APPEAL NO. 92178

A contested case hearing was held on March 23, 1991. He (The Hearing Officer) determined that the appellant failed to establish, by a preponderance of the evidence, that he suffered a compensable injury or illness, and thus was not entitled to benefits under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq.* (Vernon Supp 1992) (1989 Act). Appellant complains that since the respondent requested the contested case hearing, the burden of proof should have been on "some other party" and that since this was a medical dispute the hearing was governed by Article 8308-8.26 and should have been conducted under the provisions of the Administrative Procedure and Texas Register Act (APTRA), TEX. REV. CIV. STAT. ANN., art. 6252-13a (Vernon Supp 1991). Appellant also faults two of the hearing officer's findings of fact and claims several inaccuracies in the hearing officer's statement and discussion of the case. Appellant desires that we set aside the decision and order a new hearing under APTRA procedures, or reverse and find "that the Health Care Provider is entitled to payment from the Carrier," and strike from the findings of the hearing officer any reference to the merits of the appellant's claim concerning temporary income benefits.

DECISION

Finding the evidence sufficient to support the essential findings and conclusions of the hearing officer and his decision and order, we affirm.

This case involves the disputed issue of whether the appellant sustained a compensable injury or aggravation of an existing injury from the inhalation of chemical fumes or particles during the course and scope of his employment with the (Employer 1), a self insured entity. There was considerable evidence before the hearing officer including the opposing opinions of well qualified physicians. The hearing officer ultimately concluded that the appellant failed to meet his burden of proof, that is, establish his claim by a preponderance of evidence.

The appellant has been in the employ of Employer 1, operators of a waste water treatment plant, since early 1990 as a crew chief in liquid maintenance. He was previously employed by the (Employer 2) where, according to his testimony, he had been exposed to chemicals. He had been having wheezing and respiratory problems for about four years prior to a chemical spill at Employer's (Employer 1) plant on _____. On that date, the appellant went to a spill site and observed a large pool of a substance that turned out to be a 30% to 50% solution of sodium hydroxide. He states that he met at the site with several other employees and found a pool of green liquid. Since the nature of the substance was unknown, his supervisor told him to cordon off the area with yellow caution tape until the substance could be identified. The appellant states he was in the area about 30 to 45 minutes and that he personally cordoned off the area with the tape. He testified he could smell an odor from the substance but that it was not strong.

The appellant testified that he was required to inspect the spill area on a daily basis and could smell the substance each day. He acknowledged that he had no

immediate reaction to the substance but that after the first day he developed severe lung congestion and coughing. He stated his condition worsened until March 7, when his doctor recommended that he not return to work. He was hospitalized on March 25, 1991 because of his worsening condition.

The appellant's most recent treating physician, Dr. Z, testified that the appellant's condition was chronic bronchial spasms, an obstructive pulmonary condition. He opined that the appellant's lungs had degenerated to a level of sensitivity due to inflammation, such that any irritant allergen, chemical or vapor, could cause an adverse reaction. He testified that there is no one test that can be used to determine if a problem is related to any particular exposure. He testified that assuming the appellant was exposed to sodium hydroxide during _____ and _____of _____, it aggravated his condition.

Testimony from six employees, both in supervisory and subordinate positions to the appellant, was considered at the hearing. These individuals were present at one time or another at the spill site on _____. Their testimony indicated that: (1) the substance was not in the form of a cloud or mist, (2) they smelled little or nothing even when standing immediately over the spill, (3) no one became ill or experienced any type of reaction as a result of being in the proximity of the spill, (4) the appellant did not barricade or cordon off the area with yellow caution tape such having been done by one of the other employees, (5) if the appellant was present (some did not recall him being there), he got no closer than 20 feet to the substance and was there for only about 5 minutes, and (6) the appellant was not involved in the clean up of the spill.

The respondent called Dr. K, a toxicologist, who examined the appellant, conducted tests and reviewed various medical records pertaining to the appellant's case. He stated his opinion of the appellant's physical condition as, "it's very clear that he has restrictive airway disease" and that it was not caused by exposure to sodium hydroxide. Dr. K further testified that "[t]he chest X-rays help confirm that there is not an obstructive problem. And because of the obesity seen on the film, without necessarily any offense to (appellant), that confirms that that's the problem," (records in the file indicate a weight of 265 pounds). He testified that the appellant's problem involves "a neurologic response that he doesn't have outward control on." He stated that occupational health research has not found sodium hydroxide to be a substance causing restrictive chronic lung disease.

Numerous medical records were admitted into evidence. From the records, it is apparent that the appellant experienced respiratory problems for a considerable period of time prior to the spill incident of _____. A history in one of the records dated February 4, 1991 indicated the appellant is a "non-smoker who had a lot of allergies, sore throats, and ear aches as a child, and for the last three or four years has been having problems with wheezing and has not sought medical attention until the last few months." A report of a bronchoscopy dated "2-13-91" states that "[t]he patient has been having problems with coughing which has been developing, increasing, progressing, has occurred for the last several months and, now years, possible exposure at work to fumes.

He has been treated vigorously as an out patient without relief of symptoms, in need of full examination for his respiratory problem." The post-procedure diagnosis was severe bronchitis.

The respondent also introduced two letters (one dated May 14, 1991 and the other dated June 3, 1991) from Dr.Z addressed to the employer's claims examiner. It was shown that the contents of the letters changed after the appellant's wife, an RN, had written her comments to Dr.Z. The respondent viewed this matter as an inappropriate attempt to bolster the basis for a claim while the appellant viewed it as correcting an inaccurate history. In any event, the earlier letter made no mention of the_____ spill in relation to the appellant's condition. The latter letter states that in addition to being exposed in _____, ____ to two or three episodes of more massive amounts of chemicals including diesel fuel and chlorine (a separate claim was filed on this matter and is apparently still pending), the appellant's "condition worsened after exposure to sodium hydroxide from _____ to 3-7-91."

Sick leave records, and other medical records admitted into evidence, show the appellant suffered severe respiratory problems in _____ and _____ ____ which continued to worsen until he was hospitalized on March 25, 1991. He had a number of doctor appointments and since his condition was not improving, he underwent a bronchoscopy procedure on February 13, 1991. He acknowledged that he had been seriously ill with "bronchial pneumonia" from January 22 to January 25, 1991 and was not able to work.

Appellant's assertion that the burden of proof should not have been placed on him but rather on the respondent since they requested the contested case hearing is without merit. Clearly, the claimant in a workers' compensation case has the burden of proving by a preponderance of the evidence that a claimed injury occurred in the course and scope of his employment. Reed v. Aetna Casualty & Surety Company, 535 S.W. 2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91049 decided November 8, 1991.

Obviously, this case involved a dispute as to the entitlement to benefits under the workers' compensation procedures. The issue that was in dispute at the contested case hearing was whether the appellant sustained a compensable injury in the course and scope of his employment. Contrary to the assertion of appellant, this was not a "medical dispute" under the provisions of Article 8308-8.26 and, therefore, was not governed by the procedures set forth in paragraph (d) of that article to wit: "The hearing shall be conducted in the manner provided for a contested case under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes)." Rather, a contested case hearing, where the entitlement to any benefits at all is disputed on the basis of whether or not a compensable injury was incurred by a claimant, is governed by Article 6 of the 1989 Act. Article 8308-6.01 provides:

(a) Except as otherwise provided by this article, the Administrative Procedure and

Texas Register Act (citation omitted) does not apply to any proceeding conducted under this article.

(b) Each proceeding before the commission to determine the liability of an insurance carrier for compensation for an injury or death under this Act is governed by this article.

Appellant disagrees with the hearing officer's findings of fact No. 4 and 11. They are:

4. The Claimant had an ongoing respiratory illness which caused him to have periods of persistent coughing and wheezing for approximately 4 years prior to _____, ____.

11. The Claimant's chronic lung illness was not aggravated by exposure to the sodium hydroxide spill on the site between _____, and March 8, 1991.

We find the evidence of record sufficient to sustain both of these findings by the hearing officer. Several of the medical reports, as indicated above, fully support the finding that the appellant has been experiencing some degree of respiratory problems for up to four years. While it is true that the first direct mention of exposure specifically to chlorine occurred in his current job sometime in _____ ____ (as urged by appellant and not necessarily during his job in (City) as indicated in the hearing officer's report), there is evidence in the medical reports that he was exposed to fumes in his work place over a period of time which would have included his position with Employer 2. The appellant himself so testified.

With regard to finding number 11, it is certain that the evidence was in conflict. The two doctors' testimony on this point was not in agreement. Indeed, their professional, expert opinions were in direct opposition concerning whether the _____, spill had anything to do with the appellant's condition. And, of course, there was the conflict in the position of the appellant and the other workers regarding noted effects, odor, length of exposure and duties regarding the handling of the spill. In sum, the hearing officer, as the fact finder, had the authority as well as the responsibility to determine the relevance and materiality of the evidence, consider and weigh the evidence, assess credibility, and resolve the conflicts. Article 8308-6.34(e); Texas Workers' Compensation Commission Appeal No. 92059 decided March 23, 1992; Texas Workers' Compensation Commission Appeal No. 92128 decided May 11, 1992; Appeal No. 91049, *supra.* We do not find an appropriate basis to disturb these findings.

Appellant complains about an observation in the hearing officer's discussion section that the appellant's "psychological cautiousness and sensitivity to odors, would logically reduce the likelihood that he would go near the cordoned-off area after _____." This was not a part of the hearing officer's findings, conclusions or decision in the case and would not adversely affect the case even if there were no basis

for the comment. However, the appellant's own testimony indicated that he is careful around chemicals, that he is extremely cautious, and that he tries not to expose himself to chemicals. Appellant also expresses considerable concern over the statement in the hearing officer's report that "[t]he Carrier produced medical records which suggest that (Dr. Z), and his associate, (Dr. C), modified medical reports and statements to suit the legal intentions of the claimant." This was an accurate rendition, as the respondent did introduce such evidence for the purpose stated and conducted extensive cross examination on the particular point. The appellant was equally vocal that the changes made were to render the histories more accurate. Be that as it may, and recognizing the hearing officer was fully cognizant of the parties' positions, there is absolutely nothing to indicate this matter played any role in his decision. It is not mentioned anywhere in his findings, conclusions, discussion, decision, or order. Under the circumstances, even if this were somehow error, which we do not determine, it was harmless and as such would not affect the outcome. *See* Texas Workers' Compensation Commission Appeal No. 92034 decided March 9, 1992; Texas Workers' Compensation Commission Appeals No. 921249 Decided May 11, 1992.

Finding the evidence sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge