APPEAL NO. 000188

This appeal arises 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 November 15, 1999.[1] The hearing officer determined that the appellant (claimant) sustained a compensable injury in the form of a needle stick; that the date of injury was _____; that the compensable injury does not extend to claimant's hepatitis C; that the claimant timely reported the injury and timely filed a claim for compensation; and that the claimant did not have disability. The claimant appeals the determinations that the compensable injury was not a producing cause of her hepatitis C and that she did not have disability, expressing her disagreement with these determinations. The respondent (carrier) replies that these determinations are correct, supported by sufficient evidence, and should be affirmed. The carrier conditionally appeals the determinations that the claimant timely filed a claim for compensation and timely reported the claimed injury as compensable. The appeals file contains no response to the conditional appeal.

DECISION

Affirmed, as reformed.

Because the carrier's conditional appeal was untimely, the complained-of determinations have become final.

The carrier received the decision and order on January 11, 2000. Pursuant to Section 410.202(a), an appeal must be filed with the Appeals Panel not later than the 15th day after the decision of the hearing officer is received. The 15th day after January 11, 2000, was January 26, 2000. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)) provides that an appeal is presumed timely if mailed on or before the 15th day after receipt of the decision and received no later than the 20th day. The conditional appeal was mailed on January 26, 2000, but not received until February 1, 2000, which was the 21st day after receipt of the decision. It is thus untimely and will not be considered.

The claimant has been a registered nurse since 1988 and before that a licensed vocational nurse (LVN). In early 1990 she donated blood. An abnormally high liver enzyme level was detected, and in a letter of March 7, 1990, from the collection center, the claimant was informed that a prior blood donation was also abnormally high. She was advised to see her physician and told she was no longer eligible to donate blood. In a letter of May 4, 1990, the blood center advised her of a research program testing for antibodies to the hepatitis C virus and that in the past she "had an infection with this virus." It was again recommended to her that she see her doctor "regarding hepatitis C."

[1] This is a companion case to Texas Workers' Compensation Commission Appeal No. 000187, decided March 10, 2000, and Texas Workers' Compensation Commission Appeal No. 000410, decided March 10, 2000. Three separate docket numbers were consolidated in one CCH, with three separate decisions issued by this hearing officer.

On _____, while working in the emergency room (ER), the claimant stuck herself with a needle. The incident occurred as she was disposing of a syringe in a container. The container was above her head and already full of needles. She could not readily appreciate any exposed needles sticking out of the container and stuck herself with one of those needles. Nor could she identify the particular needle or how it had been used. She immediately reported the incident to her supervisor[2] and submitted a blood sample which tested negative for drugs, HIV, and "acute hepatitis profile." The claimant continued working. In October 1997, the claimant made an autologous blood donation in connection with a pending operation for a nonwork-related condition. The blood tested positive for hepatitis C. A liver biopsy on February 18, 1998, confirmed that she had a chronic hepatitis C infection and she began treatment with Dr. C. She was terminated from her employment on August 13, 1998.

The claimant testified that it was possible she may have had other needle sticks, but knew of none besides the one on _____, and that she had none since then. She also said her work in the ER may have exposed her to other patients with hepatitis C. When her hepatitis C was confirmed in 1998, she related it to the 1991 needle stick. She said the tests before 1991 only showed elevated liver enzymes which could be due to a number of reasons. In a recorded statement taken on September 14, 1998, she said she could not give a date or a specific incident at work that exposed her to the hepatitis C virus.

Dr. C wrote on August 13, 1998, that the claimant's "disease was very likely obtained as a result of her work as a nurse. She can recall multiple needle-sticks during her employment as a nurse in the [ER]." In a letter of November 30, 1998, Dr. C excluded other possible causes (*e.g.*, drug use, blood transfusions, tattoos) and noted that approximately 10 - 20% of patients with hepatitis C have no risk factors. Dr. F conducted a records review of this case at the request of the carrier. In a report of June 28, 1999, he addressed the question of whether it was within reasonable medical probability that the claimant "sustained hepatitis as a result of the _____ needle stick as opposed to some other needle stick or exposure at work." He concluded that this was "possible, even likely," but there was no way to know "with certainty." His rationale for this conclusion was that there was no documentation of other exposures between this date and the blood donation in 1997. In his letter he makes no reference to the prior test in 1990 indicating the possible presence of the hepatitis virus. In a follow-on letter of July 6, 1999, he discussed the probability that she acquired hepatitis C from an accidental exposure at work, including not only the 1991 needle stick but also exposures "not documented" exposures in the course of her ER duties. He concluded that the needle stick exposure "might have been the one" or that "it could have been one of the undocumented exposures that probably occurred at other times after that." Again, he focused on 1991 and after and does not mention the pre-1991 blood test results. On October 12, 1999, Dr. P described the claimant as a "patient followed by me for hepatitis C, which clearly can be acquired from a

[2] No one disputed that this incident occurred. That the needle stick was in itself a compensable injury was not disputed and the hearing officer's finding to this effect has not been appealed.

needle stick at work in 1991. She has no other risk factors or lifestyle which would place her at risk of hepatitis other than her work. Thus hepatitis C is an occupational disease in this case."

Section 401.011(26) defines injury as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The terms includes an occupational disease." An occupational disease is further defined as a "disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. . . . 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." The claimant had the burden of proving that her hepatitis C infection was a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Because the question of causation in this case was beyond ordinary experience, the claimant had to meet her burden of proof with expert evidence to a reasonable degree of medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 951553, decided October 31, 1995. The hearing officer considered the claimant's case under both theories, that is, that the hepatis C "naturally resulted" from the 1991 needle stick and that it was an occupational disease caused by her exposure to the virus under conditions inherent in her employment and to which the general public is not exposed. Under both theories of liability, he found that the claimant did not meet her burden of proof. In his discussion of the evidence, he considered it significant that the claimant had elevated liver enzymes before the 1991 needle stick, and that, despite the claimant's efforts to downplay the significance of these test results, "in the context of Claimant's medical history, the research test results outweighed the tremendous odds of a prick on _____ from a needle of unknown origin having been a producing cause of the hepatitis C." In her appeal, the claimant again argues that the 1990 "research test" result was "false positive" regarding hepatitis C and that the elevated liver enzymes were due to numerous other causes.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. This includes medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The weight to be given to and inferences to be drawn from the 1990 test results were matters for the hearing officer to decide. While the claimant argues that this test was essentially meaningless, there was other evidence from the blood center specifically describing her as being infected with this virus. Similarly, the opinion letters of Dr. F and Dr. P could have been given less weight by the hearing officer because they failed to address or even recognize the existence of the 1990 test results. And while presumably Dr. C knew of the 1990 test results, the hearing officer could have construed his opinion to be premised, as he expressly said, on "multiple needle sticks." The claimant testified that it was possible that she had more needle sticks, but could not specify any or identify a time frame for the incidents and provided no evidence of having reported any such additional

needle sticks. Under these circumstances, the hearing officer could discount the weight and credibility of Dr. C's conclusion. In addition, the claimant had no knowledge that the needle that actually stuck her was contaminated with the hepatitis C virus. Thus, the evidence in this case was significantly different from the situation in Texas Workers' Compensation Commission Appeal No. 961088, decided July 24, 1996, where we affirmed a hearing officer's finding that hepatitis was caused by a needle stick in a hospital based on evidence that the claimant, an LVN, proved she was stuck by a contaminated needle while changing the bed sheets of a patient who had hepatitis. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that the needle stick on May 28, 1991, was not a producing cause of the claimant's hepatitis C, or, in the language of the 1989 Act, that the hepatitis C did not naturally result from the needle stick on that date, and we affirm that determination.

With regard to the claimant's other, at least implied, theory of compensability, that is, that the hepatitis C was an occupational disease caused by exposures at work, the hearing officer again determined that the claimant failed to meet her burden of proof. First, we point out that Dr. C, Dr. F, and Dr. P provided their opinions largely in the context of what happens in ERs and the opportunities for exposure to body fluids containing the virus. The claimant herself could say no more than that she "may have been" exposed to patients with hepatitis C and it was "possible" that she had other needle sticks, but could not further specify when or how often. In Appeal No. 951553, *supra*, we affirmed a finding that the claimant's hepatitis C was not an occupational disease and commented:

> In the absence of any evidence of specific exposure to hepatitis C, as was present in Texas Workers' Compensation Commission Appeal No. 931104, decided January 20, 1994 (where compensable hepatitis C was found supported by a record of two documented exposures), evidence indicating only that claimant was at greater risk of an exposure than the general public amounts to no more than a speculation about the possible (as opposed to probable) causation.

In Texas Workers' Compensation Commission Appeal No. 94103, decided March 7, 1994, where we affirmed a finding the claimant, an emergency medical technician, did not have an occupational disease of hepatitis C, we wrote:

> Clearly, the evidence does not meet the requirements for proving causation between the claimant's disease and his employment with the employer/carrier. While there was evidence that the claimant's job with the city potentially exposed him to hepatitis C in a greater degree than other health care providers and a much greater degree then the general public, and the hearing officer so found as fact, this does not establish

> compensability. If it did, just about any disease, infection or other health condition sustained by a health care provider which could reasonably be found in a hospital or other health care facility or program could conceivably be held compensable without the need to further establish any causation. This is not statutory law or the teaching of Texas case authority.

Whether the claimant's hepatitis C was an occupational disease was a question of fact for the hearing officer to decide. He considered the evidence and was not persuaded that the claimant met her burden of proof. Under our standard of review, we affirm that determination.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

In Finding of Fact No. 5 and Conclusion of Law No. 6, the hearing officer refers to the filing of an Employer's First Report of Injury or Illness (TWCC-1) on August 13, 1998.[3] The date of the TWCC-1 was September 1, 1998. The date of injury was listed as August 13, 1998. It is not clear when the TWCC-1 was filed. Also, in the decision portion of the decision and order, the hearing officer wrote: "Because Carrier did not contest compensability until August 13, 1998, Claimant timely filed a claim for compensation." Contest of compensability was not an issue, and we perceive no connection between the timeliness of filing a claim for compensation and the timeliness of a dispute of compensability. For these reasons, we reform the decision and order of the hearing officer by deleting this sentence.

[3] The discussion portion of the decision and order erroneously refers to 1999.

For the foregoing reasons, we affirm the decision and order of the hearing officer as reformed.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge