APPEAL NO. 950455

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on February 9, 1995, (hearing officer) presiding as hearing officer. She determined the decedent died as a result of the compensable injury of (date of injury), and that his wife and two surviving children were his eligible beneficiaries. The appellant (carrier) appeals urging that there is no legally sufficient evidence that the decedent died as a result of a fall on (date of injury), and that the great weight of the medical evidence indicates that the decedent died as a result of cancer only. The respondents (claimants) respond that they have met their burden of proof and that the decision should be affirmed.

DECISION

Finding error, we reverse and render a new decision.

There was no question that on (date of injury), the decedent sustained a compensable injury to his heels, ankles, and back when he fell some 25 feet from a ladder at work. He was hospitalized for some eight days and underwent surgery for the fracture injuries to his heels and ankles including the insertion of pins and placement of casts. He subsequently underwent therapy and according to his wife there was some infection at one time in one of the pins. He did not return to work. Later he lost his appetite, had severe hiccups, and had digestive problems. During the Christmas holidays of 1992, the decedent went to the hospital because of severe stomach pain and a number of tests were run. He left the hospital over New Years and when he returned he was told that he had cancer. Apparently the family did not accept this, wanted a second opinion and had the decedent transferred to another hospital on January 6, 1993, where he was under the care of (Dr. A). The diagnosis on admission, according to medical records in evidence was:

(1)Stage four small cell carcinoma with liver metastasis as per history.

(2)Dehydration

(3)Hyponatremia

(4)Metabolic acidosis

(5)Anemia

(6)Rule out probable upper gastrointestinal bleeding

The following morning the deceased passed away. The medical record showing the death summary and signed by Dr. A shows:

CAUSE OF DEATH

(1)Stage 4 small cell carcinoma with liver metastasis.

(2)GI bleed.

(3)Anemia secondary to blood loss.

(4)Metabolic acidosis.

(5)Cardiopulmonary arrest.

A death certificate in the record and showing Dr. A as the certifying physician lists the immediate cause of death as cardiopulmonary arrest with stage 4 lung cancer listed as underlying cause.

The evidence established that the decedent was a cigarette smoker with his wife testifying that he smoked less than a pack a day and some medical records variously indicating less than a pack a day to Dr. A's notation in the decedent's admission summary dated January 6, 1993 that "[i]t is important to note that patient relates history that he had been a heavy smoker approximately anywhere from 1-3 packs per day for the past several years." An autopsy was not authorized or performed on the decedent. In an affidavit dated August 5, 1994, Dr. A states:

> I, [Dr A], M.D., am a practicing physician in [County], Texas and state that I have extensively reviewed the medical records of [decedent].
>
> The patient, [decedent] had Stage 4 lung cancer, which in my opinion was the proximate cause of his death. Based on my experience and expertise, I firmly believe that the patient's death was accelerated by his fall. In spite of the Stage 4 lung cancer, the patient was in relatively good health. Subsequent to the fall, the patient experienced progressive and rapid deterioration to his health. Because of this, I believe that the fall contributed immensely to the cause of his death. In my rendered opinion, the fall contributed a probability of greater than 51% to the cause of his death, based on my experience and expertise. This rendered opinion is based on reasonable medical probability.

Dr. A's curriculum vitae indicates that he is board certified in internal medicine and subspecialty boards of medical oncology. The carrier placed in evidence the written depositions of two physicians. (Dr. P), board certified in internal medicine, oncology and hematology, stated he has thoroughly reviewed the medical records of the decedent and that in his opinion and in reasonable medical probability the decedent died as a result of

progressive and extensive small-cell carcinoma of the lung and that he did not die as a result of the fall of (date of injury). Dr. P stated that in reasonable medical probability the decedent would have died when he did regardless of the injuries from the fall and the fall did not incite, aggravate or accelerate the cause of his death. (Dr. M) board certified in anatomic and clinical pathology, stated that the decedent's records had been thoroughly reviewed and that in her opinion and in reasonable medical probability, the cause of decedent's death was "none other and without a doubt" his lung tumor. She stated that the decedent's "particular type of lung tumor, known as small cell carcinoma, is one of the most deadly types of cancer known "to affect man" and that "of the major types of lung cancer, small cell carcinoma has the worst prognosis, is the most aggressive, has the shortest expected survival, and has the strongest correlation with cigarette smoking." Dr. M stated that in reasonable medical probability the decedent did not die because of his injuries from a fall and that he died of the tumor "most particularly, because of the affects the tumor exerted throughout his body, especially since it had already spread beyond his lungs" and that none of the medical problems leading to his death "could in any way be related to his injury at work. . . ." Dr. M stated that decedent would have died at the time he did regardless of the earlier injury which was "entirely incidental and had nothing to do with the actual cause of his death . . ." and that the injuries from the fall "certainly did not incite nor aggravate nor accelerate the progression of his tumor. . . ."

The hearing officer found that based on reasonable probability the deceased's compensable injury accelerated his death and contributed a probability of greater than 51% to the cause of his death and that aggravation of a preexisting condition is an injury and concluded that the compensable injury of (date of injury), was a cause of his subsequent death on January 7, 1993. Our review of the evidence in this case, and our consideration of previous case law, leads us to conclude that the hearings officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we reverse and render a new decision.

Clearly, a case of this nature relies on the medical evidence and opinion. Where the matter of causation is not in an area of common experience, expert or scientific evidence may be essential to satisfactorily establish the link or causation between the employment and the injury. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1990); Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). However, it is the substance of the expert testimony, rather that the use of particular terms or phrases that is determinative on the issue of reasonable medical probability. Schaefer, *supra*. In Shaefer, a doctor testified that in reasonable medical probability a disease the claimant had (atypical tuberculosis) resulted from his employment. The court noted that the evidence failed to establish either the particular bacterium involved in the claimant's unusual disease or how the claimant contracted it. The court stated after a review of the substance of the doctor's testimony, that although he stated his opinion was based on reasonable medical probability, that the testimony did no more than suggest a possibility as to how or when the

claimant was exposed to or contracted the disease and held that "his opinion is not based upon reasonable medical probability but relies on mere possibility, speculation and surmise." We conclude the same rationale could be applied to this case particularly given the apparent inconsistency and conflict between Dr. A's diagnosis of the claimant's medical condition upon admission, the cause of death contained in the death summary, the causes of death officially listed on the death certificate, together with the total absence of any medical explanation of the mechanics or processes involved or other basis for the "reasonable medical probability" that the decedent's lower extremity injuries from the fall caused or aggravated the small cell lung cancer from which the deceased expired. The evidence does not show or indicate that the decedent would not have died of the lung cancer absent the (date of injury) fall. *See generally* Texas Workers' Compensation Commission Appeal No. 92598, decided December 23, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 93159, decided April 15, 1993.

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 couple of 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 noting 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, *supra*. 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 also cited Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059, 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." That arguably is the situation in this case regarding Dr. A's August 5, 1994, affidavit particularly when considered in conjunction with the decision in Schaefer, *supra*. *Compare* Walters v. Fidelity & Casualty Company of New York, 611 S.W.2d 934 (Texas Civ. App.-Eastland 1981, writ ref'd n.r.e.), where two physicians testified regarding causal connection between preexisting cancer and a back fracture of the spine, one of whom stated "I would stick with the fact that the spine was weakened as

a result of the cancer spread and, therefore, fractured and was a producing, hastening cause in his demise."

Regardless whether the evidence of causation is considered to be so weak as to be considered no evidence, in our opinion, the determinations of the hearing officer on the issue on appeal are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Aside from the apparent conflict and inconsistency comparing the death certificate and the reports of Dr. A with his much later affidavit, there are two depositions from physicians holding appropriate board certifications that clearly and unequivocally disconnects the fall from the death causing small cell lung cancer. This is by far the great weight and preponderance of the evidence in this case. Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Accordingly, we reverse and render a new decision that the decedent's compensable injury of (date of injury), was not a cause of his subsequent death on January 7, 1993, and that no benefits are due under the 1989 Act.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge