APPEAL NO. 081522
FILED JANUARY 15, 2009

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 September 8, 2008. The hearing officer resolved the disputed issue by deciding that the employee's (decedent) death was a result of the compensable injury sustained on _____.

The appellant (carrier) appealed, contending that the hearing officer erred as a matter of law and that there is insufficient medical evidence to support the hearing officer's determination. The respondent (claimant) responded, urging affirmance.

DECISION

Reversed and rendered.

It was undisputed that the decedent had been diagnosed with small cell carcinoma of the lung in January of 2006, and had received chemotherapy and radiation treatment in the following months. The parties stipulated that the decedent sustained a compensable injury on _____. The evidence reflects that the decedent sustained serious injuries in a motor vehicle accident (MVA) on _____. The emergency room records note a head laceration and give traumatic brain injury, right superior and inferior pubic rami fractures, grade 2 splenic injury, and occult left pneumothorax and pneumomediastinum as impressions. Additionally, the emergency room records note that a CT of the chest revealed a 2.1 cm right mid-lung mass consistent with lung cancer and also a right-sided effusion. Further, the emergency room records note that the decedent had been seen earlier in the day by a physician due to complaints of congestion. The decedent was hospitalized as a result of these injuries for an extended period of time and was transferred to a rehabilitation facility. The decedent was discharged from the facility on October 13, 2006. The discharge summary states the decedent made significant gains while hospitalized and notes that he would continue to participate in physical, occupational, and speech therapy on an outpatient basis. The decedent was subsequently re-hospitalized after being diagnosed with Methicillin-Resistant Staphylococcus Aureus. The decedent was transferred to another hospital and later transferred to a rehabilitation facility. The decedent died on April 9, 2007. His death certificate lists recurrent lung cancer as the immediate cause of death.

A letter dated May 30, 2007, from Dr. D, the decedent's treating oncologist, is in evidence. Dr. D states that the decedent had achieved complete remission prior to his MVA but that his cancer returned in March of 2007. Dr. D opined that given the decedent's "state of debilitation as a result of the [MVA], there was no way to give him effective treatment and he died of lung cancer." Further, Dr. D opined that the MVA was "a significant contributor" to the decedent's death and "[i]t may have even played a role

with his recurrence due to the debilitating effects of the accident and subsequent events."

The hearing officer noted that the parties agreed to seek a second opinion from another oncologist, Dr. F. Dr. F reviewed the medical records of the decedent. In a report dated November 12, 2007, Dr. F opined that based on the medical records and the death certificate, that the decedent's death was not a direct and natural result of the work-related injury of _____, but rather "a result of the natural history of small cell lung cancer; that is to recur within a period of one year from the time of diagnosis despite initial good results from chemotherapy." Dr. F attached medical literature regarding small cell lung cancer which discusses survival issues to support his opinion. Dr. F specifically disagreed with the treating oncologist's, Dr. D's, opinion with regard to the decedent's survivability. Referencing medical literature which was admitted into evidence, Dr. F stated that currently there are "no satisfactory treatments which offer anything like more than a few weeks to a few months of response for patients who have had recurrent small cell cancer." Again citing to the medical literature in evidence, Dr. F explained that there is no known benefit to continuing chemotherapy indefinitely, stating the absence of chemotherapy would have had no measurable effect on the survival of the decedent. However, Dr. F further noted that it is entirely possible to treat patients for lung cancer while in recovery from other complex medical issues such as those involved following the decedent's MVA. To further clarify, Dr. F, in a letter dated December 24, 2007, stated that "it is not medically probable that the trauma sustained by [decedent] in the [MVA] on _____, including the treatment of those injuries, including the hospitalizations and the various medical procedures, and/or medication necessary to treat these injuries were a factor in the re-activation of the latent tumor cells."

Also, in evidence was correspondence dated October 22, 2007, from a doctor who performed a peer review of the decedent's medical records. The peer review doctor opined that "the evidence suggests [the decedent] had an inoperable highly malignant lung tumor with a grave prognosis when diagnosed in January 2006." The peer review doctor noted that the evidence (other than that from the treating oncologist, Dr. D) suggests the decedent had a residual right lung tumor when the MVA occurred. The peer review doctor concluded that he did not think the claimant's death was a direct and natural result of his compensable injury.

The claimant has the burden to prove that the decedent's death was a result of the compensable injury. Appeals Panel Decision (APD) 041409, decided July 22, 2004. Where, as here, the causal connection is not a matter of general knowledge, it must be proven to a reasonable medical probability by expert medical evidence. 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.). Expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of laypersons. *See also,* Insurance Company of North America v. Myers, 411 S.W.2d 710, 713 (Tex. 1966) (holding that an "inference that a pre-existing tumor was activated and the deadly

effects of a malignancy accelerated by an injury" was a "question of science determinable only from the testimony of expert medical professionals.")

In APD 950455, decided May 9, 1995, the decedent employee sustained a compensable injury on (date of injury), when he fell 25 feet from a ladder at work. He was hospitalized and underwent surgery for fracture injuries to his heels and ankles. Thereafter, he suffered an infection in one of the pins. At some point he lost his appetite and developed digestive problems. Very early in January 1993, he was diagnosed with small cell carcinoma. He died on January 7, 1993. A treating doctor opined, and the hearing officer determined, that because the decedent had experienced a rapid deterioration of his health following the compensable fall, the fall contributed to the cause of death. Other medical evidence in the case asserted that the decedent employee would have died when he did as a result of the small cell carcinoma regardless of the injuries from the fall and that the fall did not incite, aggravate or accelerate the cause of his death. The Appeals Panel reversed the decision of the hearing officer, stating "[t]he evidence does not show or indicate that the decedent would not have died of the lung cancer absent the [(date of injury)] fall."

In Schulle v. Texas Employers' Insurance Association, 787 S.W.2d 608 (Tex. App.-Austin 1990, writ denied), the court affirmed a take-nothing directed verdict where a decedent died of lung cancer in October 1985, a few months after having sustained a fall and resulting back injury (vertebra compression) in July 1985. There was testimony from a doctor to the effect that a bed ridden patient may not be treated as successfully as one who remains up and around, that such a patient tends to give up more easily and that, in his opinion, if the decedent had not fallen at work he would have lived longer, although he could not tell how much longer, "by a moment, or a day, or a week, or a month." The court noted the lack of evidence that the fall was a producing cause of the death, that is, that the injury (alone or in connection with other injuries or conditions) resulted in death. *See also*, Jacoby v. Texas Employers' Insurance Association, 318 S.W.2d 921 (Tex. Civ. App.-San Antonio 1958, writ ref'd n.r.e.) cited in Schulle. In Jacoby, also a case involving death from cancer, the court stated its belief that:

> . . . the Courts of this State are committed to the proposition that an injury which does no more than weaken the physical resistance to disease is insufficient to constitute a producing cause, and that although the injury may have retarded or lessened the physical resistance of the injured employee to disease, pre-existing or thereafter contracted, unless the pre-existing disease itself is incited, aggravated or accelerated by the injury, or unless the injury is the producing cause of the after acquired disease, the injury cannot be a producing cause within the Workmen's Compensation laws.

The court in Jacoby, *supra*, also cited Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059 (Tex. 1898), for the principle that "[i]f the probative force of evidence be so weak that it raised only a surmise or suspicion of the existence of a fact sought to be established,

that evidence in legal contemplation is 'no evidence' and will not support a finding which comprehends the existence of the disputed fact."

The hearing officer's determination that the compensable injury of _____, was a producing cause of the (decedent's) death is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The only medical evidence that supports the hearing officer's determination that the compensable injury of _____, was a producing cause of the decedent's death was a letter dated May 30, 2007, from the treating oncologist which states the MVA was a significant contributor to the decedent's death and *may* (emphasis added) have even played a role in the recurrence due to the debilitating effects of the accident and subsequent events. The treating oncologist further states however that the decedent's death was caused by lung cancer. The medical evidence does not show or indicate that the decedent would not have died of the lung cancer absent the _____, compensable injury. The claimant failed to prove to a reasonable medical probability by expert medical evidence the necessary causal connection between the decedent's compensable injury and his death.

Accordingly, we reverse the hearing officer's determination that the decedent's death was a result of the compensable injury of _____ and render a new decision that the decedent's death was not a result of the compensable injury of _____.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge