APPEAL NO. 94103

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on December 7, 1993. In pertinent part, he determined that the appellant (claimant) did not establish a specific incident of exposure to the hepatitis-C virus (the basis of his claim) and that since it is an ordinary disease of life and not an occupational disease he is not entitled to workers' compensation benefits. He also found that the claimant timely reported his asserted injury, hepatitis-C, to the respondent (employer/carrier). Claimant comments on several of the hearing officer's findings and one of his conclusions and, we perceive, desires that the decision be reversed. The employer/carrier urges that the claimant failed to establish any accident or to prove any causal connection between his hepatitis-C and his work and argues that the evidence is sufficient to support the decision of the hearing officer.

DECISION

Finding the evidence sufficient to support the denial of benefits under the 1989 Act and no error of law, we affirm.

Two issues were presented for resolution at the contested case hearing: (1) did the claimant sustain a compensable injury in the form of an occupational disease on _____; (2) did he timely report his injury or have good cause for failing to timely report. Only the first issue is on appeal.

The evidence established that during the pertinent times, the claimant held two jobs, one as an Emergency Medical Technician - Paramedic with the city Fire Department since 1984, and the other as a Paramedic at (Hospital) and (Medical Center) since 1989. The evidence also established that in a letter dated August 3, 1992, and following the claimant having been a blood donor, he was advised that his blood tested positive for the antibody to hepatitis-C which may indicate a past or persistent infection with the hepatitis-C virus. Other evidence, including the testimony of the claimant, established that the claimant had sustained a needle stick incident sometime in 1990 while working at the (Hospital) and (Medical Center) and a second needle stick incident in August 1991 while on the job with the employer/carrier. After, the 1990 incident, tests for HIV and hepatitis A were performed on the patient involved which were negative. It is not known if the patient had hepatitis-C as, according to the claimant, a test for hepatitis-C antibodies only came about sometime in 1990 and it apparently was not performed on the patient. Following the August 1991 incident, both the patient and claimant were immediately tested and the patient's test was not positive for hepatitis-C antibodies. The claimant's test was positive, but he claims he was never notified by the employer/carrier and only found out about it after the blood donor matter in 1992. The employer/carrier claimed that their records indicated he was notified in September 1991, but a copy of the report was virtually illegible.

The claimant testified critically that the employer/carrier did not have (at least in the past) an effective program or policy to protect against diseases like hepatitis and that two

other Paramedics with the Fire Department had tested positive for hepatitis-C. He also outlined the much greater exposure risk to hepatitis-C he encountered in his job with the employer/carrier as opposed to the lesser exposure at the hospital. He indicated that with the employer/carrier he worked longer, had longer and greater exposure, "more blood, more amniotic fluid, more vomit, more feces, more urine." He stated that he believed he acquired hepatitis-C "either through exposure during the 1980s as a paramedic or possibly through one of my coworkers that infected me. Or vise versa, I could have infected them." He stated that "[t]his occupational disease, I do believe, is present in my employment place." He also stated that he was not claiming an incident but rather an "occupational disease from my date of hire. Being around blood products and body fluids throughout the 1980s without proper training and or exposure infection control." The claimant also introduced two brochures on hepatitis which generally discuss matters of risk and prevention.

A December 3, 1993, statement from the claimant's doctor indicated that the claimant is asymptomatic and has hepatic dysfunction and has a positive hepatitis-C antibody that is confirmed by RIBA. The statement does not mention the claimant's job at the hospital but provides as follows:

> He has been working at the Fire Department at the City of (City 1) since 1984. Although there is no definite source of this infection, it is certainly possible that this is job related.

The employer's risk manager testified and indicated that given the incubation period involved, a person tested immediately after a needle stick incident would not show positive from that incident but that the test serves as a base line. She also testified that she only knew of one other person in the Fire Department Paramedics that had been positive for hepatitis-C and that the city, although initially disputing compensability, subsequently paid benefits because there was documented exposure to a patient who had hepatitis. This occurred within the last two or three years.

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. Section 401.011(34) provides the following definition:

> “Occupational disease” means 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 includes a disease or infection that naturally results from the work-related disease. 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.

In Texas Workers' Compensation Commission Appeal No. 93885, decided November 15, 1993, we discussed the matter of causation in a case involving Lyme disease *citing* Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ) as follows:

> The court noted that an "ordinary disease" is one to which the general public is exposed outside the employment, *citing* Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980). The court observed that implicit in this definition is the proposition that all diseases outside the scope of employment are "ordinary diseases," and that in Schaefer, *supra*, the court held that an extremely rare disease, mycobacteriosis intracellular, is an "ordinary disease of life" absent a causal connection between the employee's affliction and employment.

Compare Texas Workers' Compensation Commission Appeal No. 931104, decided January 20, 1994, where the Appeals Panel affirmed the hearing officer's determination that the claimant was injured (hepatitis-C) in the course and scope of his employment. There was evidence of two documented exposures and expert medical evidence that "[t]here can be no medical doubt that [claimant] acquired hepatitis-C virus infection from either a needle stick injury or from mucosal splash exposure," (the two documented exposures).

In Texas Workers' Compensation Commission Appeal No. 92085, decided April 16, 1992, a case where the hearing officer awarded workers' compensation benefits to an employee of a hospital, we reversed and rendered where there was no evidence of a causal connection between the claimant's hepatitis-C and her employment. We cited Schaefer, *supra*, and noted the Texas Supreme Court's reference to its decision in Parker v. Mutual Liability Insurance Co., 440 S.W.2d 43, 46 (Tex. 1969), where the court stated:

> probabilities of causation articulated by scientific experts have been deemed sufficient to allow a plaintiff to proceed to the jury. For while a scientific training conceives of anything as possible, coincidence can be measured and generalizations similar to but not the same as uniform physical laws can be drawn from the probability of a result following a cause. In fact, the relationship between cause and its effect per se without theoretical explanation, can be nothing more than probable relationships between

> particulars. But this probability must, in equity and justice, be more than coincidence before there can be deemed sufficient proof for the plaintiff to go to the jury.

In Texas Workers' Compensation Commission Appeal No. 92157, decided June 1, 1992, a licensed vocational nurse had blood splashed in her eye at work and sometime later was diagnosed with hepatitis. There was no evidence of any testing of the patient involved and the only expert medical evidence linking the blood exposure to the claimant's illness was a statement that there was a "possibility" that the claimant's viral infection "could have been related to the eye splash of blood." The Appeals Panel upheld the determination of no injury in course and scope of employment.

In the case before us, the only "scientific" evidence as to causal connection between the claimant's positive hepatitis-C antibody and his job with the city is the statement of his treating doctor which only states it is "certainly possible" that his condition is job related. Not only does this not rise to a "medical probability" level, the claimant here was employed in two different paramedic positions at the time. This significant factor does not appear to have been taken into account in the opinion rendered.

As the hearing officer noted and as the claimant himself acknowledged, it can not be ascertained from the evidence when or how he became infected with hepatitis-C as indicated by the positive hepatitis-C antibody test as confirmed by RIBA. Expert medical testimony in the case rises to no more than a possibility, a level for establishing causation that has been rejected by the Texas courts. As the court observed in Schaefer, *supra*,

"[t]he fact that proof of causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation." Id at 205. Probative evidence of causation lacking in this case, we affirm the determination that the claimant is not entitled to benefits.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge