APPEAL NO. 941335

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 31, 1994. Addressing the single disputed issue, he (the Hearing Officer) found that the appellant's (claimant herein) tuberculosis (TB) was a non-compensable ordinary disease of life. The claimant appeals this determination arguing that it is contrary to the great weight of the evidence. The respondent (carrier herein) replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The claimant, a licensed vocational nurse (LVN), provided home health care services as an employee of (employer). She testified that she was told by her treating doctor on (date of injury), that she had TB based on a lung culture taken the previous January. She also stated that a TB skin test given by her employer sometime at the end of January or beginning of February 1993 was negative.

It was the claimant's position that she was at high risk for contracting TB because she was a minority (Hispanic); she had diabetes which suppressed her immune system; and she was a health care worker. She believed the employer's TB test presented a false negative because of the condition of her immune system and that she contracted TB because she provided in-home medical care to patients who had TB. According to the claimant's testimony, a typical home visit with a patient would last from 30 to 60 minutes and involved checking the patient's vital signs and, perhaps, administering shots.

The claimant introduced into evidence a list of nine of her patients, together with the dates she saw them, who, she said, tested positive on a TB skin test. She said the test was given to these patients by her employer after she reported being diagnosed with TB. She said she received the list from her employer and did not know the results of any confirmatory testing given to these patients. Also in evidence were the medical records of a Mr. H who tested positive for TB on September 1, 1992. He was released from the hospital after receiving treatment for numerous medical conditions with the annotation in his records "respiratory isolation not necessary." He died on September 30, 1992, for undisclosed reasons. The claimant said she saw this patient three times between his release from the hospital and his death. Records of a Ms. L, who was listed by the claimant as a patient, reflect that she had positive TB skin test results on May 26, 1993. According to the claimant, she visited Ms. L some 30 times in 1992 and some 20 times in 1993.

A progress note of April 15, 1993, from the clinic where the claimant was treated, stated that in view of her risk factors, i.e., nurse and probable exposure, anti-TB therapy would be initiated. On June 29, 1993, Dr. W, a treating doctor, provided a specific

diagnosis of mycobacterium TB, but gave no opinion as to the cause or source of this condition. In a medical report of June 14, 1994, Dr. R, the claimant's subsequent treating doctor, diagnosed presumed isoniazid resistant TB; pulmonary coccidiomycosis and diabetes mellitus, with the onset of TB given as February 1993. As to a possible cause of her TB, Dr. R writes:

> [Claimant] was in her usual state of health working as a public health nurse until February 1993 when she developed a chronic cough. A prolonged diagnostic evaluation to include a bronchoscopy revealed Isoniazid Resistant Tuberculosis which may have been contracted by patient contact at her work. [Claimant] has no other exposure history, but her susceptibility is confounded by Diabetes Mellitus which makes her more susceptible to infections - particularly indolent infections like tuberculosis and coccidiomycosis.

Finally, Dr. R in a report of August 16, 1994, repeats these diagnoses and comments essentially verbatim and indicates that the TB has resolved with therapy.

Ms. N, a registered nurse (RN) and claimant's supervisor, testified that in her opinion, a patient with TB is no longer considered contagious after two weeks on medication. She confirmed that after the claimant was diagnosed with TB approximately 175 possible patients of the claimant were tested for TB exposure. Of these, five were positive for exposure, but she is not aware of the results of any confirmatory tests. Mr. M, a registered nurse and patient administrative manager for the employer, testified that, to his knowledge, confirmatory tests of Ms. L for TB were negative.

Based on this evidence, the hearing officer determined that the claimant did not sustain TB in the course and scope of employment and that her TB was an ordinary disease of life. In her appeal of this decision, claimant argues that the evidence "clearly showed that she treated numerous people who had [TB] prior to the time that she was diagnosed . . . with it" and that TB can only be contracted by direct contact with an individual with TB. The claimant's attorney on appeal also offers statistics for the proposition that because TB is so rare, it is not an ordinary disease of life. With regard to this latter point, we note that no such statistics were offered into evidence at the CCH and do not become evidence by virtue of the attorney's recitation in the appeal. We, therefore, disregard them. Section 410.203; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.2(a) (Rule 143.2(a)). *See also* Texas Workers' Compensation Commission Appeal No. 93924, decided November 17, 1993.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Injury includes an occupational disease which is a disease arising out of and in the course of employment. It excludes an ordinary disease of life to which the public is exposed outside of employment unless incident to a

compensable injury or occupational disease. Sections 401.011(26) and (34). The testimony of an injured employee is in many cases sufficient to establish that an injury occurred in the course and scope of employment. However, the Appeals Panel has required expert medical evidence to prove causation by reasonable medical probability in cases such as this "where the subject matter is so complex that a fact finder lacks the ability from common knowledge to find a causal connection." Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993, and quoted in Texas Workers' Compensation Commission Appeal No. 941159, decided September 30, 1994. *See also* Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980). The fact that such proof may be difficult to obtain does not lesson the claimant's burden of proof. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. Similarly, the fact that a disease may be rare does not exclude it from being a disease to which the general public is exposed outside of employment. Schaefer, *supra*. Causation is a question of fact for the hearing officer to resolve. Appeal No. 941159, *supra*.

The only medical evidence on the question of causation in this case is the statement of Dr. R that the claimant's TB "may have been contracted by patient contact at her work." The hearing officer was free to accept or reject Dr. R's opinion as probative evidence establishing the requisite causation. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston (14th Dist.] 1984, no writ. He obviously was not persuaded by Dr. R that the claimant contracted TB in the course and scope of her employment. In this regard, this failure of proof is similar to Texas Workers' Compensation Commission Appeal No. 92157, decided June 1, 1992, where we affirmed a decision of a hearing officer finding no compensable injury because a medical expert's statement that the injury "could have been related" to an incident on the job amounted only to a possibility, not the required probability. *See also* Texas Workers' Compensation Commission Appeal No. 94103, decided March 7, 1994; Texas Workers' Compensation Commission Appeal No. 93885, decided November 15, 1993; and Texas Workers' Compensation Commission Appeal No. 92352, decided September 8, 1992, for a discussion of the required proof of causation.

The hearing officer concluded probative evidence of causation was lacking and the claimant did not meet her burden of proof. We hold that the hearing officer's resolution of the issue was not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). For this reason, the claimant is not entitled to benefits.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge