

APPEAL NO. 002573

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 October 11, 2000. The issues at the CCH arose from the death of (deceased), whose surviving spouse, (claimant), was the beneficiary. He died on _____, and the claim was that he contracted tetanus as a result of a wound he sustained in his employment with (employer) on _____. Also in issue was whether he gave timely notice of injury to his employer or had good cause for not giving notice. An apparent issue over the identity of the beneficiaries was apparently resolved when it became apparent that there were no children under age 25 and therefore the deceased's beneficiary was the claimant.

The hearing officer found that although the deceased sustained a minor cut to his left forearm on _____, his subsequent death from systemic inflammatory response syndrome secondary to respiratory failure and tetanus was not caused by that cut, she further found that the claimant had not given timely notice of his injury to his employer and had no good cause.

The claimant has appealed. The claimant argues that medical evidence persuasively shows a connection between the deceased's work-related wound and his death. The claimant further argues that good cause in failure to give notice is measured by the knowledge the family had about his cause of death. The respondent (carrier) responds that the decision should be affirmed. The carrier also responds that the date of the specific injury is the date from which the 30-day notice period should run.

DECISION

We affirm in part and reverse and render in part.

The deceased was employed as a crew pusher for his employer, an oil well servicing business. One of the deceased's crew members, Mr. M, stated that putting up and taking down straight and barbed wire fences was a common part of the job, and that the deceased usually pitched in to help his men. Mr. M said that while leather gloves were worn during this operation, they only reached to the wrist area.

The claimant stated that on _____, when the deceased came home from work and sat down with her at the kitchen table, she noticed a small area of dried blood on his left arm. He told her that he was stuck by a wire and it was nothing, but the claimant cleaned the area, which she described as "a punch" type of wound. Within two weeks, the claimant and her daughters, who also testified, agreed that the deceased underwent changes in his energy level, health, and personality. He kept working. The deceased was asked by his coworkers to seek medical treatment on or around July 13, 1999, and he did so. He was seen by Dr. P, but refused blood work. He was given medications for a sore throat and right arm pain, but within two days began to experience difficulty swallowing and rigidity of the jaw. The deceased was hospitalized on or about July 14, 1999; multiple tests

were administered. He died on July 27, 1999. The third listed cause of death was tetanus; the first listed cause related to multiorgan system failure and the second was respiratory failure.

It was undisputed that, until after _____, the deceased had not seen a doctor except on a very occasional basis (at least twice) since 1956. He did not have regular health checkups or immunizations. The claimant and the daughters agreed that the deceased tended not to complain very much when he was bothered by something. They said that when the deceased was hospitalized and they were told he had tetanus, it was at that point that the wound of _____ was recalled. An early June 1999 picture of the deceased at a family function clearly shows him with a wound on his middle left forearm.

Hospital testing indicated that the deceased had some cavitations and granulomas on one upper lung consistent with having had tuberculosis. The July 15, 1999, hospital report noted that deceased's symptoms began a week earlier, starting with stiffness in his right arm and that he had been having a chronic cough. He was noted to have a spastic gait and dysphagia. Dr. A, who had reviewed the records for the carrier, testified by telephone. He was board certified in internal medicine and occupational medicine. He had actually treated patients with tetanus, which he said would still likely cause fatalities in 10% of patients even if managed under the best of circumstances. Dr. A said that the tetanus bacterium was ubiquitous.

Dr. A stated that tetanus-like symptoms (tetany) could be caused by a number of things, including low calcium levels. He noted that the deceased's hospital testing showed low calcium. He said that it was not possible to tell with certainty (and without an autopsy) what the deceased's cause of death was. He had multiple system failure but there was an underlying cause which was not readily apparent.

Dr. A said that the usual incubation period for tetanus ran from three days to three weeks. Although the hearing officer stated that Dr. A described respiratory failure as unusual in connection with tetanus, that was not what he said; rather, he stated that the lung condition that the deceased had was not a symptom of tetanus. In fact, on the matter of respiration, Dr. A indicated that one treatment given to tetanus patients to maintain vital signs would be to support and maintain respiration.

When asked if he felt that the deceased's tetanus (if that was what he had) could be caused by a wound inflicted on _____, Dr. A did not say that this was impossible, but rated the chance as "less than 50%." He did so because the deceased's manifestation of these symptoms was way outside the usual incubation period (given a _____ wound) and that there were other explanations (such as low calcium level) for tetanus-like symptoms. Finally, there was medical evidence, as well as the claimant's testimony, that the deceased had poor dental health (a "rotten tooth" as described by the claimant) for which he did not seek dental treatment. Dr. A said that all of the tetanus patients he had treated contracted their disease dentally.

The written opinion of the deceased's doctor, Dr. MR, states that he practices general medicine and had reviewed literature about tetanus to arrive at his conclusion that the deceased sustained his disease as a result of a wound. Dr. MR said that he understood this happened on _____ and involved the right arm. Dr. MR did not address the incubation period directly although he indicated that the deceased had symptoms for two months before seeking medical treatment. Dr. MR said there was no doubt in his mind that the deceased's "right arm wound" caused tetanus which in turn caused his death.

On the matter of notice, evidence was brought forward that it was the employer's official policy to report even the most minor incident or wound. However, Mr. M agreed that it was not unusual to decline to report minor injuries, examples of which he characterized as hitting one's finger or incurring wounds with little or no bleeding.

The claimant testified that the employer was told of the injury when tetanus was diagnosed and linked to a probable abrasion or scratch, while the deceased was in the hospital. Evidence presented from the employer was that the deceased had not previously notified the employer of any wound or scratch.

The development of a disease and its causal relationship to a wound are matters beyond common experience, and medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. See Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. In this case, the hearing officer had conflicting medical evidence to weigh, and not just one but multiple possible causes of not just tetanus but the deceased's systemic functions failure. Dr. A testified as to the incubation period of tetanus after a wound, and he also identified bad dental health as a cause of tetanus. Against this was Dr. MR's opinion and testimony of the deceased's gradually declining health, and the evidence indicating that fence making was a common activity of his job. The hearing officer's resolution of the conflicts is not against the great weight and preponderance of the evidence, In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951), and we will affirm.

On the matter of timely notice, the employer's reporting policy for injuries is not the determining factor in analyzing whether timely notice of an injury was given. The theory of recovery was that the disease naturally developed from the _____, injury. Although notice in this case was required to be given within 30 days this date, we have often stated that belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Good cause must continue up to the time that notice was actually given. Texas Workers' Compensation Commission Appeal No. 94975, decided September

2, 1994. The date for giving notice did not run from the deceased's family's understanding of the etiology of tetanus, but that was a factor to consider in determining good cause.

The hearing officer erred in not finding good cause. The record developed here, as well as the fact that the course and development of tetanus is beyond general lay knowledge, presents a classic trivialization of the injury and good cause for the delayed reporting of the injury on deceased's behalf. We accordingly reverse the determination that the carrier is discharged from liability because of untimely notice and we render a decision that the deceased had good cause for his failure to give notice because he trivialized his injury.

Accordingly, we affirm the hearing officer's decision and order on the injury issue and reverse and render on the notice issue.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge