APPEAL NO. 93158
FILED APRIL 15, 1993

On January 26, 1993, a contested case hearing was held. The issues determined at the contested case hearing were whether the claimant, (the respondent in this appeal), sustained basal cell carcinoma as a result of a work-related injury of _____; whether he gave timely notice of the injury to his employer; and whether he timely filed a claim with the Texas Workers' Compensation Commission (Commission). The hearing officer determined that timely notice and claim had been made, and neither point has been appealed. The hearing officer further determined that the claimant's basal cell carcinoma was related to and caused by his injury of _____.

The carrier has appealed, arguing that the great weight and preponderance of the evidence is against the decision. As part of its argument, the carrier notes that the medical evidence supporting a connection between the injury and the cancer should not be given weight because the doctor rendering the opinion was obtained by the claimant's attorney. The carrier also argues that the cancer was an ordinary disease of life and therefore not covered as a work-related injury. No response has been filed.

DECISION

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

The hearing decision fairly sets forth the facts developed at the hearing. The claimant, who was 64 years old, was a welder/pipefitter who went to work for the employer, (employer) on April 8, 1991. On _____, the claimant was seated and welding inside a large drainage pipe, 36 or 42 inches in diameter. When he raised his hood to view the weld, a piece of hot material popped out and struck him on the inside of his lower left eyelid. Claimant immediately left the pipe and reported to his supervisor, Mr. C, what had happened. He stated that Mr. C told him not to worry, that it would heal, and did not make a report or send claimant to the doctor.

The burn did not heal, but began to ulcerate. Claimant then talked with the safety manager for the employer, Mr. T, who referred him to Dr. S. Dr. S performed a biopsy and diagnosed basal cell carcinoma, at the end of January 1992.

Claimant said he was referred to Dr. C, whose specialty was set forth in the record only as "H.M.D.P.A." Claimant said that Dr. C examined him from two or three feet away, and told him that he was a doctor and claimant did not need to tell him anything. Dr. C's medical report states that this visit took place on February 10, 1992, and that he did not think that claimant's cancer was job-related. On February 20, 1992, claimant was examined by an ophthalmologist, Dr. SH, who surgically removed the carcinoma from claimant's lower left eyelid and cheek on February 21, 1992. In answers to a deposition on written questions, Dr. SH responded as follows:

Q: For purposes of this question, please assume that [claimant] received a burn to an area on or around his left eyelid from a spark or welding "slag" on or about _____. In your opinion, based upon your medical knowledge, skill, experience, training, and education, and reasonable medical probability, was the damage or harm [claimant] suffered to the area on or about his left eyelid caused by, the result of, or incident to such a burn?

A: No

Q: [Same assumption of _____ injury]
In your opinion, based upon your medical knowledge, skill, experience, training, and education, and reasonable medical probability, was the damage or harm [claimant] suffered to the area on or around his left eyelid an ordinary disease of life to which the general public is exposed outside of employment?

A: Yes

Claimant testified that he still would need cosmetic surgery. Other than missing five to six days from work, claimant continued to work for the employer until he was laid off on or about May 28, 1992. He denied that he had any previous injuries in the area where the carcinoma was removed.

On November 24, 1992, the claimant was examined on a consulting basis by Dr. H, a dermatologist. Dr. H's letter notes that claimant had actinically damaged skin on exposed areas, and further states:

> From a dermatological point of view, the history of basal cell carcinoma arising in an area of previous burn scar on the background of actinically damaged skin is certainly consistent with a work-related onset of the problem. Skin neoplasia following burns/scars is not an unusual situation. In view of the absence of basal cell carcinomas elsewhere and the basal cell carcinoma specifically arising in the confirmed area of work-related injury, I concur with the concept that the basal cell cancer probably had its origin in the work-related injury.

According to Dorland's Illustrated Medical Dictionary, the definition of "actinic" is:

"pertaining to those rays of light beyond the violet end of the spectrum that produce chemical effects."

An affidavit from Mr. T put into the record states that he observed an inflamed and ulcerated sore the size of a dime in the area around claimant's left eyelid on April 8, 1991, the claimant's first day of work. Claimant specifically denied this.

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. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.34(e) (Vernon Supp. 1993) (1989 Act). 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 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 at the work place. 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). A carrier that argues that incapacity relates solely to a preexisting condition has the burden of proof. Texas Employers' Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977).

Where the matter of causation 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 at a work place and an injury, that medical opinion must establish that an injury is linked to the work place 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). However, it is the substance of the expert testimony, rather than the use of particular terms or phrases, that is determinative on the issue of reasonable medical probability. Id, at p. 202.

We believe that the link between a burn at work and subsequent basal cell carcinoma does not involve matters within the category of common experience such that the compensability of claimant's injury can be established through lay testimony alone.

See also Texas Workers' Compensation Commission Appeal No. 92187 decided June 29, 1992. There is medical evidence on either side.[1] The hearing officer evidently considered the comparative expertise of the medical witnesses, as she was entitled to do. Although Dr.[1]H did not express the direct opinion that claimant did not have an ordinary disease of life, the hearing officer could properly infer that his linkage of the cancer to the burn weighed against Dr. SH's answer that claimant's "damage or harm" was an ordinary disease of life. Although the carrier argues that Dr. SH's opinion is entitled to "presumptive weight," no authority is cited for this argument. Whether claimant was referred to Dr. H by claimant's attorney does not give rise to such a presumption.

We affirm the decision of the hearing officer.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge

[1] There is no evidence of the opinion of Dr. S. Carrier argues that the affidavit of Mr. T, which recites a belief as to what Dr. S's opinion was, is "evidence" of that opinion. Although conformity to the rules of evidence is not necessary, Art. 8308-6.34(e), the Appeals Panel has noted that this provision is not "carte blanche" for admission of egregious hearsay. *See* Texas Workers' Compensation Commission Appeal No. 92144, decided May 28, 1992. The hearing officer evidently, and appropriately, gave little or no weight to this part of Mr. T's affidavit.