APPEAL NO. 93939

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S. art. 8308-1.01 *et seq.*). On September 8, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue to be determined at the contested case hearing was whether claimant, DW, who is the appellant, was injured in the course and scope of his employment with (employer) through chronic exposure to chemicals and heavy metals. The parties stipulated that if there was an occupational disease, that the date of injury was (date of injury).

The hearing officer determined that claimant had not proved that he sustained a seizure or an occupational disease as a result of exposure to chemicals and heavy metals.

The claimant has appealed, arguing that a causal link between employment and exposure to hydrocarbons has been proven by "undisputed and unopposed expert medical evidence." The claimant argues that the overwhelming evidence established toxic chemical syndrome due to exposure to substances described only as "hydrocarbons." Claimant faults contrary medical evidence because it is responsive only to arsenic exposure. The claimant argues evidence he believes to be in his favor. Carrier responds that the sole bit of evidence favorable to claimant's theory is not medical evidence and is not entitled to any weight.

DECISION

We affirm the hearing officer's decision.

The claimant stated that he was employed by employer in 1990 or 1991, and was a supervisor of crews sent throughout the company to clean residue out of catalyst and chemical reactors for various customers in the petrochemical industry. The claimant testified as to various pieces of protective gear, clothing, gloves, and respirators that he regularly wore, and acknowledged that the purpose was to prevent exposure to chemicals. He stated that he regularly wore such clothing. He stated that such clothing such as tie-back paper suits would many times become torn crawling around inside the reactor or that dust would be in the air outside the reactor. When asked to describe the chemicals to which he was exposed, claimant replied, "[j]ust about every kind of chemical they make, probably." When pressed for further specificity, claimant stated that he was exposed to benzene and gasoline. Throughout his testimony, claimant also alleged exposure to substances described generally as "hydrocarbons."

Claimant stated that at the end of a three day drive to a job site in (city, state), he had a grand mal seizure on July 29, 1992, for which he was hospitalized in that area for about six days. Claimant stated that the hospital was unable to specify a cause, and suggested he see a neurologist. He indicated that after the seizure he had muscle spasms and headaches, although by the time of the hearing these complaints were occasional.

Claimant testified that his employer offered him a job in the office upon his return, but that he was unable to take it for two reasons: his Dilantin (which he described as anti-seizure medication) level was not yet established, and he was also warned to stay away from chemicals and refrain from driving. Claimant stated that he had not had seizures prior to (date of injury), or been treated for epilepsy.

In brief review, the documentary evidence in this case shows the following:

- Hospital records/Hospital, (date of injury) and 7/2/1992. Diagnosis of grand mal seizure, etiology unknown. Normal CT scan noted. Although it is noted that claimant is to have an EEG, and an MRI was recommended, no further medical test results are noted.

- (Dr. G), letter of August 1992. Recommends that claimant change his job, noting that "by his account, he has had repeated exposure at work to heavy metals and other industrial chemicals." Dr. G notes that on one occasion, an elevated arsenic level was detected in claimant's urine.

- (Dr. GO), of Occupational and Environmental Medicine, Texas Lung Institute, letter to Dr. G of August 14, 1992, notes that repeat urine tests show arsenic within normal limits. Records diagnoses of cervical spinal strain, headache secondary to this, seizure disorder, and transient elevated arsenic probably related to seafood ingestion.

- Dr. G, letter to carrier dated November 5, 1992. Recites no definite etiology for generalized seizure. Comments that claimant was evaluated by Dr. GO on July 29, 1992, for "any possible heavy metal exposure".

- Dr. GO, letter to carrier dated November 11, 1992, recites testing of claimant and rules out seizure as related to arsenic exposure. "It is well documented within the medical literature that exposure to arsenic and other heavy metals can cause seizure disorder if it is related to long-term arsenic poisoning . . . . Mr. Walker does not have evidence of long-term arsenic poisoning . . . at the present time, I do not feel his seizure disorder is work-related; however, on initial presentation, this was not as clear as at the present time." The letter indicates that elevated arsenic in claimant's urine may have been due to seafood ingestion or other environmental exposure.

- Letter from employer to the Texas Workers' Compensation Commission, dated June 7, 1993, indicated that claimant may have participated in May in the unloading of a catalyst at Texaco Chemical in (city) that was expected to contain arsenic. A Material Safety Data sheet for the compound indicated hazardous ingredients included zinc oxide, copper oxide, and calcium/aluminate cement. The Health Hazard Data section indicated that onset of symptoms would be 4-12 hours after exposure. Seizures are not specifically listed as a side effect of zinc or copper exposure.

- July 8th letter from (Dr. B) of the Texas Lung Institute noted that claimant recited a history on July 29, 1992, of having eaten seafood within several days of the seizure and before evaluation by Dr. G. The letter opines that the causal link between his seizure and arsenic has not been clearly established.

It is noted that although letters from Dr. GO and Dr. B indicate that there is a medical workup for claimant, it was not made a part of this record. Claimant testified that he discussed his exposure to benzene and gasoline with Dr. G.

Claimant tendered a letter at the contested case hearing dated September 3, 1993, and signed by (Dr. PhD), of Biotech Institute. The letter is addressed to claimant's attorney, and states:

I have reviewed both the medical records furnished to me by your office and the questionnaire [claimant] filled out. Additionally, I conducted a telephone interview with [claimant] this afternoon. Based on the questionnaire and telephone interview as well as limited medical records, it is my opinion that [claimant] suffers from Toxic Chemical Syndrome - more specifically, chronic exposure to hydrocarbons which is the result of job-related duties. These chemicals will cause the symptoms of which [claimant] complains. A more thorough examination and specific laboratory work can accurately detect and pinpoint the nature and extent of the injury.

With regard to arsenic and seizure, I am presently investigating and should have an answer to that specific question by Wednesday . . .

Below his signature, Dr. PhD lists qualifications as diplomate of the American Board of Vocational Neuropsychology, of the International Academy of Behavioral Medicine, and of the American Academy of Pain Management. Claimant's attorney indicated that Dr. PhD was a psychologist. Beyond this, any qualification or expertise that Dr. PhD may have to be able to opine as to the cause and etiology of occupational disease is undisclosed in this record. Other than the letter, the specific information upon which Dr. PhD's opinion is based, or the "hydrocarbons" to which he understands claimant to have been exposed, are not disclosed in the record. Carrier objected to this evidence for failure of a proper predicate and for late exchange, but the hearing officer admitted it on the recited basis that he believed he was compelled by the statute to admit documents signed by health care providers. He further opined that claimant had timely exchanged the document. These rulings have not been appealed.

We would note that the procedural history of the case as reflected in the record may explain claimant's complaint on appeal that much of the medical evidence contrary to his case concerns whether or not he was poisoned by arsenic. During the period of time preceding the contested case hearing, claimant's apparent theory of recovery had been that exposure to chemical and heavy metals resulted in increased arsenic which lead to the seizure. In sworn answers on July 12, 1993, to interrogatories propounded by the carrier,

the claimant described a specific instance in which he alleged he was cleaning a reactor at a named customer's location without protective equipment in mid-May 1992, which subjected him to "tainted dust and water." The claimant stated that he "believes the arsenic exposure in May 1992, precipitated his seizure and subsequent disability." The answers to interrogatories also state that a negligence lawsuit was filed for this exposure against two companies (not including the employer) and two individuals. By the time of the hearing, the specific instance alluded to in these answers was not asserted as the basis for claimant's injury, but, rather, claimant contended injury from continuous exposure over the course of his employment.

The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). A claimant must link the contended injury to the employment. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The burden is not on the carrier to prove that a compensable injury did not occur. Texas Workers' Compensation Commission Appeal No. 92118, decided May 1, 1992.

Where the subject of an injury is not so scientific or technical in nature as to require expert testimony, lay testimony and circumstantial evidence may suffice to establish causation. *See* Travelers Insurance Co. v. Strech, 416 S.W.2d 591 (Tex. Civ. App.-Eastland 1967, writ ref'd n.r.e.). However, when the matter of causation is not within common experience, expert medical or scientific evidence may be essential to satisfactorily establish the link between the injury and the employment. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.- Texarkana 1974, writ ref'd n.r.e.). We believe that, in this case, the etiology and development of a seizure disorder and related symptoms from chemical exposure are beyond common knowledge, and that evidence establishing a link as a matter of reasonable medical probability is required. *See* Schaefer v. Texas Employers' Insurance Ass'n, 612 S.W. 2d 199 (Tex. 1980).

We cannot agree with claimant's argument that the hearing officer's determination flies in the face of "overwhelming" medical evidence. At a bare minimum, we believe that a contention that one has suffered a toxic exposure to chemicals requires some development in the evidence beyond the generic description of such substances (heavy metals, hydrocarbons), and a demonstration, as opposed to a bald assertion, that exposure to such substances causes certain enumerated physical effects of the type and nature experienced by a claimant. *See* Texas Workers' Compensation Commission Appeal No. 92187, decided (date of injury); *also* Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92342, decided September 4, 1992.

We would also note the method of exposure was not described or alleged. In this case, the trier of fact was left to speculate about whether such exposure occurred through, for example, intact skin contact, abraded skin contact, inhalation, or ingestion. Further, claimant testified that he regularly wore the protective gear assigned, the purpose of which was to guard against exposure. While he indicated that some of this equipment would tear

at times, or that exposure could occur outside a reactor, there was little information developed in the record as to how a toxic exposure could occur if and when protective gear is routinely worn.

Further, while a trier of fact could infer that a medical doctor has training and expertise in the diagnosis and etiology of disease, the same is not necessarily true for experts who are not medical doctors. Carrier's attorney did object to admission of Dr. PhD's letter at the hearing. The claimant's attorney responded that such objections to the lack of a predicate or qualification of Dr. PhD as an expert went to the weight of that evidence rather than its admissibility. The trier of fact apparently adopted claimant's reasoning, and, rather than speculate or guess about Dr. PhD's medical or scientific expertise did not accord his letter as much weight as the opinions of doctors who had tested and examined the claimant. With the record essentially devoid of evidence setting out the expertise or qualifications of Dr. PhD, the assumptions underlying his opinion, or more detail about the information upon which his information is based, claimant is now hardly in the strongest position to complain because his opinion on occupational disease was given less weight than Dr. GO, Dr. G, or Dr. B.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). As fact finder, he resolves conflicts in the evidence, including conflicts among medical and expert witnesses. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ). We do not find that the hearing officer's determinations that claimant did not have an occupational disease or a seizure caused by chronic exposure to heavy metals and chemicals to be against the great weight and preponderance of the evidence in this case. We affirm his decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Thomas A. Knapp
Appeals Judge