

APPEAL NO. 990654

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 4, 1999. With regard to the issues before him, the hearing officer determined that the decedent suffered an occupational disease in the form of a malignant melanoma as a result of exposure to the sun, which resulted in the decedent's death and that the decedent had disability from August 15, 1997, to May 26, 1998. (The hearing officer's findings which would indicate disability to June 26, 1998, are hereby reformed to conform to the evidence, which was that the decedent died on (decedent's death date).)

Appellant (carrier) appeals, contending that the decedent "was exposed to a disease of life to which the general public is exposed outside the employment." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant beneficiary, referred to as claimant, responds, arguing that the decedent was exposed to sunlight "in an increased degree" as opposed to the general public and that the medical evidence supports a direct causal connection between the decedent's employment and the melanoma. Claimant urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The decedent worked for (employer) for over 23 years and, at the time of his injury, was a field representative or "Field Observer" working out of doors at construction sites, ensuring that the architect's plans were being followed. At some time in 1995, the decedent went to his family doctor to have a mole on his neck removed. The mole was diagnosed as a malignant melanoma. The decedent underwent several different types of treatment, multiple excisions, chemotherapy and radiation, but the melanoma metastasized, spreading to different parts of the body. Claimant testified that the decedent was no longer able to work on August 15, 1997, and died on (decedent's death date). Claimant contends that the melanoma was an occupational disease caused by the decedent's work out of doors where he was exposed to the sun. Decedent also had a preexisting condition of multiple sclerosis and Bell's Palsy, which are not asserted to be work connected.

In evidence is a letter from the employer describing the decedent's job duties, "that he be out of doors; at construction sites," that decedent would spend less than one week in the office "in a given year," that decedent would not spend time inside a job trailer or inside a building, that the decedent "truly has the 'outdoor' occupation" and concludes that:

Although we lack medical expertise, it seems that exposure to the sun over a period of 23 plus years has certainly caused this particular melanoma. Since the lesion on the back of his neck is exactly where any shade from his hard

hat (required to be worn on construction sites) stops and before any protection from his collar begins it can hardly be disputed that sun exposure is the cause.

Claimant testified that the decedent would go to work at 5:00 or 6:00 a.m. and work until 4:00 p.m. or so five or six days a week. In evidence is a medical report dated April 18, 1998, from Dr. AS, who conducted a review for carrier. Dr. AS recited the decedent's job duties, including that "90% of his time was spent out of doors"; reviewed the records of Dr. F, the decedent's treating oncologist, who was of the opinion "that the melanoma is due to the patient's excessive sun exposure"; stated that Dr. S was of the same opinion, as was the decedent's employer; and commented on the decedent's requirement to wear a hard hat. Dr. AS concluded:

In my medical opinion, within a reasonable degree of medical certainty, I am in complete agreement with them. The medical literature does indicate a direct association between ultraviolet radiation (sunlight) and the development of malignant melanoma. In addition, unprotected skin is also prone to other skin malignancies from sunlight. The history provided and substantiated by [decedent's] employers supports the contention that the patient spent the bulk of his adult work life out of doors, obtaining massive sun exposure. The latency period (i.e. the fact that it took so many years for the cancer to develop, despite intense sun exposure) supports current theories of cancer biogenesis and resultant clinical manifestation.

* * * *

Nonetheless, I do feel that the evidence in this case very strongly points to the sun exposure as being directly attributable in [decedent's] case.

Lastly, although [decedent] mentioned that one brother had cancer, it was a renal malignancy, and not a melanoma. In addition, [decedent] denied being engaged in hobbies that were out door activities. Even if he had engaged in such leisure pursuits, I feel the amount of time spent at work would far outweigh the amount of sun exposure he would get from a presumptive avocational activity.

In a report dated January 12, 1998, Dr. F writes:

As is well described in the medical literature, melanoma is caused by sunlight. [Describes the decedent's duties in detail.]

Therefore, I think it is quite clear that his melanoma is due to sun exposure. This sun exposure is a requirement of his work, and the fact that he has to wear a hard hat which cannot cover his neck is also a requirement of his work. Both of these things give very strong consideration that [decedent's] melanoma was caused by his employment over which he had no control.

Carrier introduced a report dated April 23, 1998, from Dr. W, a doctor in (City), (Country), who opined that while some doctors have stated an opinion that the decedent's melanoma was caused by sun exposure and that there "are convincing data that the incidence of melanoma is increased in individuals with heavy sun exposure," Dr. W believes:

[T]hey have not shown that this man had high sun exposure to this area of his scalp/neck, and that, therefore, sunlight can be implicated in this case in increasing the risk of melanoma. In my view the burden would be on them to prove that there was a high level of sun exposure in the site of the primary melanoma, and that this was solely work related. I don't believe that has been proven. [Emphasis in the original.]

Also in evidence is a report dated July 16, 1998, from Dr. B, who, in a record review, cited several medical journal articles and concluded:

I would like to say that the medical literature does not reflect that occupational sun exposure causes melanoma. . . . It is my conclusion that the evidence does not support that his melanoma was occupationally acquired. Furthermore, much of his sun exposure that caused the melanoma would have been acquired as teenager or young adult before he was exposed on the job; thus, I am forced to conclude that he did not die from an occupationally acquired illness.

An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). A repetitive trauma injury is "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared to employment generally." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employers Insurance of Wausau 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

Carrier first appeals the findings that decedent's date of injury was _____, when he was diagnosed with melanoma. Carrier does not specify in what respect it disagrees with those findings and we note that Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have

known the disease may be related to the employment. Carrier appears to misconstrue the date of injury as being when the totality of the injury occurred, saying, "how could this Claimant have worked for the Employer for 23 years and on this last day of his employment be exposed to and diagnosed with malignant melanoma Where were the other 22 years of his exposure to the sun . . . ?" We simply refer to the definitions of occupational disease, repetitive trauma injury and Section 408.007. Decedent, prior to that date, just went to have a mole removed and, on _____, was told he had malignant melanoma, which claimant is contending was due to repetitive exposure to the sun over 23 years. We find no error in the hearing officer's determinations on those points.

The principal thrust of carrier's appeal is that melanoma is in the definition of occupational disease, which excludes "an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." The hearing officer found (in appealed findings) that the "melanoma was an occupational disease caused by the decedent's work, outdoors, where he was exposed to repeated and excessive exposure to the sun's rays." In Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994, in discussing whether bilateral Morton's neuroma was an ordinary disease of life, the Appeals Panel affirmed the proposition that "each claim for occupational disease must be judged on a case-by-case basis." After citing Texas Workers' Compensation Commission Appeal No. 931149, decided February 4, 1994, the Appeals Panel continued, saying:

The decision continued that "'ordinary' diseases to which even the general public is unquestionably exposed in some measure could be compensable in one context, although not in another" if, quoting Larson's Workers' Compensation Law § 41.33(b), the harm producing elements are present "in an unusual degree." This position is consistent with Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), also cited by the carrier, which noted that the phrase "ordinary disease of life" in workers' compensation law is a term of art with a meaning distinct from its common meaning and that it does little good opining about whether a disease is an ordinary disease of life when the test of whether a disease is compensable is "if there exists a causal connection, either direct or indirect, between the disease and the employment." *Id.* at 252. Although some situations may be so tenuously connected to the workplace that they could only be attributed to the conditions and hazards inherent in ordinary life or employment in general, see, e.g., Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993 (cancer and second hand smoke in the workplace), the determination of compensability is ultimately a matter of whether the claimant can prove by reasonable medical probability that there is a causal connection between the claimed injury and the employment. Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993.

One of the Appeals Panel's leading cases on ordinary disease of life is Appeal No. 93744, *supra*, where we affirmed the hearing officer's decision that claimant, who had

contracted lung cancer after 23 years of inhaling second hand smoke, was not entitled to workers' compensation benefits. That case did an analysis of court construction of ordinary disease of life in Hernandez, *supra*, stating, "[t]he test is whether there was a causal connection between the claimant's lung cancer and her employment." The hearing officer found there was not, and the Appeals Panel affirmed, noting that the "evidence, although conflicting," was sufficient to support the hearing officer's determinations. Similarly, the evidence in this case is conflicting but the hearing officer found that the "probative evidence of a causal connection between the employee's work and the melanoma . . . is overwhelming." We are unwilling to say that finding is incorrect as a matter of law or so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier contends this case is like ordinary walking, sitting and standing cases where decedent's exposure to the sun was not any more hazardous to his employment "than the ordinary general public is exposed to." *Compare* Texas Workers' Compensation Commission Appeal No. 980352, decided April 6, 1998. That, of course, is a factual determination for the hearing officer to resolve; however, the hearing officer apparently believed that being outdoors, exposed to the sun, 10 hours a day, five and six days a week for 23 years, was a greater exposure than that to which the general public is exposed and, further, that at least two doctors have made a definite causal connection between decedent's employment and the malignant melanoma. We decline to hold, as a matter of law, that melanoma is an ordinary disease of life to which the general public is exposed outside of employment.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge