APPEAL NO. 92269

A contested case hearing was held on May 5, 1992, in (city), Texas, (hearing officer) presiding. The two issues at the hearing were: (1) whether the claimant's (appellant herein) disability is due to an injury in the course and scope of his employment on (date of injury), when he struck his head, or to a pre-existing condition unrelated to the claimed injury; and (2) whether the claimant gave timely notice of his head injury to his employer, (employer).

The hearing officer held that appellant failed to show that the hemorrhage he suffered on or about (date), was caused by an injury occurring in the course and scope of his employment; that he did not give timely notice of his condition to his employer on April 18, 1991; and that he had good cause for his failure to timely report his condition to the employer.

The appellant argues that there is insufficient evidence to support the hearing officer's Finding of Fact No. 3, that on or about March 1, 1991, appellant bumped his head at work while working on cutaways; alternatively, appellant says such finding is against the great weight and preponderance of the evidence. Appellant says also that Finding of Fact No. 4, that appellant did not suffer an injury at work on (date of injury), is against the great weight and preponderance of the evidence, which demonstrates that his injury occurred on that date. Finding of Fact No. 5, appellant says, is also against the great weight and preponderance of the evidence, because it states that appellant began to develop symptoms of left-sided weakness on (date), and further weakness developed on April 19, 1991; appellant says the evidence shows he had loss of use of his left leg on (date), the day after the injury. With regard to the injury itself, appellant says that one physician gave his opinion that, based on reasonable medical probability, the blow to appellant's head was a contributing factor to his disability. In addition, appellant's treating doctor wrote a letter in which he expressed the opinion that the blow to the head was the precipitating factor that caused the hemorrhage.

DECISION

Finding no error on the part of the hearing officer, we affirm.

Appellant was employed by a company that manufactured motorized rear-view mirrors for trucks. He testified that on (date of injury), while working on a mirror, he hit the right rear portion of his head on some overhead shelving. He said he felt a sharp, excruciating pain, but that he shrugged it away. He said when he got up the next morning there was blood on the right rear part of his head, and his left leg went out from under him. He said the problem with his leg giving way continued while he was trying to help his brother install a clothes dryer at his house on Saturday, (date). However, he went back to work the next week for employer and continued to work until April 8th. About the second week of April he also began to experience weakness in his left arm.

On April 1st appellant went to a chiropractor who gave him treatments but ultimately sent him to (Dr. H) (appellant said his chiropractor thought Dr. H was a neurologist, but in actuality he was not). Dr. H ordered a CAT scan of the brain and an MRI of the lower back. Because the CAT scan revealed a right parietal hemorrhage appellant was referred to (Dr. B), a neurosurgeon. A later CAT scan revealed increased edema, but no change in the blood clot. On April 19th, after appellant reported he could not lift himself off the ground, he was sent by Dr. B to the emergency room of (Hospital); on April 29th Dr. B operated and performed evacuation of the hematoma, biopsy, and coagulation of cryptic vascular malformation. The postoperative diagnosis was right frontoparietal intracerebral hematoma secondary to cryptic AV (artio-venous) malformation. Appellant also has had occupational therapy and physical therapy since that time.

Appellant said his supervisor, (Mr. Z), was out of the office on (date of injury). He did not mention anything to Mr. Z about an injury until April 1st, when he told Mr. Z he was going to see a chiropractor. On that day, he did not report the incident as job related because he said at that time he did not relate his symptoms to bumping his head at work. He first became aware of a connection when the report came back from Dr. H, indicating the CAT scan had shown something on his brain.

There was controverted testimony as to when the injury occurred. (Ms. P), an administrative assistant working for employer, testified that, to the best of her knowledge, the injury was first reported to employer on April 18th, which was the day Mr. Z contacted employer's corporate office to say appellant had phoned him. Mr. Z told her that appellant said he thought the incident occurred at the end of January or early February. On April 19th, Ms. P contacted appellant who told her the injury had occurred near the end of February or early March. She said that to the best of her knowledge appellant had never reported to anyone that the accident occurred on (date of injury).

Appellant also said he was injured while working on "cutaways," which he characterized as mirrors which had been cut away and which his employer used at trade shows to show the difference between their mirrors and those of their competitors. In an effort to tie down a more specific date of injury, Ms. P said she reviewed the inventory audit trail and found that a lot of cutaway work had been done prior to March 6th, when a big order for cutaways was needed for a trade show. She also reviewed records of the employer to see when Mr. Z was out of the office. She said the records show he was at the corporate offices in Arlington on February 21st and 22nd, and also on April 12th and 13th. On cross-examination, Ms. P said she did not know specifically whether there was any cutaway work done on (date of injury), although she said it was improbable. In answer to a question as to whether she knew whether Mr. Z was in the office on that date, she said it "appeared that he was."

(Mr. S), appellant's brother, testified that he had asked appellant to help him install 220v outlets for a dryer on Saturday, (date). He said appellant tried to climb the attic ladder and was unable to because he could not lift his leg. He said he was certain the date was

(date) because at the time, Saturday was the only day he had off from his job. On cross-examination he said he had the next Saturday free, but that he did not recall what he did on (date) or 30th.

The medical records which were made part of the record also contain differing dates of injury. In an April 17th letter to Dr. H, Dr. B said that around (date), appellant began to notice some weakness of the left leg and tightness of the left hamstring, which had progressed to his arm about a week before. A history, physical, progress notes, and consultations sheet signed by Dr. B on April 17th said appellant struck his head in February. An April 19th telephone message to Dr. B from appellant states he hit his head in late February or early March. (Appellant acknowledged that the telephone number on the message was his own.) An April 29th history and physical report from (Hospital) by Dr. B said the intracerebral hematoma developed approximately (date), and that "the patient also reported that he had bumped his head into a metal pipe at work several weeks earlier." A consultation report of uncertain date (it is not clear whether the handwritten "4-19" was in reference to date of admission or date of consultation) from (Dr. S), who saw appellant while he was at (hospital), says that appellant stated he banged his head at work on or about (date). A January 30, 1992 letter from (Dr. McD), who reviewed appellant's medical records, and who was a witness (by deposition) for appellant, stated that the appellant struck his head at work at the end of February or the beginning of March. Appellant attributed the varying dates to the fact that he suffered some loss of memory, including dates, from the injury.

Appellant had been treated in the past for seizures, for which his family doctor had prescribed Dilantin and Phenobarbital. He had been taking these medications for 15 years or more. In recent years he had, on his own, started to gradually decrease the dosage from three times a day to two times, then one time, and finally to no medication as of approximately December 1990. He had an EEG in 1980, the January 10th report of which showed "paroxysms of frontal dominant slow activity." A January 16, 1980 report of a skull and CT scan of the brain found, in part: ". . . small foci of density enhancement at the right cerebral hemispheres, one immediately lateral to the slightly compressed appearing anterior horn of the right lateral ventricle and the other at the inferior posterior aspect of the right parietal lobe. In addition, there is a small focus of high density attributed to calcification at the superior convexity of the right parietal lobe."

A May 16, 1981 repeat EEG study found, in part: ". . . presence of some bursts of frontal dominant theta activity. A new finding at this time is the presence of a significant depression of activity on the right side during sleep, a finding which would indicate the presence of a lesion of undetermined character involving this hemisphere."

Both appellant and respondent called as witnesses by deposition, physicians who had reviewed appellant's medical history and given their opinion as to whether appellant's condition was related to bumping his head at work. Both sides agreed, and their questions on deposition reflected, that the opinions were to be based on reasonable medical

probability.

The testimony of Dr. McD, appellant's witness, stated in part as follows:

Q:Explain arteriovenous malformation.
A:This is an abnormality of blood vessels where there is a profusion of blood vessels often forming arteriovenous anastomoses.

Q:Explain intraparenchymal hemorrhage.
A:This is hemorrhage in the substance of the brain as opposed to outside the brain.

Q:In your opinion, is [appellant's] disability caused by a hemorrhage?
A: Yes.

Q:Was the hemorrhage caused by a ruptured blood vessel?
A:Yes.

Q:Can a blood vessel, such as the blood vessel that ruptured in [appellant's] head, be caused to rupture by a blow to the head?
A:Yes.

Q:Assume that a person has a pre-existing condition of arteriovenous malformation. Could a blow to the head accelerate or exacerbate that condition so as to cause a ruptured blood vessel?
A:Yes.

Q:Could that pre-existing condition cause a person to be more susceptible to a blow on the head causing a blood vessel to rupture?
A:Yes.

Q:Is the proximity in time of the blow to the head and the onset of symptoms relevant? Explain.
A:Yes. A short time interval between a blow and onset of symptoms in hours or a couple of days would indicate that the blow probably caused the hemorrhage. On the other hand, a longtime (sic) interval would suggest that injury and hemorrhage were not related.

Q:In your opinion, assuming [appellant] hit his head on (date) 1990 (sic), and started developing symptoms of a ruptured blood vessel the next day, could the blow to the head be a contributing factor to his disability?
A:Yes.

In answer to cross-questions, Dr. McD stated that he is a general and family practitioner and that while he does not perform brain surgery he has treated individuals with

seizures. He also answered further cross-questions, in part, as follows:

Q:Assume with me that [appellant] has had seizures since the age of 15 and that he has been treated with medication. Further assume that he stopped the medication in late 1990 or early 1991. Tell us what effect, if any, this may have had on his condition based on reasonable medical probability.

A:Blood vessel abnormalities such as these can be the cause of seizures. Medication to control seizures controls them, and if he had stopped taking the medication, then there is a possibility he could have recurrence of seizures.

Q:Assume with me that [Dr. B], his operating physician, has reported that [appellant] told him that he struck his head in February of 1991 and that his symptoms began around (date). Based on reasonable medical probability, if he did strike his head in February of 1991, that incident had nothing to do with the rupturing of a blood vessel in [appellant's] head, did it?

A:A blow to the head in a case such as this is more likely to be the cause of symptoms a few days after the incident rather than a month later.

(Dr. Ba), a neurological surgeon, testified for respondent by video deposition. He said appellant's diagnosis, intracerebral hematoma probably from the rupture of the cryptic AV malformation, meant a congenital abnormality of a blood vessel in the head that burst. He said the bursting of these blood vessels can be triggered by events that raise the blood pressure, such as sexual activity, but that they can also burst during sleep. He also testified in relevant part as follows:

Q:Do you have an opinion based on reasonable medical probability as to whether or not a blow to the head that [appellant] claims to have received at work caused this problem in his head?

* * * * *

A:No, it didn't.

Q:Can you explain why your opinion is that such a blow would not cause this problem that [appellant] had?

A:. . . there are several reasons. No. 1, if he'd had a significant blow, he would not have had an intracerebral hematoma. He would have had a contusion on the surface of the brain. He would have either had a subdural where a blood vessel is torn that connects on the surface of the brain; he could have possibly had a fracture and torn through a vessel on the covering of the brain called the dura and gotten an epidural hematoma,

a blood clot on top of the brain. Were he to have had an intracerebral hematoma in this deep area, he would have had contusion above it--a bruise above it. I mean, I think it's virtually impossible.

* * * * *

Q:In your opinion, based on reasonable medical probability, could [a history of seizures] have contributed or caused this problem that he had where his blood vessel burst in his head?
A:I think that...the two diseases are related. I think that more than likely the seizures were caused by the abnormal brain at the area where this vascular lesion was...

* * * * *

Q:Do you have an opinion based on reasonable medical probability as to the closeness in time of [appellant's] symptoms to his blow to the head as having anything to do with this problem that he ultimately had?

* * * * *

A:There's no relationship.

(Dr. Ca), a neurologist, testified for respondent by deposition in part as follows:

Q:Please tell us based upon reasonable medical probability what your diagnosis of [appellant's] condition is.
A:Right frontal parietal brain hemorrhage, secondary to rupture of arterial venous malformation (spontaneous).

Q:If you are of the opinion that [appellant] had a rupture of a malformation in his head, please tell us based on reasonable medical probability as to whether or not that rupture was caused by a blow to the head.
A:No.

Q:Please tell us the reason for your opinion stated above.
A:This syndrome has never been reported to the best of my knowledge as a result of trauma in adults.

On cross-questions Dr. Ca testified in part as follows:

Q:Does medical literature or the medical profession recognize that minor trauma can cause hemorrhage in the substance of the brain?
A:. . . In my opinion, minor trauma causing brain hemorrhage is medically improbable.

* * * * *

Q:Can a blood vessel, such as the blood vessel that ruptured in [appellant's] head, be caused to rupture by a blow to the head?
A:Not in adults and, therefore, not medically probable in this patient.

Q:Assume that a person has a preexisting condition of arteriovenous malformation. Could a blow to the head accelerate or exacerbate that condition so as to cause a ruptured blood vessel?
A:Probably not in adults.

Q:Could that preexisting condition cause a person to be more susceptible to a blow on the head causing a blood vessel to rupture?
A:A preexisting condition such as an AVM in the brain may cause a patient to have a seizure and sustain injury to the head or in some cases a subdural hematoma, but to the best of my knowledge, in adults, not rupture of a preexisting AVM.

* * * * *

Q:In your opinion, assuming [appellant] hit his head on (date), 1990 (sic), and started developing symptoms of a ruptured blood vessel the next day, could the blow to the head be a contributing factor to his disability?
A:Not to the disability arising from the ruptured AVM.

Dr. McD also said in a January 30, 1992 letter to appellant's attorney that:

[t]he cause of the patient's paresis was undoubtedly the hematoma in the brain and this undoubtedly was caused by hemorrhage from the arteriovenous malformations present in the patient's brain. However, what caused the vessels to rupture and start to ooze at this particular time is open to conjecture and it is perfectly possible that the blow to the head could have caused a contrecoup type of injury which resulted in the hemorrhage.

A December 12, 1991 letter from Dr. B to Dr. H said that:

this patient raised the question of whether the head trauma he described prior to his injury could have been related to the cerebral hemorrhage. There are many things associated with AV malformation and hemorrhage and these may hemorrhage spontaneously. I have explained that to the patient although the association of the head trauma is hard to ignore and perhaps a precipitating factor in this case.

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), requires that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the injury occurs. This notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(a), (c). An employee's failure to notify the employer as required by the statute relieves the employer and the employer's insurance carrier of liability under the act, unless: (1) the employer or person eligible to receive notification or the insurance carrier has actual knowledge of the injury; (2) the Texas Workers' Compensation Commission determines that good cause exists for failure to give notice in a timely manner; or (3) the employer or insurance carrier does not contest the claim.

Because of the foregoing statutory provisions, the actual date of injury can be crucial. In this case, the evidence of date of injury was highly controverted. The hearing officer determined that the appellant did not suffer an injury at work on (date of injury). Appellant's testimony was the only evidence that the injury occurred on this date. Numerous other pieces of evidence, including doctors' reports and the testimony of Ms. P, gave earlier dates. On review of the record, we conclude that the hearing officer's finding is not against the great weight and preponderance of the evidence.

The hearing officer further found that the appellant bumped his head at work on or about Friday, March 1, 1991. Appellant contests this finding as being not supported by sufficient evidence or, in the alternative, against the great weight and preponderance of the evidence. The record contains no direct evidence that the injury occurred on this date, although several sources gave estimated dates of "late February, early March." Ms. P testified that the order of cutaways was due sometime before March 6th. Because the hearing officer's finding says "on or about March 1," (emphasis added) we believe it is supportable, and is not so against the great weight or preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

If the notice of injury is untimely, it will relieve the employer and its insurance carrier of liability unless one of the three exceptions is found to apply. Exceptions one and three to the notice statute do not apply in this case. Appellant's appeal appears to raise the good cause exception, by stating that he had no reason to believe the injury caused his disability until April 18th, when Dr. H told him there could be a connection. Therefore, he had 30 days from the time he knew to report the injury.

The hearing officer in Finding of Fact No. 6 found as follows: "[appellant] did not report his left-sided weakness to [employer] until April 18, 1991 because he did not initially associate his condition with bumping his head at work." (The respondent, in its reply, disputed this finding of fact. We do not consider this to be a timely appeal of this finding, as respondent's reply was filed later than 15 days after the date on which the decision of the hearing officer was received. Article 8308-6.41(a)) The hearing officer also stated in Conclusions of Law No. 4 and 5 that appellant did not give timely notice of his condition to

his employer on April 18, 1991, but that he had good cause for his failure to timely report his condition to his employer. Thus, the issue of notice was further considered and settled below in appellant's favor, although the decision on that issue was immaterial in light of the hearing officer's decision that appellant did not show that his hemorrhage was caused by a work related injury. We find no error on the part of the hearing officer on the issue of timely notice.

The claimant in a workers' compensation case has the burden of proof to establish that a compensable injury arose in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. App.-Beaumont 1976, writ ref'd n.r.e.). For an injury to be compensable, an employee must prove that there exists a causal relationship between the injury and the ultimate disability. Illinois Employers Insurance of Wausau v. Wilson, 620 S.W.2d 169 (Tex. App.-Tyler 1981, writ ref'd n.r.e.). The on-the-job injury need not be the sole cause of the disability; it is sufficient to show that the injury was a producing cause of the disability. Texas Indemnity Ins. Co. v. Staggs, 134 S.W.2d 1026 (1940). "Producing cause" has been defined as "that cause which, in a natural and continuous sequence, produces the death or disability in issue, and without which the death or disability would not have occurred." Jacoby v. Texas Employers Insurance Association, 318 S.W.2d 921 (Tex. App.-San Antonio 1958, writ ref'd n.r.e).

While issues of injury and disability in workers' compensation cases generally may be established by the testimony of lay witnesses, even where such testimony is contradicted by the unanimous opinions of medical experts, expert testimony is required where the subject is of such scientific or technical nature that a jury could not form an opinion based on the evidence as a whole aided by their own experience and knowledge. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. App.-Texarkana 1974, writ ref'd n.r.e.).

The above exception only applies where the claimant alleges or it is undisputed that he is suffering from disease, and he seeks to prove that his injury either caused or aggravated the disease, or when an injury or disability to a specific part of the body is alleged to have caused damage or infirmity to other, unrelated portions of the body. *Id* at 495. The facts of this case appear to place it within the first of these circumstances.

The hearing officer had before her ample medical evidence to show causation, and there is nothing in the decision and order nor in the record at the hearing to indicate that she did not consider all the medical evidence before her. This includes the statement of Dr. McD that it was "perfectly possible" that the blow to the head could have caused an injury resulting in hemorrhage; the statement of Dr. B that "the association of the head trauma is hard to ignore and perhaps a precipitating factor in this case;" and Dr. McD's testimony on deposition that, based on reasonable medical probability, a blow to the head could cause a blood vessel to burst and could accelerate or exacerbate the preexisting condition of arteriovenous malformation. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence.

Article 8308-6.34(e). We hold that the hearing officer's conclusion that appellant failed to meet his burden of proof in showing that the

hemorrhage was caused by a work-related injury was supported by sufficient evidence and was not against the great weight and preponderance of the evidence.

The decision of the hearing officer is thus affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge