APPEAL NO. 92598

On October 9, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding as hearing officer. The hearing officer determined that the deceased employee suffered a compensable injury on (date of injury), but his death on May 11, 1992 was not the result of the compensable injury and (carrier), was not responsible for death benefits pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The widow (beneficiary/claimant) of the deceased appealed requesting a finding that the deceased's death on May 11, 1992 was a result of the (date of injury) compensable injury. Carrier filed a response.

DECISION

The hearing officer's decision is affirmed.

The facts in this case are not in dispute. The deceased was a 41 year old construction foreman, when on (date of injury), while helping his crew lift a heavy concrete grating, he felt something pop in his neck. He subsequently developed severe headaches, was first seen by (Dr. W), a board certified family practitioner, who referred the deceased to (Dr. B), a neurosurgeon. The deceased was also seen by (Dr. Bu), an oncologist and carrier's MEO. The doctors all agreed that the deceased had a malignant brain tumor. Although (Dr. B) operated to remove the tumor and the deceased underwent radiation therapy, the deceased died on May 11, 1992.

The sole issue as framed at the contested case hearing (CCH) was: "[d]id the deceased employee sustain a compensable injury on (date of injury), that resulted in his death on May 11, 1992?" Claimant testified at the CCH that the deceased had been in good health before the (date of injury) incident and had not complained of headaches. The carrier at the CCH submited as Carrier's Exhibit D, the written deposition of the custodian of records at (Hospital), which showed in the medical history of the deceased on (date) that "[p]atient has been having headaches for approx. 3 weeks prior to admission."

All three doctors involved were deposed by written deposition and asked basically the same questions. Although the answers varied in some small detail, generally the agreed upon consensus was that the strain of lifting by deceased on (date of injury) increased the deceased's intra-cranial pressure and caused the headaches. The headaches resulting from the pressure affected the natural progression of the tumor by bringing it to the attention of the doctors "slightly earlier than it otherwise would have become." (Dr. W) answered the question "[d]id [deceased] death occur as a result of the job related injury he sustained on or about (date of injury)?" by saying:

A. [Deceased's] death occurred secondary to a malignant brain tumor, which basically was the etiology to his actual cardiovascular collapse and death. The job-related incident definitely aggravated the symptoms which probably would have been present at a later time, but the job itself was not the direct

cause of [deceased's] death.

Both (Dr. B) and (Bu) answered the same question unequivocally "no." The hearing officer found that the deceased sustained a compensable injury on (date of injury), but that the deceased's death on May 11, 1992 was not the result of the compensable injury. Claimant in her appeals asks us to review the hearing officer's decision and requests us to find "that [deceased's} compensable injury on (date of injury), did result in his death of May 11, 1992." Of note is that claimant in the alternative asks for a finding that deceased's compensable injury accelerated his death and asks "for payment of death benefits to the claimant for the period of time to be determined during which it is determined that [deceased] would have survived had it not been for the compensable injury which he sustained on (date of injury)."

We have consistently held that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence pursuant to Article 8308-6.34(e). As stated previously the facts are virtually undisputed. The only issue of any disagreement is that claimant testified that the deceased had not complained of headaches prior to (date of injury) and the hospital record reflects the deceased "has been having headaches" for approximately three weeks prior to (date of injury). The doctors' opinions are all in agreement except for minor variations such as (Drs. W) and (Bu) agree "that headache is the most common symptom of brain cancer," while (Dr. B) answers that questions "[n]o, because it is not the most common thing." The doctors all agree that the deceased apparently had a malignant brain tumor on (date of injury). (Drs. W) and (B) state the preexisting brain tumor was "aggravated" because the straining "caused intra-cranial pressure," which led to an earlier discovery of the tumor. Where the matter of causation of an illness or injury is not an area of common experience, expert or scientific evidence may be essential to satisfactorily establish the link between employment and the claimed injury, as a matter of reasonable medical probability. Schaefer v. Texas Employers' Insurance Ass'n., 612 S.W.2d 199 (Tex. 1990).

In Walters v. Fidelity & Casualty Co. of New York, 611 S.W.2d 934, (Tex. Civ. App.-Eastland 1981, writ ref. n.r.e.) a widow sought death benefits due to a job-related injury which aggravated an existing condition of cancer. In that case, the medical evidence was, in all reasonable medical probability, ". . . that the preexisting cancerous condition of Walters was aggravated by the injury [and that the deceased] would probably have lived 'a little longer' without the back injury." The doctor testified as to how a weakening of the spine contributed to the death. There was no such medical evidence in the case at bar. In contrast, in Schulle v. Texas Employer's Ins. Ass'n., 787 S.W.2d 608, (Tex. App.-Austin 1990, writ denied), the court held that the worker's on-the-job fall and resultant fractured vertebra were not the producing cause of the worker's death from cancer. Article 8308-4.41 provides "[t]he insurance carrier shall pay death benefits . . . if the compensable injury results in death." Thus, the evidence must establish that the compensable injury resulted in death. Certainly in the instant case there was a compensable injury, the pop in the neck, but as in Schulle, *supra*, the medical testimony, as found by the hearing officer, falls short of establishing that the compensable injury resulted in the deceased's death from a malignant brain tumor.

Claimant, also advances the argument, in the alternative, that she should receive benefits for the period the deceased would have survived had it not been for the compensable injury. There was no evidence that was the fact, but nonetheless there are several reasons why this argument must fail. This argument was not an issue at the CCH, and pursuant to Article 8308-6.42(a) we can only consider the record developed at the CCH. Further, there is no provision for such benefits in Article 8308-4.42 for such payment. The duration of benefits depends solely on the beneficiary's relationship to deceased. Although no direct evidence was presented regarding claimant's request for benefits for the period deceased would have survived had it not been for the compensable injury, the doctors' opinions would seem to indicate, arguably, that the compensable injury caused the doctors to discover the malignant brain tumor earlier than they otherwise would have and consequently it could be argued that deceased survived longer because of the earlier discovery of the tumor.

In any event, having reviewed all the evidence, we find the great weight and preponderance of the evidence to support the findings of the hearing officer. We will not set aside the findings of the hearing officer unless those determinations are so weak or so against the evidence 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.) We do not so find.

The decision of the hearing officer is affirmed.

_____

Thomas A. Knapp
Appeals Judge

CONCUR:

_____

Robert W. Potts
Appeals Judge

_____

Susan M. Kelley
Appeals Judge