APPEAL NO. 931104

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held in (city), Texas, on October 11, 1993, to determine whether the claimant was injured in the course and scope of his employment with (hospital), on (date of injury). Two separately docketed cases were heard simultaneously, the issue in the other case being whether the claimant was injured in the course and scope of his employment with the (city) on (date). However, hearing officer (hearing officer) issued two separate decisions in the two cases, the decision in this case being in claimant's favor. The carrier for employer (employer) appeals this decision, contending that the claimant failed to prove a causal connection between the incident at the hospital and his hepatitis C. The claimant filed a response to such appeal; however, because it was not received timely it will not be considered. Section 410.202; Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992.

DECISION

We affirm the hearing officer's decision and order.

During the pertinent time periods in question in this case, the claimant worked as a paramedic for both hospital and for city. On (date), while working for the city, he responded to an aggravated assault incident. While assisting the victim, who had been hit in the mouth, the claimant received mucosal spray from the victim's mouth into his own. Although the victim had dried blood on his mouth, and the claimant said he did not taste blood, he was sufficiently concerned to fill out a communicable disease exposure notification form which was required by the city. On (date of injury), while working at the hospital, claimant had just finished drawing blood from a patient in the later stages of AIDS when the exposed end of the needle stuck him in the left hand.

Claimant began having his blood tested on (date), shortly after the first incident; on that date and on (date), the tests were negative for hepatitis C. After being stuck with the needle on (date of injury), both claimant and the patient were given blood tests and both tested negative for hepatitis C.[1] No tests were ever performed on the assault victim, who could not be located. On July 17th, for the first time, the claimant's blood tests indicated an elevated level of liver enzyme indicative of hepatitis or other liver dysfunction. His first onset of symptoms, difficulty in urinating, occurred on (date). During this period of time he was being seen by (Dr. B), who diagnosed hepatitis C on July 27th.

In an undated handwritten note date-stamped as received on August 7, 1992, Dr. B wrote the claimant had developed hepatitis, "status-post needle stick injury. This could be due to many blood borne viral pathogens (e.g. HIV, CMV, hepatitis C etc.). This in my

[1]Claimant has never tested positive for HIV. Certain of his blood tests were positive for hepatitis B, which he attributed to the fact he had been immunized for it.

estimation is probably related to his needle stick injury recently. Lab tests to define the etiology are pending."

In another handwritten note date stamped August 18th, Dr. B stated claimant was "exposed to blood products and had a mucosis surface exposure several weeks prior to the onset of hepatitis. His workup has failed to delineate the exact etiologic agent to this date, further workups pending." Dr. B continued, "[t]his type of hepatitis was most probably due to one of the exposures listed above."

On December 22, 1992, Dr. B wrote that "[t]here can be no medical doubt that [claimant] acquired hepatitis C virus infection from either a needle stick injury or from mucosal splash exposure," and that further testing would be conducted to rule out chronic hepatitis. On January 19, 1993, Dr. B wrote that claimant's "only risk factor for acquiring hepatitis C has been his needle stick and mucosal splash exposure. As such, I would believe one of the two exposures led to his problems."

Apparently at carrier's request, claimant was seen by (Dr. P) on February 24th; on March 8th, Dr. P wrote that the usual incubation period for hepatitis C is six to 16 weeks after exposure, so that "any time between March and June is the most likely time of exposure." He went on to state that while the hospital patient tested negative for hepatitis C, the test was not more than 70% sensitive, and "thus it is possible, especially in an immunocompromised HIV+ patient, to transmit hepatitis C even though the test is negative. Hepatitis C is common in both homeless persons and HIV patients, so it is not possible to determine the source of [claimant's] hepatitis C."

A March 24th letter from the Texas Medical Foundation stated that, based on a review of claimant's medical records, the etiology of claimant's hepatitis could not be determined. However, it also stated that statistically, of the two exposures, the needle stick was more likely to be the occupational injury responsible for the transmission of the viral agent.

On September 14th, Dr. B wrote a letter summarizing claimant's needle stick exposure, followed by symptoms approximately five to six weeks later. Dr. B wrote that the initial hepatitis C virus infection serology was negative at six weeks but was positive at a five-month repeat testing, and stated that "this is a very typical pattern for needle stick hepatitis C serology. 50% are positive at 6 weeks after onset of illness, but only at 6 months are another 40% positive (most of these were low inoculum infections such as needle sticks . . .). Also note that the infection occurs at the time of inoculation, though the range of onset of symptoms is from 2-26 weeks with a mean onset of symptoms being 7-8 weeks. Once again, this is entirely consistent with [claimant's] clinical course." Dr. B concluded with the statement that "[t]here can be no medical doubt as to the source, and etiology of his hepatitis."

The claimant also introduced into evidence articles from medical publications concerning hepatitis C. The first described the disease as a blood borne form of non-A,

non-B hepatitis, and stated that it was most commonly transmitted percutaneously and that health care personnel who work with blood and blood products are vulnerable to infection through their exposure to needle stick and mucosal contamination accidents. The second article included employment as a health care worker as a risk factor for the hepatitis C virus, along with other factors of IV drug use, history of blood transfusion, heterosexual exposure, household exposure, hemodialysis, and "no known source." The article cited the same incubation periods stated by Dr. B in his last letter.

The carrier challenges the hearing officer's determination that the claimant on (date of injury), sustained an injury in the form of an occupational disease, hepatitis C, in the course and scope of his employment while working for the hospital. The carrier contends that there is no evidence that the AIDS patient had hepatitis C, or even that such disease was present at the hospital. It also contends there is insufficient probative evidence of causation between the incident of that date and claimant's disease.

The 1989 Act defines occupational disease to include a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, but does not include an ordinary disease of life to which the general public is exposed outside of employment. *See* Section 401.011(34). 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 present in an increased degree as compared with employment generally. *See* Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana 1982, no writ); INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ).

The Appeals Panel has on numerous occasions considered cases wherein the causation of an occupational disease, including hepatitis, was at issue. Texas Workers' Compensation Commission Appeal No. 92085, decided April 16, 1992, reversed the hearing officer's determination that the employee sustained an occupational disease, hepatitis C, while employed as a member of the housekeeping staff of the employer hospital. In that case the employee believed she contracted the disease when she pushed down some waste paper articles in a trash bag which had been used from "infectious patients;" there was also contrary testimony from a coworker that the employee did not touch the trash bag on the day in question. In reversing and rendering a decision for the carrier, the Appeals Panel cited case law, including Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980), in which the Supreme Court stated that causation may be proved by expert testimony, so long as it establishes a "reasonable probability of a causal connection between employment and the present injury. . . . In the absence of reasonable probability, the inference of causation amounts to no more than conjecture or speculation (citations omitted)." The court in that case found a "crucial deficiency" in proof of causation in the employee's expert's testimony, setting forth at length portions of that doctor's cross-examination and determining that such testimony only suggested a possibility as to how or when the employee was exposed to or contracted the disease. The court pointed out that the expert's testimony assumed that the employee was infected with a particular serotype, and that the serotype was present in the soil, but that it was admitted that the particular strain

was not identified, the manner of transmission was unknown, and there was no evidence that the bacteria was present in the soil where the employee worked.

The facts of this case, we believe, are distinguishable. In Appeal No. 92085 the employee's evidence relative to causation was vague, and was controverted by another employee. Unlike the situation in Appeal No. 92085, *supra*, the claimant in this case testified, and it was uncontroverted, about the occurrence of two incidents which medical evidence showed were of the type by which hepatitis C could be transmitted. Appeal No. 92085 is also distinguishable by the lack of expert testimony, which was present in the instant case. While carrier contends that Dr. B's letters are conflicting and thus presumably of diminished credibility, to some extent they demonstrate a progression in that doctor's opinion over time as claimant underwent continued testing. As Dr. B stated, while the etiology of the disease remained unknown initially, there was no medical doubt that the disease was acquired from either of the two exposures. Dr. B's final opinion was that the needle stick was the source of the disease, based on blood testing over a period of time which showed a "very typical pattern for needle stick hepatitis C serology." Both Drs. B and P, as well as one of the medical articles, placed claimant's (date of injury) injury within the possible incubation period for the disease. Finally, to the extent that the AIDS patient tested negative for hepatitis C, Dr. P wrote that it was possible for an HIV+ patient to transmit hepatitis C even though the test is negative. In sum, we find that the substance of the expert medical evidence in this case was sufficient to establish a reasonable probability of a causal connection sufficient for a fact finder's determination.

Carrier also cites as precedential Texas Workers' Compensation Commission Appeal No. 92093, decided April 24, 1992. In that case the employee contracted hepatitis B after sticking herself with a lancet after having used it on a patient whose symptoms, the employee believed, included those common to hepatitis. The director of nurses at the employer hospital testified that the patient in question was given a blood test five days before her death which was within normal limits, and that there had not been a case of hepatitis B at the hospital for the past few years. Evidence from the employee's treating doctor, in the form of an affidavit, was summarized in the decision as stating that nothing led him to believe the patient carried or had hepatitis B. In addition, the carrier's medical expert stated that within reasonable medical probability, the claimant could not have gotten hepatitis by sticking the patient and then herself. He also said that only during the last part of an incubation period (usually a few weeks to six months), just prior to the clinical, acute phase, is a person contagious to others, although he said it was possible for a totally asymptomatic person to transmit the disease.

It appears that the bulk of the medical evidence in Appeal No. 92093 centered around the fact that the patient in question had tested negative for hepatitis B. While that fact is similar to the situation with the AIDS patient, the record in the instant case also contains medical evidence from Dr. P, which the hearing officer could choose to credit, that the test for hepatitis C can be falsely negative for HIV+ individuals, along with the opinion of Dr. B as to probability of causation by the needle. This evidence, we believe, removes this case from one in which the evidence only shows a "mere possibility" of a causal connection.

Schaefer, *supra*. This being the case, we will not substitute our judgment for that of the fact finder, even where the evidence may have led a different fact finder to another conclusion. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Compare also Texas Workers' Compensation Commission Appeal No. 93049, decided March 1, 1993, another hepatitis case, in which the Appeals Panel upheld the hearing officer's determination that the deceased's injury--a puncture wound from a nail--did not cause his fatal disease, hepatitis B. Medical opinion in that case consisted of one doctor who said the deceased "probably contracted [the disease] from a puncture wound with a contaminated nail," and another doctor who stated he did not know whether the nail was a cause, but that such causation was "not likely but possible." The Panel in that case quoted from Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969), in which the court stated that "[t]here can be many possible `causes,' indeed, an indefinite number of circumstances can cause an injury. But a possible cause only becomes `probable' when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue can be submitted to the jury." Upon review of the medical evidence, the Appeals Panel concluded that there was sufficient evidence to support the hearing officer's finding that the puncture wound did not cause the ultimate disease.

And see Texas Workers' Compensation Commission Appeal No. 92157, decided June 1, 1992, wherein a licensed vocational nurse contracted hepatitis after being splashed in the eye with blood from a patient whose medical condition was not in evidence. In upholding a finding of no compensability, the Appeals Panel noted medical evidence indicating there was no link at all between the exposure to blood and the ultimate disease, and other medical evidence that causal connection was a "possibility." There was also evidence that the employee had positive indicators for the disease. Noting that the hearing officer is the sole judge of the relevance and materiality of the evidence as well as its weight and credibility, Section 410.165(a), the Appeals Panel found sufficient probative evidence to support the decision that the employee failed to establish causation.

Likewise, our examination of the evidence in this record indicates that the hearing officer's determination of compensability is supportable, and is not against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We therefore affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge