer denied Menchaca's request to add additional issues, finding good cause was not shown. Thus, the Hearing Officer's decision does not include any findings or conclusions related to Menchaca's entitlement to lifetime income benefits.

The record also does not include Menchaca's request for review to the Appeals Panel, only the decision of the Appeals Panel denying the appeal, so we are unable to determine whether Menchaca presented to the Appeals Panel the issue of whether the Hearing Officer abused her discretion in denying his request to add the issue of lifetime income benefits. *See* Tex. Workers' Comp. Comm'n, Appeal No. 972042, 1997 WL 34630298, at *3 (Jan. 1, 1997) ("We [appeals panel] review a hearing officer's ruling on a motion for additional issues under an abuse of discretion standard."). Moreover, in his petition requesting judicial review, Menchaca does not

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[6] Menchaca previously sought lifetime income benefits from ICSP based on the alleged total and permanent loss of the use of both hands resulting from the 1994 injury. The Commission determined that he was not entitled to lifetime income benefits, the appeals panel denied his administrative appeal, and he sought judicial review of that decision. The trial court granted summary judgment in favor of ICSP and Menchaca appealed. On appeal, the Fourteenth Court of Appeals affirmed, concluding that ICSP's summary judgment evidence established that Menchaca possessed substantial utility of his hands above the wrists and that his inability to gain and keep employment did not result from the condition of his hands, and Menchaca failed to file a response raising a genuine issue of material fact. *Menchaca v. Ins. Co. of State of Penn.*, No. 14-12-01158-CV, 2014 WL 871206, at *4 (Tex. App.—Houston [14th Dist.] Mar. 4, 2014, no pet.) (mem. op.).

include the Hearing Officer's decision denying his motion to include additional issues as one of the specific determinations by which he was aggrieved and for which he sought judicial review in the trial court. *See* TEX. LAB. CODE § 410.302(b) ("The pleadings must specifically set forth the determinations of the appeals panel by which the party is aggrieved."). He merely claims in his petition that he is entitled to lifetime income benefits.

Menchaca has not shown that this issue was presented to and considered by the hearing officer, Appeals Panel, or the trial court. Thus, he has waived judicial review of this issue. *See Debose*, 2014 WL 3512769, at *6–7; *Thompson*, 2011 WL 3820889, at *4. The trial court properly granted summary judgment on the issue of lifetime income benefits.

4. *ICSP's compliance with TEXAS LABOR CODE § 410.258*

Menchaca next argues that the trial court's final judgment is void because ICSP failed to comply with Texas Labor Code section 410.258. Specifically, Menchaca contends ICSP failed to provide notice to the Commission thirty days before the trial court signed its June 29, 2018 order granting summary judgment in favor of ICSP. We disagree.

Section 410.258(a) requires a party to file "any proposed judgment . . . with the division not later than the 30th day before the date on which the court is scheduled to enter the judgment . . . ." TEX. LAB. CODE § 410.258(a). The division

is then given the opportunity to intervene not later than 30 days after receipt of the notice if the commissioner determines that the proposed judgment is not in "compliance with all appropriate provisions of the law." *Id.* § 410.258(b), (c). If the division does not intervene, the court shall enter the judgment if the court determines the proposed judgment is in compliance with the law. *See Id.* § 410.258(d). Finally, if a judgment is entered without complying with the requirements of section 410.258, the judgment is void. *Id.* § 410.258(f).

Here, the trial court granted summary judgment in favor of ICSP on June 29, 2018. The order expressly states that it is not a final appealable judgment and that "the Court shall enter a final judgment after notification to the Division of Workers' Compensation [Commission] as set forth in Texas Labor Code § 410.258." Prior to filing its motion for entry of final judgment, on July 5, 2018, ICSP provided notice to the Commission of the proposed final judgment. In a letter dated July 10, 2018, and in response to a communication from Menchaca, the Commission acknowledged receipt of the proposed final judgment from ICSP and stated that it did "not anticipate filing an intervention petition in [his] judicial review lawsuit because the proposed 'Final Judgment' appear[ed] to be in compliance with the Act." After thirty days had passed from the date that Menchaca provided notice of the proposed final judgment to the Commission, on August 8, 2018, ICSP filed a motion for entry of judgment, which the court signed on September 21, 2018. The final judgment also

expressly states that the "notice of the form of judgment was made pursuant to Texas Labor Code § 410.258."

We conclude that ICSP complied with section 410.258 of the Texas Labor Code by providing notice of its proposed final judgment thirty days before filing its motion for entry of final judgment. ICSP was not required to provide notice of its proposed order on its motion for summary judgment, because any order on that motion was not a "judgment," but rather interlocutory, and not subject to appeal or review until final judgment was entered. *See, e.g.*, *Dallas Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 763 (Tex. 2019) ("An interlocutory order *granting* summary judgment is not subject to appeal." (emphasis in original)). Section 410.258 speaks in terms of a proposed "judgment"; here, the court did not enter a final judgment until after ICSP provided notice of the proposed final judgment to the Commission and filed its motion for entry of final judgment. Accordingly, we hold that ICSP complied with section 410.258 and decline to hold that the trial court's final judgment was void.

For the reasons stated above, we overrule Menchaca's second issue.

Findings of Fact and Conclusions of Law

In his third issue, Menchaca argues that, because he received an adverse decision on summary judgment, the trial court erred in failing to issue findings of fact and conclusions of law to explain the basis for its summary judgment ruling.

Menchaca argues that because ICSP raised numerous points in its summary judgment, without findings from the court, he "must now guess the reasons behind the trial court['s] ruling affecting his claim, an overwhelming/burdensome task."

"[F]indings of fact and conclusions of law have no place in a summary judgment proceeding." *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997). This is because, for summary judgment to be rendered, there cannot be a genuine issue as to any material fact, and the legal grounds are limited to those stated in the motion and response. *Id.* "[I]f summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response." *Id.* Thus, "[t]he trial court should not make, and an appellate court cannot consider, findings of fact in connection with a summary judgment." *Id.* Because there was no need for findings of fact and conclusions of law, we hold that the trial court did not err in failing to issue them at Menchaca's request.

We overrule Menchaca's third issue.

Motion for Sanctions

In his fourth issue, Menchaca argues that the trial court erred in "excluding" and failing to hold a hearing on his motion for sanctions. However, we hold that Menchaca has failed to preserve this issue for appeal.

In order to present a complaint on appeal, Texas Rule of Appellate Procedure 33.1 requires that the record demonstrate that (1) the complaint was made to the trial

court by a timely request, objection, or motion and (2) the trial court either "ruled on the request, objection, or motion, either expressly or implicitly," or "refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." TEX. R. APP. P. 33.1(a).

Here, Menchaca filed a motion for sanctions against ICSP for filing a frivolous and groundless motion for summary judgment. The record reflects that Menchaca filed a notice of hearing on his motion for sanctions for August 31, 2018. At the August 24, 2018 hearing on ICSP's motion for entry of judgment, the trial court stated that the motion for sanctions was not set for hearing that day but that "[i]f it comes forth, I'll consider it." On August 31, 2018, Menchaca emailed the clerk of the 113th District Court, noting that he was informed that the trial court would not hold the hearing on August 31, 2018 on his motion for sanctions, and that he "wanted to go on record and request that the . . . motion for sanctions be stayed to be lifted by the court at a later date." On September 12, 2018, Menchaca filed a "request to trial court" requesting that his "motion for sanctions filed on July 19, 2018 be brought forth to the trial judge for consideration." However, in a letter filed with the trial court on September 20, 2018, Menchaca stated that he "continues to request that his Motion for Sanctions be stayed for a later date." On September 21, 2018, the trial court entered an order making the June 29, 2018 order granting

summary judgment in favor of ICSP a final and appealable judgment; however, the final judgment makes no mention of the pending motion for sanctions.

The record contains no ruling from the trial court, either implicit or explicit, on Menchaca's motion for sanctions. Nor does the record reflect that the trial court refused to rule on such motion. In fact, the record reflects the opposite. The trial court indicated its intention to consider the motion, if it was presented to it for a ruling. However, Menchaca's multiple requests to the trial court that the motion for sanctions be "stayed" demonstrate that he did not pursue a ruling on the motion or object to the trial court's failure to rule. Thus, we hold that Menchaca failed to preserve this issue for appellate review. *See* TEX. R. APP. P. 33.1(a).

We overrule Menchaca's fourth issue.

Additional Issues

In his fifth issue, Menchaca argues that the trial court erred in excluding his "motion to include additional issues." Specifically, Menchaca argues that the Hearing Officer, and the trial court, erred in excluding his "other issues" relating to his neck, depression, and lifetime income benefits because good cause existed for the addition of such issues. However, we conclude that Menchaca has not preserved this issue for appellate review. Again, in order to preserve a complaint for appellate review, Rule 33.1 requires a party to make a timely request or motion stating the

specifics of the complaint, as well as to obtain a ruling from the trial court on the request or motion. TEX. R. APP. P. 33.1(a).

Here, despite Menchaca's claim that the trial court erred in excluding his "motion to include additional issues," the record is devoid of any evidence that such a motion was filed in the trial court, or that review of the Hearing Officer's decision on the motion to include additional issues was appealed to the Appeals Panel. Nor does the record reflect that Menchaca made even an informal request to the trial court to consider his additional issues. And, apart from the statement in his petition that he is entitled to lifetime income benefits, there is nothing in the record to suggest that Menchaca put on any evidence related to these additional issues or why the Hearing Officer abused its discretion in refusing to consider them. Because there is neither evidence that Menchaca made a request or motion to the trial court related to these additional issues, nor evidence that the trial court ever ruled on any such request or motion, we hold that Menchaca has failed to preserve this issue for our review. *Id.*

We overrule Menchaca's fifth issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.