APPEAL NO. 92331
FILED AUGUST 28, 1992

On June 16, 1992, a contested case hearing was held in [City], Texas, with [hearing officer] presiding. The hearing officer determined that [RB], the appellant herein, had not incurred injury to his back, shoulders, and chest that was connected to an accident at work sustained on [date of injury], in the course and scope of his employment with [Employer]. The employer is a governmental entity that is self-insured for workers' compensation coverage. The hearing officer further determined that a hiatal hernia and Dilantin toxicity were also not caused by the [date of injury] accident. Therefore, the pains and injuries suffered by appellant were not compensable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-1.03(10) and (12) and Article 8308-3.01.

The appellant asks that the decision be reviewed and reversed, arguing that there was not substantial evidence supporting the determinations of the hearing officer. The appellant complains that appellant's physician, Dr. M, was biased against appellant because he is also on the respondent's governing body. As evidence of bias, appellant points to the fact that Dr. M furnished respondent with information about appellant's medical condition. Appellant argues that he was able to work prior to the [date of injury] accident, but wasn't able to work after that date. Appellant argues, essentially, that because a hiatal hernia was not diagnosed prior to the accident, that it logically was caused by the accident. Appellant argues, as to all injuries, including those similar to his preexisting medical conditions, that the degree of pain incurred is greater than before the accident; hence, such injuries were caused by the accident. Conclusions of Law No. 2, 3, and 4 are specifically challenged. No findings of fact are specifically disputed, although Conclusion of Law No. 2 essentially reiterates Findings of Fact No. 5 and 6 as its basis.

Respondent asserts that the decision was supported by the evidence, especially that showing that appellant suffered prior to [date of injury] from gastric complaints and Dilantin toxicity, and that the treating doctor was not biased in his analysis of appellant's condition.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

RB, the appellant, was injured when he slipped on [date of injury], while carrying, with his supervisor, an air conditioning unit weighing approximately 175 lbs. The unit fell on top of him, specifically in the abdominal area. Appellant missed a half day of work that day, all the next day, and then returned to work on [two days after date of injury]. He worked until October 17, 1991 when he left work until sometime in late January 1992. He was terminated upon his return to work for reasons not established clearly in the record.

On [two days after date of injury], he consulted his family physician, (Dr. M), who had treated him for various ailments, including epilepsy, since 1988. Dr. M determined that he had a tender abdomen, and released him to limited work effective that day. Appellant, who was 30 years old, acknowledged that he had epilepsy since he was two years old, and had taken Dilantin throughout much of his life, along with other medications, to control seizures. He stated that since his accident, but not before, he had problems with weight loss, dizziness, nausea, vomiting blood, along with back, chest, and shoulder pain. He stated that a hiatal hernia was detected after the accident, but never before. He agreed that Dr. M. would have a pretty good understanding of his medical history.

Extensive medical records were produced and made part of the record. While Dr. M has been appellant's primary doctor before and after [date of injury], appellant has also been treated frequently at the [DV Hospital] emergency room, and been referred, before and after the accident, to (Dr. S) and (Dr. B) of (Digestive practice). Succinctly, these records indicate that, along with other maladies, appellant has been treated for dizziness, gastric difficulties, chest pain, back pain, body aches, nausea, and vomiting blood prior to, as well as after, the accident. The records also indicate that appellant's considerable weight loss was detected well before [date of injury]. Dr. M, in his deposition, testified that appellant first complained about back pain after the accident on October 14, 1991. He testified that a back strain could manifest itself some days after an accident. Dr. M stated, however, that based upon his experience, a back strain would typically resolve itself within 3 weeks. He further noted that, in his opinion, appellant's back and chest pain were not related to the [date of injury] accident, but had to do with his preexisting gastritis, the origin of which he felt had not yet been identified. Dr. M felt that appellant had fully recovered from the compensable injury, abdominal tenderness. When appellant began seeking treatment from Dr. M in October 1991 for nausea and abdominal/digestive-type ailments, Dr. M referred him again to the Digestive practice, where he saw Dr. B. The records also indicate that Dr. B first detected a non-inflamed hiatal hernia November 22, 1991; a test on October 24, 1991 had shown no evidence of hiatal hernia.

Regarding the Dilantin toxicity assertion, Dr. S treated appellant in July 1991 when he was hospitalized for excessive Dilantin. There is no record of Dilantin toxicity as such after September 1991, and appellant's wife was unable to recall any incident of toxicity other than the July 1991 episode. When appellant was cross-examined at length about treatments indicated in the records for complaints similar to those asserted in his claim, he, for the most part, testified that he could not recall those visits that preceded his July 1991 hospitalization. No evidence was ever submitted, although requested a number of times by the hearing officer, concerning the relationship of Dilantin toxicity to the [date of injury] accident. Likewise, the hiatal hernia was never linked to the accident except through argument that, because it was detected at a point in time after the accident, it was, therefore, caused by the accident.

Appellant testified that, to the extent that he had some preexisting ailments, such as his epilepsy, he had not missed work because of them. This was countered by testimony from (Ms. G), the secretary for the employer's risk management section, which showed absences from July 4, 1990 through [date of injury] in excess of 600 hours, including accrued sick leave, convenience leave, and vacation time along with "absence hours."

Where the matter of causation of an illness or injury is not in an area of common experience, expert or scientific evidence may be essential to satisfactorily establish the link or causation between the employment and the injury. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.- Texarkana 1974, writ ref'd n.r.e.). When expert medical opinion is presented to draw a connection between conditions arising out of employment and an injury or disease, such medical opinion must establish that an injury is linked to employment as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1990). In Hernandez v. Texas Employers' Insurance Association, 783 S.W.2d 250 (Tex. App.- Corpus Christi 1989, no writ), the court noted that lay testimony as to onset of asthma, coupled with testimony about the conditions at the work place, was insufficient to establish that an injury occurred in the course and scope of employment, noting that expert testimony was generally necessary where the claimed injury is a disease. Id, at p. 253.

In this case, appellant contends that a hiatal hernia, and toxicity from a medication he has taken for the epilepsy he has had for 28 years, was caused by his [date of injury] accident. We believe that the cause of neither of these ailments involve matters within the category of common experience such that the compensability of appellant's injury can be established through lay testimony alone. *See also* Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. This is especially true since in this case the medical records reveal numerous contacts with health care professions for gastrointestinal ailments as well as adjustments in medication to control seizures, and evidence the only episode of Dilantin toxicity that incapacitated the appellant occurred in July 1991, prior to the accident. We would note that the hearing officer asked several times during the course of the hearing that such linkage be established. His findings of fact that "no" evidence was presented to show that either the Dilantin toxicity or hiatal hernia resulted from the [date of injury], accident are correct in light of the law discussed above and the need for medical testimony. Chronology alone will not sustain appellant's burden of proof.

Dr. M had served as appellant's treating physician for years, before he was elected to respondent's school board. Dr. M referred appellant to Dr. B, during his treatment for the gastrointestinal symptoms that occurred after [date of injury], and there is no contention Dr. B is connected to respondent. Further, the 1989 Act and the rules of the

Commission specifically compel, or authorize, furnishing medical information to insurance carriers pursuant to payment of benefits. Articles 8308-4.66, 8308-8.01; *see also* Texas W. C. Comm'n, 28 TEXAS ADMIN. CODE §133.3, §133.100-106. Thus, the fact that Dr. M furnished medical reports to this respondent does not, as appellant asserts, prove bias in his conclusions about appellant's condition.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). A claimant must link any contended physical injury to an event arising from his employment. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-1961, no writ). Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.- Corpus Christi 1973, no writ).

Dr. M's connection to the respondent's governing board was known to the appellant and admitted by Dr. M. Dr. M had also been the appellant's primary doctor for years prior to his election to respondent's board. Dr. M was also paid through the workers' compensation coverage afforded by the employer. Appellant was treated by doctors other than Dr. M before and after the accident. The hearing officer could consider and weigh all these matters in determining the weight to be given to Dr. M's testimony and records as well as other evidence presented. Given all the evidence, we cannot say that the hearing officer's determination that the back, chest, and shoulder pain was not connected to the accident, or that appellant had recovered from injuries that were connected to the accident, is against the great weight and preponderance of the evidence.

There being sufficient evidence to support the decision of the hearing officer, we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge