APPEAL NO. 941291

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held. He (the Hearing Officer) determined that the respondent (claimant) sustained a compensable occupational disease on or about (date of injury), and that the claimant suffered disability from April 18, 1994, up to the date of the hearing. Appellant, the employer and self-insured carrier (carrier), appeals urging that the hearing officer erred in concluding that the claimant's injury is the result of an occupational disease and that she suffered disability "where there was no evidence of compensable injury." Claimant responds that the evidence is sufficient to support the decision of the hearing officer and asks that it be affirmed.

DECISION

Given the state of the evidence in this case and the specified assertions of error, we affirm.

The claimant testified that she had worked as a physical education "paraprofessional" (coach) for the employer for some 11 years. She stated that her duties required her to be outside in the sun on asphalt or in an open field for six and a half to seven hours a day supervising children doing physical education activities. She said she was required to do this even when sunburned from the previous day. She also stated that she and the other coaches were prohibited from standing in the shade because "it would be unfair to the children" and that no shelters or screens were provided, although they had been sought on several occasions. She stated there were occasions when it was hot and she and other coaches were denied permission to be inside and make up classes when it was not so hot. She testified that she was fair skinned, always wore a hat and put on sunscreen, particularly on her lips since they hurt during the last couple of years. She stated she had blistered, cracked lips a year earlier and that they got better over the summer when she was out of the sun. In (month year), her lower lip was blistered, swollen and painful. She also testified that she was not out in the sun in her off duty time except for short, occasional periods in going to and from places. She denied that she went to the beach, swam outdoors, fished, or did other activities in the sun.

She went to a doctor, was taken off work and advised to stay out of the sun and was diagnosed with chronic muco-keratose or leukoplakia, which the doctor characterized as a pre-cancerous lesion due to severe exposure to the sun while coaching for the employer. The claimant saw a second doctor in May 1994, who lists his impression as "leukoplakia of the lower lip" and states "[i]t is my professional opinion as a medical doctor that [claimant's] medical condition is due to her longtime exposure [11 years] to the sun as a direct result of her employment with [employer]."

The only evidence submitted by the carrier were the medical records of the two doctors who treated the claimant and which were similar to the records submitted by the claimant.

The hearing officer, after listening to closing argument by counsel, made it clear that he would only consider the evidence that was brought before him at the hearing and that argument was not evidence. He also stated he could not take judicial notice in place of evidence and would look to the evidence as to such matters as whether this is an ordinary disease of life and pointed out his concern with the state of the evidence and the limitations he faced under the posture of the evidence. In his discussion of the evidence in his Decision and Order, the hearing officer noted (as he had at the outset of the hearing) that the claimant had the burden of proof of causation, and that the carrier had no responsibility to come forward with medical evidence in the absence of probative medical evidence supporting the claimant's position. He observed that once the claimant came forward with direct medical evidence on the issue of causation, it became incumbent on the carrier to address it, which they did not do. Based on this, carrier urges that the hearing officer "erroneously shifted the burden of proof to the employer." We do not agree. The hearing officer was stating the obvious, he had before him the opinions expressed by two doctors which included the issue of causal connection. This was medical evidence for him to weigh in determining the issue before him and there was no evidence to weigh on the opposing side of the issue. Clearly, the hearing officer could take into account the absence of contrary evidence in weighing all the evidence in the case. As the Court of Appeals in Sells v. Texas Employers' Insurance Association, 794 S.W.2d 793, 794 (Tex. App.-Tyler 1990, writ denied) stated:

> TEIA also asserts that in our analysis of the evidence, we took into account the *absence* of evidence that Sells sustained his (date), injury *off the job*. That, we most certainly did. The standard of review requires us to do so. But in so doing, we did not hold that a defendant *must* produce evidence in opposition to that of the plaintiff. It is clear under Texas practice that a defendant has no such obligation or burden. However, in our adversarial system, a party not bearing the burden of proof on an issue may, or may not, produce defensive evidence to counter a claim of his adversary. Both the jury and the appellate court must look to *all the relevant evidence adduced*--the jury to make findings of fact--and the appellate court to determine whether there is evidentiary support for those findings or to determine whether the finding (or non-finding) is against the weight and preponderance of the evidence. [Emphasis in original.]

The carrier urges that there is no evidence that the claimant's injury was the result of an occupational disease and that there is no evidence of a causal link between the injury and the employment. Although the carrier acknowledges that the claimant did present medical evidence, it baldly states that it was neither "direct nor probative" and that it does "nothing more than document clinical impression, unsupported by diagnostic testing, speculative assuming that claimant's condition was causally linked to her employment." In this regard, the hearing officer found that the two doctors "have given the medical opinion that there is a direct causal connection between claimant's employment and the pre-cancerous condition of her lips caused by repeated exposure to the sun" and that the condition "caused by repeated exposure to the sun while at work is an

occupational disease." There is no evidence of any requirement that a specific diagnostic test be performed to diagnose the claimant's condition and there is nothing that indicates that the diagnosis or impression of the doctors was erroneous. We have reviewed all of the medical evidence introduced and, under the circumstances, cannot say that the hearing officer's findings were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The carrier also urges that what is involved here is an ordinary disease of life to which the general public is exposed outside of employment. Section 401.011(34) provides that the term occupational disease "does not include an ordinary disease of life to which the general public is exposed outside of employment. . . ." While a pre-cancerous skin condition caused by exposure to the sun would not, at least at first blush, appear to fall within this definition of occupational disease since members of the general public, as well as employees in other occupations, are exposed to the sun, other factors are present here for the fact finder to consider. As we have previously stated the key in evaluating such cases is causation, that is, whether there is a causal connection between the claimant's work and her pre-cancerous leukoplakia of the lip. In Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993, we accepted the reasoning of the court in the Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi, 1989, no writ), which cited Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1981), and noted:

> The court said that its analysis revealed the term "ordinary disease of life" to be a term of art having a meaning distinct from the common meaning of words, and that as such, it is not useful for a witness to opine that an affliction is an "ordinary disease of life." The court stated that the test of whether a disease is compensable under workers' compensation is if there exists a causal connection, either direct or indirect, between the disease and the employment.

In the Schaefer case, benefits were ultimately denied because there was no evidence that a particular bacteria which causes the disease the claimant had was present at the work site. That is not the same type of situation in the present case. The earlier case cited by the carrier, Bewley v. Texas Employers' Insurance Association, 568 S.W.2d 208, 211 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.), the court, in affirming a summary judgment denying recovery for a cold, sore throat, and pneumonia resulting from exposure to water and inclement weather over several days, did not rationalize the case in terms of causation; rather, deemed the claimant's illness as an "ordinary disease of life to which the general public is exposed." The court also noted that the claimant's condition did not fall within the term "occupational disease" which the court noted has been construed to mean a disease which is contracted gradually in the course of an employment and as a commonly recognized incident of it, whose time and place of development are not susceptible of definite ascertainment. We do not find Bewley controlling in the case under review.

The hearing officer found that the claimant's duties required her to be outdoors at least six hours each school day, that over 11 years the claimant had been repeatedly exposed to the sun during her work days, that the claimant was not authorized by the employer to stand in shaded areas performing her duties, that the claimant frequently suffers sunburn while performing her duties, and that the claimant is expected to work each day even if she is still sunburned from a previous day. There was unrebutted evidence from the testimony of the claimant to support these factual determinations. Although the hearing officer does not have to accept a claimant's testimony at face value, Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ), he determines the weight and credibility to be attached to any witness, Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). And, a claimant's testimony alone is sufficient to establish a factual matter in a case. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The claimant's testimony was probative in showing the greater demands of her employer and her work in a significantly increased exposure to a condition ultimately resulting in the disease diagnosed by her doctors. We cannot conclude that the doctor's opinions relating the pre-cancerous leukoplakia to the claimant's work duties given the state of the evidence was nothing more than speculative assumption, as asserted by the carrier. While the carrier's argument in this case may have some appeal, argument is not evidence as the hearing officer clearly stated on the record. When we review the evidence available to the hearing officer in this record and to us on appeal, we are simply unable to hold that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Nor can we hold, as a matter of law, that the evidence in the case supports only one conclusion; that is, that the claimant's pre-cancerous leukoplakia can be no more than an ordinary disease of life.

Regarding the second issue, the carrier's main thrust is that without a compensable injury, there cannot be disability. Having determined that there is no sound basis to overturn the hearing officer's finding of a compensable injury, this argument fails on this basis. While the evidence concerning the period of disability was minimally developed, the hearing officer found that the claimant "was taken off work by her treating doctor on April 18, 1994, and has not been returned to work by medical authority" as of the date of the hearing. There are notations in the medical records that provide some support for the hearing officer's finding. One of the claimant's doctors noted that his recommendation was "for no sun exposure which if (claimant) is not allowed to get out of the sun with her job, it means that she can't work until she can do the job, but without being outside." While the claimant has improved during the course of treatment, there is no indication that she has been returned to work and she continues with follow-up treatment and evaluation. The claimant testified that she reported to the school authorities concerning the doctor's orders that took her off her job and prohibited exposure to the sun. She stated that initially there was an indication that she might be permitted to work inside but that this was withdrawn as an option and the work conditions were to remain the same. The claimant did state that there are "other things" that she could do if she did not need to go outside.

Although the evidence on the disability issue is not overwhelming and it is possible

that inferences different from those deemed most reasonable by the hearing officer could be made, this is not a sufficient basis to reverse. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's finding and conclusion are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, *supra*.

For the forgoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge