APPEAL NO. 000961

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 March 31, 2000. The hearing officer determined that the _____, compensable injury was not a producing cause of the appellant's (claimant) splenomegaly condition; that claimant did not have disability; and that the respondent (carrier) did not waive the right to contest the compensability of the claimed injury by not contesting compensability within 60 days of having been notified of the injury. The claimant appealed, contending that she was healthy before her compensable injury and is now "chronically ill," that at least one doctor said that "the Splenomegaly is [work related]," and that carrier had not timely contested compensability of the condition. The carrier responded, urging affirmance.

DECISION

Affirmed.

Claimant sustained a compensable chemical inhalation injury on _____ (all dates are 1999 unless otherwise noted), and sustained chemical burn and smoke inhalation injuries which eventually resolved. Claimant subsequently was diagnosed with a splenomegaly condition and her spleen was surgically removed in December. Claimant testified that the spleen condition was caused by the chemical inhalation because she had had no prior problems or complaints until after the chemical exposure. Claimant saw a number of doctors for her condition.

Claimant's treating doctor, Dr. A, in a note dated October 5th, referred claimant to a neurologist for migraine headaches and to hematology for her spleen. In a report dated October 13th, Dr. A comments that claimant was healthy before the chemical exposure and since then has been having respiratory problems, left side flank pain, and possible kidney stones. Dr. A commented:

> But during one of the episodes of pain, we did a CT scan which showed splenomegaly. CT scan was, otherwise, completely negative. At the same time, patient started referring that she had a lot of migraine headaches with nausea and vomiting.
>
> * * * *
>
> At this moment, there is no way that I can prove that the exposure is the cause of all her problems, only by the subjective fact that the patient didn't have these problems before. She has now been chronically ill with persistent left flank pain, splenomegaly and recurrent migraine headaches.

Dr. P, a referral doctor, in a report dated October 18th, recited that claimant developed flank pain seven days after her exposure and that a CAT scan of the abdomen "revealed

a 'mildly prominent spleen.'" Dr. P commented that claimant had been "a very healthy woman" and that he does not believe claimant "has an underlying hematological problem" but that "we have to relate the pain to her incident in mid July." Dr. T referred to Dr. P's exam, stating:

> [Dr. P] saw her for her splenomegaly and said that her left flank pain was due to this. He put her on non-steroidal [medication] and said that it would probably clear up long term on its own. He apparently assumed that it was due to the chemical exposure. She has never had migraine [sic] before. She says the first headache occurred nine days after the chemical exposures.

Dr. T's impression was "[p]otential toxic fume exposure at work with secondary lung injury and splenomegaly. . . ." Other doctors also suggested that the findings "almost have to be related" because claimant was completely asymptomatic before her exposure. Material Safety Data Sheets (MSDS) are in evidence. Dr. PA reviewed the MSDS and was of the opinion that many of the solvents could cause liver, kidney, and hematological problems. Dr. PA concluded:

> It is possible that the splenomegaly is a response to [claimant's] exposure to solvents. There is no evidence that [claimant] had any splenic problems before her exposure. I believe that her splenomegaly is related to her exposure at [employer].

Dr. A, in a report dated March 24, 2000, commented:

> After revision and multiple consults to neurologists, hematologists, oncologists and toxicologists, I have to conclude that the splenomegaly is secondary to benzene exposure and other chemicals and fumes that she inhaled as a result of an accident at work.

Dr. WA, a peer review doctor, in a report dated November 30th, recited the medical history and the various doctor's reports and concluded:

> As to the spleen, there is not enough information to establish a relationship to the work exposure event. It seems more likely that the splenomegaly is unrelated and was found as a result of efforts to explain abdominal pain. Splenomegaly is not mentioned as a result of toxic exposures in the texts reviewed, nor in the MSDS's provided. From the reviewer's occupational experience it is not seen, except when the toxicity is associated with bone marrow injury, liver injury, or hemolysis – all of which appear to be excluded by the normal laboratory findings.

Carrier argued that claimant may have had a preexisting condition which was found only because of the extensive tests and that all of the medical evidence fails to show a causal connection between the toxic exposure and the spleen conditions and fails to rise to the degree of reasonable medical certainty.

The hearing officer found that claimant's compensable (toxic inhalation) injury "was not a producing cause of Claimant's splenomegaly condition." Claimant disputes that finding, citing the reports of Dr. A, other doctors, and the MSDS, and stated that Dr. P "concluded that the splenomegaly is related to the exposure." (In point of fact, Dr. P only stated that "it was possible.")

The claimant had the burden to prove the nature and extent of her compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether the chemicals in the workplace were a cause of this disease was a question of fact for the hearing officer to decide and, because of the complicated nature of causation in this case, had to be proved by expert testimony 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.). A medical opinion that relies on mere possibility, speculation, and surmise is not based on reasonable medical probability and the fact that this burden of proof may be difficult to meet does not lessen it. Texas Workers' Compensation Commission Appeal No. 980718, decided May 27, 1998. In this case, nearly all of the doctors say it is possible that claimant's condition was caused by the toxic exposure and only Dr. A's March 24, 2000, report rises to the status of reasonable medical probability. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence and this applies equally to medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer obviously gave more weight to the opinion of Dr. WA than to claimant's doctors who usually opined that the causation was only a possibility and based that surmise on the fact that claimant had had no prior symptoms. The hearing officer was within her discretion in believing some medical evidence and rejecting other.

Claimant also appealed the hearing officer's determination that carrier had not waived the right to contest compensability of the claimed injury, arguing that her case "should not fall under these new laws." Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), effective March 13, 2000, provides, in part, that Section 409.021 and subsection (a) of Rule 124.3 "do not apply to disputes of extent of injury" and that if a carrier receives a medical bill that involves treatment or services the carrier believes is not related to the compensable injury, the carrier shall file a notice of dispute of extent of injury not later than the earlier of the date the carrier denied the medical bill or the due date for the carrier to pay or deny the medical bill. The Appeals Panel has held that Rule 124.3 is applicable to

those cases in which the CCH is convened on or after March 13, 2000, the effective date of Rule 124.3. Texas Workers' Compensation Commission Appeal No. 000789, decided May 30, 2000. In this case, the CCH was held on March 31, 2000, and, therefore, we will apply Rule 124.3.

In that we are affirming the hearing officer's decision regarding the extent of injury, claimant cannot, by definition in Section 401.011(16), have disability due to the splenomegaly condition.

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:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge