APPEAL NO. 92085
FILED APRIL 16, 1992

On February 4, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that respondent (claimant herein) sustained an occupational injury (hepatitis C) on April 10, 1991, in the course and scope of her employment while employed as a member of the housekeeping staff at the (Hospital). He further determined that claimant provided timely notice of her injury to Employer and had a disability from April 10th to the date of the hearing. In its appeal, carrier challenges the evidence supporting the hearing officer's conclusions that claimant sustained her injury in the course and scope of her employment and provided her Employer with timely notice of injury. Carrier further contends that the hearing officer abused his discretion in excluding evidence that no patient at claimant's place of employment had hepatitis C. In her response Claimant contends that the evidence is sufficient to support the hearing officer's decision and that his exclusion of the evidence was correct since carrier had not shown good cause for failing to provide information about hepatitis patients at Employer until the morning of the hearing.

DECISION

Finding no evidence of a causal connection between claimant's hepatitis C and her employment, we reverse and render.

Claimant testified that she commenced her employment at the Hospital on December 16, 1990. Prior to this employment, claimant had operated a janitorial service with her husband cleaning commercial buildings including the restrooms. However, she discontinued this work in 1985. Claimant said she was not exposed to blood and blood products in her previous work. Prior to being accepted for employment with Employer's housekeeping staff, claimant testified she tested negative for hepatitis C; however, the report of Dr. PJP, dated January 2, 1992, which was introduced by claimant, recounted in its "[h]istory" portion that claimant was informed in January 1991 that her lab work showed she was not immune to "Hepatitis" and would have to take a series of three "Hepatitis B Vaccine" injections. According to this report, claimant became very ill within one and one-half hours of the first injection on January 14, 1991, and the series was not completed. Claimant was assigned to perform her housekeeping duties in the western section of the Hospital under the immediate supervision of Mr. Y. This section included the drug and alcohol unit. Her duties included emptying trash containers, cleaning restrooms, water fountains, and the cafeteria. When asked whether she was exposed to blood and blood products in the performance of her duties she responded affirmatively. She provided no details whatever. She testified that she became very ill on April 10th, at the Hospital experiencing headache, dizziness, slurred speech, difficulty walking, and nausea. Her husband was called and he took her to a doctor who that day had claimant admitted to a hospital where she was diagnosed as having hepatitis C. According to the evidence she had also been ill at work the previous day and experienced those symptoms.

Claimant testified that approximately two weeks before she became ill on April 10th, she had been cleaning trash off the tables in the cafeteria after lunch with a coworker, Mr. D. The Hospital clients with infectious diseases used paper plates, cups and disposables in consuming their meals in the cafeteria and such trash was supposed to be segregated in special red bags and marked with the word "Bio" because of the possibility of contamination. On that occasion, claimant said she saw a plastic trash bag that needed closing so she put her hands into the bag to push the trash down so she could tie a knot in the bag. As she did this, Mr. D told her to drop the bag as it was contaminated. According to claimant, coworkers Mr. D and Ms. M knew she touched that bag. Claimant knew she was not supposed to touch contaminated trash and stated that the hospital was out of the special bags for contaminated trash. According to carrier, employees are trained "not to mess with" bags which are marked as Bio-hazard.

According to claimant, there were patients with hepatitis in her place of employment at the time. Claimant did not testify as to which variety of hepatitis such patients had or whether she had any contact with them or their blood, blood products, or body wastes.

Claimant was in the hospital for 11 days commencing on April 10th and her treating doctor was Dr. LB. Claimant was first told on April 15th that she had hepatitis and that this diagnosis was confirmed on April 19th. Claimant testified that when she was first in the hospital, she called her immediate supervisor, Mr. Y, every day before 8:00 a.m. and later on, every other day. She said she told Mr. Y that she had hepatitis. Another supervisor, Ms. W, called claimant at the hospital every day and claimant also told her she had hepatitis. Claimant testified that she not only told these supervisors she had hepatitis but also that she had contracted it at the hospital. Claimant testified she also provided such information to the manager of the housekeeping department, Ms. B, sometime around April 15th.

After her discharge on April 21st, claimant testified she was still very weak and ill, could not perform her household chores, and spent much of the time in bed. Claimant testified that at some time after her discharge from the hospital she was involuntarily terminated by Employer because she was unable to work. She testified she was readmitted to the hospital on May 10th (the hospital records indicate May 8th) with the confirmed diagnosis of hepatitis C and remained there 13 days. After being discharged, claimant said she and her husband talked to Mr. H at her place of employment and told him she was claiming an occupational disease from her work at the Hospital. On that day claimant said she also filed her claim with the Texas Workers' Compensation Commission (Commission). She also testified that she had told Mr. H at some time prior to May 30th that she had contracted hepatitis C while at work.

Claimant's son testified that at sometime when his mother was in the hospital the first time, Ms. B called him at home to inquire about his mother. He said that he told her that his mother had gotten hepatitis at work and said that Ms. B should have known from his conversation that his mother was contending she contracted the hepatitis at work.

Claimant's husband testified that he was in his wife's hospital room when Ms. W called and heard his wife say she had gotten hepatitis at work. He also testified that claimant filed her claim on May 30th because it was the first day she was well enough to be out and about and that prior to May 30th claimant was too sick to take care of business.

Claimant's treating doctor, Dr. LB, referred her to Dr. KM for a consultation and his report, dated April 19th, assessed claimant's condition as "abnormal liver enzymes with antibodies to hepatitis C suggesting recent infection with hepatitis C." Dr. KM's report, which was introduced by claimant, stated that claimant advised she had started working a few weeks earlier at the Hospital and that "[s]he denies coming in contact with any patients having hepatitis. She also denies contact with people having hepatitis. . . ." Dr. PJP's report states that claimant pointed out that notwithstanding this statement in Dr. KM's report there were some patients at the Hospital with hepatitis.

Claimant also introduced a pamphlet from the American Liver Foundation entitled "Hepatitis C -- a common but little known disease." According to this pamphlet, hepatitis C is one of the "many common diseases caused by a virus;" the hepatitis C virus "is spread through blood and blood products, and body fluids;" and the people at highest risk of infection include intravenous drug abusers, sexual partners of infected persons, hemophiliacs, persons receiving kidney dialysis and blood transfusions, and "health care personnel who may be exposed to infected blood or blood products." Carrier didn't dispute that claimant had hepatitis C but, rather, that claimant didn't contract the disease at the Hospital.

Claimant also introduced a "Discharge Summary" prepared by Dr. LB which pertained to claimant's second hospitalization from May 5 to May 18, 1991. According to this exhibit when claimant was discharged from her first hospitalization on April 20th, she was prescribed a medicine "for the diagnosis of partially complex vertical seizures . . . [and] was also found to have hepatitis C antigen positive." This summary went on to state that claimant "denied alcohol or IV drug abuse or smoking . . . did work on the substance abuse ward at the [Hospital] and she is known to get multiple prescriptions from different doctors in the area." This exhibit then referred to a pathology report prepared after a liver needle biopsy procedure was performed on claimant during her second hospitalization period in May 1991 and stated the following:

> The comment by the pathologist that this was an atypical type of hepatitis with acute portal inflammation and severely diffuse steatosis, probably strongly suggesting an idiosyncratic drug toxicity superimposed to a fatty background due to obesity. The patient had a urine drug screen on 5/5/91 and the patterns were consistent with the following drug, nortriptyline and its metabolites, flecainide, and caffeine. The patient denied the use of these medications. Because of her `propensity to [Dr. S]' and to visit multiple physicians for multiple complaints and take multiple prescriptions the patient was seen by a psychiatrist."

Dr. LB's summary then stated the following:

> Suggestions: Take meds as directed and keep appointments with [Dr. KM]. Appointment to be made with [Dr. B] p.r.n. I told the patient that if she continues to go to different M.D. to get the prescriptions that she wants and not those ordered she will have to find herself another attending physician . . . . [Dr. KM] also stated that the patient may be taking medications unknown to us which may be hepatotoxic and he did not think that she needed any follow up in the near future as far as her liver enzymes were concerned and the suggestion was that she avoid drugs that would be injurious to the liver and he would follow her p.r.n."

The pathology report, dated May 18, 1991, was introduced by carrier. The report stated that "[t]his is an atypical-type of hepatitis with acute portal inflammation and severe diffuse steatosis. These features strongly suggest direct or idiosyncratic drug toxicity, probably superimposed to a fatty change background due to obesity. . . ." This report stated the "Final Diagnosis" as "Fatty Liver Hepatitis."

Mr. D, a coworker of claimant, was called by carrier. He testified that when he saw claimant moving towards the trash bag on the occasion to which claimant testified, he told claimant not to touch it because Employer had told employees to "be on the lookout for hepatitis." Mr. D said that claimant did not touch the bag. While denying that employees were exposed to blood or blood products at work, he did acknowledge that there is contaminated trash at the Hospital and conceded that employees at the Hospital would be more exposed to disease at work than elsewhere.

Ms. B denied that claimant ever told her she contracted her hepatitis at work and she had several conversations with claimant about her situation. Ms. B testified that claimant called her on April 24th after being discharged from the hospital, told her she had been in the hospital 11 days with hepatitis C and didn't know when she could return to work. According to Ms. B, claimant never told her on April 24th or earlier that the hepatitis was work-related. Ms. B testified at first that she had never had a telephone conversation with Claimant's son about his mother's condition. Ms. B also testified that the nursing personnel and not the housekeeping staff segregate the contaminated waste; that housekeeping personnel are not in close contact with clients and have no greater exposure to disease than anyone else; and that the housekeeping personnel do clean floors, bathrooms, and water fountains and do take precautions against contact with disease.

When carrier asked Ms. B whether the Hospital "had any clients now with hepatitis C," claimant objected on the basis that carrier had only that morning been provided with an answer to one of her interrogatories. That particular interrogatory asked carrier to state exactly how many patients at the Hospital had hepatitis (any form) and the ward units where such patients lived during the period of claimant's employment. Carrier had previously

answered claimant's other interrogatories. The hearing officer asked carrier for a showing of "good cause" for its failure to timely provide the information. Carrier's counsel stated that claimant's interrogatories had been propounded to another employee of carrier and that the information had to be requested from the Hospital. Carrier had earlier obtained information from the Hospital to answer two of the interrogatories and had supplemented its answers accordingly. However, counsel had only obtained the information about Hospital clients with hepatitis the afternoon before the hearing when he talked to the employee of carrier to whom the interrogatories had been propounded. The hearing officer ruled that such explanation did not constitute "good cause" and excluded the testimony.

Carrier contends on appeal that claimant did not prove by a preponderance of the evidence that she sustained an occupational disease in the course and scope of her employment in that the element of causation was not proved. According to carrier, the hearing officer must have simply applied a logic that since claimant didn't have hepatitis C before she commenced the employment and was later diagnosed as having hepatitis C, she must, perforce, have contracted the disease at the Hospital. Carrier contends that "[t]here is simply no evidence that [claimant] came into contact with any hepatitis C germs at the [Hospital]." We agree with carrier that there is no evidence which proves that claimant contracted her disease at the Hospital and for that reason we reverse and render.

The Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act) defines "occupational disease" as follows in article 8308-1.03(36):

> "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. The term includes other diseases or infections that naturally result 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 term includes repetitive trauma injuries.

The provisions of article 8308-1.03(36) have been adopted by the statute providing workers' compensation insurance for state employees. TEX. REV. CIV. STAT. ANN. art. 8309g.

We have previously observed that the above definition is substantially similar to the language in the predecessor statute and should receive the same construction. Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991.

The Texas courts have had occasion to discuss the necessity for proving causation to establish the compensability of occupational diseases. In Home Insurance Co. v. Davis, 642, S.W.2d 268, 269 (Tex. App.-Texarkana 1982, no writ), the court instructed as follows:

To be compensable as an occupational disease, a disease must be one arising out of and in the course of the claimant's employment, and cannot be an ordinary disease of life to which the general public is exposed outside of the employment. Tex.Rev.Civ.Stat.Ann. art. 8306 § 20 (Vernon 1967). To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's work and the disease, *i.e.*, the disease must be indigenous to the work, or must be present in an increased degree in that work as compared with employment generally. (Citations omitted.)

Claimant asserts in her response that carrier misperceives the law in this area. Claimant recognizes that she "must establish a causal link between her illness and her employment through probative evidence . . . [which] may be accomplished through a showing that the occupational disease is present in the employment in an increased degree." Claimant cites us to INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ), and to Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Claimant then urges that the record is replete "with examples of the presence of infectious diseases at the [Hospital] in a greater degree than that expected in the normal background population." Claimant goes on to contend that examples "probative of a causal link between the disease and [claimant's] employment include the following: health care personnel are generally at a higher risk; the Hospital takes precautions and trains employees so as to prevent their contracting infectious diseases; [d]isease is so rampant at the [Hospital] that infectious waste is segregated from other waste;" and, employees are instructed in the special handling requirements for segregated waste.

Our careful review of the record persuades us that the quantum and quality of the evidence required to establish the causation element between claimant's disease and her employment is not merely insufficient to support the hearing officer's conclusion but is virtually nonexistent and requires our reversal and rendition of a decision to the contrary.

In Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980), the employee, a plumber who routinely had to crawl under houses to perform repairs and installations, contended that his "atypical tuberculosis" had been caused by his exposure to soil contaminated with a variety of fecal matter including that of birds and other fowl. The employee also raised birds commercially. The employee's evidence included the testimony of his treating physician to the effect that in his opinion, based on reasonable medical probability, the employee's disease resulted from his employment. The insurance carrier showed, however, that the employee was diagnosed as having "Group III mycobacterium intracellularis;" that the employee's particular subgroup of bacterium (Group III) was composed of at least 30 serotypes (subgroups) which varied substantially in their disease producing capacities; that the employee's Group III bacteria was not serotyped or subgrouped so as to determine whether or not it was an avian strain (considered the most pathogenic); and, the bacterium with which the employee was infected had "not been

isolated in any of the environments where he worked or lived." *Id* at 201. The Texas Supreme court observed that "the specific problem is establishing a causal connection between the disease and Schaefer's employment. . . ." *Id* at 202. The court noted that causation may be proved by expert testimony but that even that caliber of evidence must amount to more than speculation or conjecture. The following comment of the court is instructive:

In Parker v. Mutual Liability Ins. Co., 440 S.W.2d 43, 46 (Tex. 1969), this court stated:

> [P]robabilities of causation articulated by scientific experts have been deemed sufficient to allow a plaintiff to proceed to the jury. For while a scientific training conceives of anything as possible, coincidence can be measured and generalizations similar to but not the same as uniform physical laws can be drawn from the probability of a result following a cause. In fact, the relationship between cause and its effect per se without theoretical explanation, can be nothing more than probable relationships between particulars. But this probability must, in equity and justice, be more than coincidence before there can be deemed sufficient proof for the plaintiff to go to the jury.

> We have held that in workers' compensation cases expert medical testimony can enable a plaintiff to go to the jury if the evidence establishes "reasonable probability" of a causal connection between employment and the present injury. (Citations omitted.) In the absence of reasonable probability, the inference of causation amounts to no more than conjecture or speculation. (Citation omitted.) *Id* at 202.

The court then went on to find "a crucial deficiency in the proof of causation," namely, that "[t]he evidence fails to establish that any bacteria was present in the soil where Schaefer worked." *Id* at 203. The court went on to reject the employee's treating physician's expert opinion on causation because the doctor "assumes that the employee had an avian serotype of the bacterium pathogenic to fowl" and further assumes that such particular bacteria was present in bird droppings where the employee worked when it was admitted that the particular strain from which the employee suffered hadn't even been identified let alone been shown to be present in the soil where the employee worked. The court went on to state that the treating doctor's opinion on causation "does no more than suggest a possibility as to how or when Schaefer was exposed to or contracted the disease. . . ." and held that such opinion "relied on mere possibility , speculation, and surmise. (Citation omitted.)" *Id* at 204. Holding that "there is no evidence that the disease suffered by Bobby Schaefer is an occupational disease arising out of and in the course of employment," the court observed that "[t]he fact that proof of causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation. (Citation omitted.)" *Id* at 205.

The court in Schaefer also disagreed with the employee's contention that his Group III mycobacteria intracellularis was not an "ordinary disease of life" and that such category of afflictions is "limited to illnesses such as common colds and the flu and do not include exotic diseases such as in intracellularis." The court responded to such contention thusly:

> We disagree with Schaefer's contention. The fact that m. intracellularis is an extremely rare disease afflicting very few persons does not exclude it from being a disease to which the general public is exposed outside of employment. M. intracellularis has not been found to be an occupational disease. It has not been shown to be indigenous to Schaefer's work or present in an increased degree in that work. (Citations omitted.) Ordinary diseases of life are compensable only when incident to an occupational disease or injury. (Citations omitted.) *Id* at 205.

See also Home Insurance Company v. Davis, *supra*, where both the employee and the insurance carrier adduced testimony from doctors on the issue of whether the employee's chronic bronchitis was caused by his on-the-job exposure to alternating hot and cold temperatures, as the employee argued, or by his smoking as the carrier argued. Even the employee's treating doctor acknowledged that chronic bronchitis was an "ordinary disease of life which any person was subject to contracting, and that it was just as likely that [Mr. D] bronchitis was caused by his history of smoking cigarettes as by his employment." *Id* at 269.

In INA of Texas v. Adams, *supra*, cited by claimant, the carrier contended that the employee had failed to establish the causal relationship between his hearing loss and his employment. The employee had worked for years for Texaco in the telephone store room and described the noise level in the room as louder than a baby crying or a door slamming. An otolaryngologist testified that the employee had suffered a 21.8% hearing loss and concluded it was "the result of high noise levels over an extended period of time. He concluded from the patient history that the loss was work- related." *Id* at 267. The carrier on the other hand presented high blood pressure, high triglycerides, high cholesterol, advancing age, and heredity as "possible causes." Carrier argued that "hearing loss is an ordinary disease of life and appellee was therefore required to show he was exposed to more noise than the general population." *Id* at 267. The court found "sufficient testimony of the noise levels in the workplace and sufficient expert testimony of noise rather than high blood pressure or age being the probable cause of the hearing loss for the jury to infer the employment caused the sensorineural hearing loss." *Id* at 267. The court's discussion on causation and occupational disease is helpful and follows:

> Ordinary diseases of life to which the general public is exposed outside the employment are not compensable except where incident to an occupational disease or injury. TEX. REV. CIV. STAT. ANN. art. 8306 sec. 20 (Vernon Supp.1989). To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's employment and the

> disease, *i.e.*, the disease is indigenous thereto or present in an increased degree. Home Insurance Co. v. Davis, 642 S.W.2d 268, 269 (Tex.App.-Texarkana 1982, no writ). Causation may be established where general experience or common sense dictates that reasonable men know, or can anticipate, that an event is generally followed by another event; where there is a scientific generalization, a sharp categorical law, which theorizes that a result is always directly traceable to a cause, forming a sequence of events from a harmful consequence to the act itself; or by probabilities of causation articulated by scientific experts. Parker v. Employers Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex.1969). *Id* at 267.

See also our decision in Appeal No. 91026, *supra*, where Panel No. 1 commented on the element of causation thusly:

> Whether the issue of causation is framed in terms of the disease being indigenous to the work or present in an increased degree, as urged by carrier, or that the disease must be inherent in that type of employment, or but for the employment, would claimant have suffered the harm, what is required is evidence of probative force of a causal connection between the employment and occupational disease. (Citations omitted).

In the case *sub judice*, there was no expert testimony adduced. In Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), the court affirmed the trial court's judgment which set aside a workers' compensation award for the employee who had contended that her asthma and allergic rhinitis was caused by dust, lint, and chemical dyes in the clothing plant where she worked. The court first analyzed the phrase "ordinary diseases of life" as found in the statute and described it as a term of art essentially related to causation. The court went on to discuss "the test" as "whether there is evidence, either direct or indirect, of a causal connection between her disease and her employment . . . [and] [a]bsent evidence of that causal link, her disease is not compensable and is an `ordinary disease of life'." *Id* at 252. The employee's treating physician testified that while numerous agents, at home and at work, could trigger the symptoms, he couldn't opine as to what caused the employee to develop asthma and allergic rhinitis. Importantly, the court observed as follows regarding the necessity for expert testimony:

> However, expert testimony may be required where a claimant alleges that employment caused or aggravated a disease and the fact finder lacks ability, from common knowledge, to find a causal connection. Parker v. Employers Mut. Liab. Ins. Co. of Wis., 440 S.W.2d 43, 46 (Tex.1969). Since the cause of disease is more difficult to ascertain than the cause of a physical injury, it is less likely that a jury will have the common knowledge that is required to establish causation. *Pegues*, 514 S.W.2d at 494. The cause, progression, and aggravation of disease, requires expert testimony to establish a

"reasonable probability" that the disease is causally connected to employment. *Insurance Co. of N. America v. Meyers*, 411 S.W.2d 710, 713 (Tex.1966). The majority of cases in this area involve the cause of cancer, and there are no cases which specifically address asthma.

As applied to the instant case, expert medical testimony is required due to the uncertain nature of the cause of asthma. When experts cannot predict probability of causation of a disease, it is improper to allow the jury to do so. *Parker*, 440 S.W.2d at 49. There is no expert medical testimony that linked Hernandez' inhalation of lint particles at work to her developing asthma.

As we have shown in our review of the documentary evidence, there was no opinion from either the treating doctor, Dr. LB, the consulting doctor, Dr. KM, or the pathologist, or from any source, that the hepatitis C virus mentioned only in claimant's brochure from the American Liver Association, could be, let alone probably was, transmitted to claimant when she pushed down some paper waste articles in a trash bag which had been used by "infectious patients" while eating their lunch in the cafeteria. There was no evidence as to whether any of the "infected patients" were infected with the same hepatitis virus from which claimant suffered on whatever day it was in March or February that she touched some potentially contaminated paper trash. Even more speculative was claimant's apparent suggestion that she may have come into contact with the blood or blood product of a patient infected with hepatitis C while she cleaned a restroom or water fountain. Similar to Schaefer, *supra*, there is here no evidence that whatever strain of hepatitis virus with which claimant was infected existed on any of the paper products she said she touched nor that such virus existed on any restroom facility or water fountain which she may have cleaned, assuming, without knowing, that she came into contact with blood, a blood product, or body wastes. Claimant failed to establish, as did the claimant in Schaefer, a reasonable probability of causation between her employment and her disease.

Compare our decisions in Appeal No. 91002 and Appeal No. 91026, *supra*, where we found sufficient evidence to sustain the decisions of the hearing officers that the employees had sustained compensable injuries in the nature of occupational diseases. Through not necessary to decide in view of our disposition of this case, we reviewed the evidence concerning the issue of whether claimant provided her employer with timely notice of her injury and were satisfied that sufficient evidence of record supported the hearing officer's determination. Similarly, we do not find the hearing officer abused his discretion in excluding testimony regarding information not timely provided by carrier.

The decision of the hearing officer is reversed and carrier is held not to be liable for the payment of any benefits.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge