APPEAL NO. 92187

A contested case hearing was held on April 14, 1992, in (city), Texas, (hearing officer) presiding as hearing officer. She determined that the respondent sustained a compensable injury on (date of injury), due to noxious fume inhalation while in the course and scope of her employment. Appellant urges error in some of the hearing officer's Findings of Fact and a Conclusion of Law and urges there is no evidence of what the fumes were or how they caused an injury or of a causal connection between the place of employment and the injury. In the alternative appellant urges the evidence is insufficient to support the hearing officer's decision. No response has been filed to the request for review.

DECISION

Finding no evidence of record to establish a causal connection between the respondent's dizziness, fatigue, loss of balance, and airway dysfunction and her employment, we reverse and render.

The respondent worked for the appellant, a self-insured employer, as an office employee at the (Hospital). She claims that on (date of injury), she was overcome by "noxious" fumes in the office causing her to feel dizzy and to lose her balance when she stood up. She states that while she was at lunch (in the same building) she felt better but then became dizzy when she returned to work. She called her husband and left work early at the suggestion of her supervisor. She stated she felt better at home and that when she came to work the next day, (date), she again felt dizzy and later went home. She has not worked since that time.

Respondent testified she was okay before (date of injury), but that now she is tired, becomes exhausted easily and has a loss of balance. She testified that her supervisor went to a doctor for the same problems that she, the respondent, is having (neither party called the supervisor as a witness or presented any statement of the supervisor). She also indicated maintenance has been called in the past regarding problems with the air conditioning. She believes that the injury she suffered from the "noxious" fumes resulted from the job. She continues to have the same problems almost daily including fatigue, dizziness and balance problems.

On cross-examination, the respondent stated that her speech has also been affected, "it hasn't been the same since (date of injury)." She acknowledged she had prior problems with dizziness and balance in 1988 when she was treated for her ears and for hearing problems. She also stated she did not see any fumes on (date of injury), as they were not visible, but that she smelled a "strong odor."

The respondent went to see (Dr. M) on September 19, 1991, and has continued under his treatment since that time. His report dated February 18, 1992, indicates in the history section as follows:

This fifty-five year old, black female employee of (Hospital), was first seen in my office on September 19, 1991, complaining that she had been exposed continuously to fumes on the job for the previous several months, which had gotten worse over the previous 2 to 3 weeks. The patient stated that this caused her to have headaches almost constantly and to have minimal energy. The patient had difficulty working and had been off work for approximately a week. She stated that she had been losing her balance for the past 2 to 3 months.

Dr. M's diagnosis, in pertinent part, lists "(1) noxious fume inhalation producing headache and malaise." Later in the report, the following information is set out:

The patient was seen again on October 14, 1991, complaining of having lost her voice and indication that her strength had decreased. She stated that she had had a low-grade fever for the past 1 to 2 weeks. The patient in addition to that stated, that she had some hearing impairment which was documented by Dr. M. The patient had severe laryngitis, and she was referred to Dr. M on this same date. The patient was advised that she should have an evaluation by a pulmonary disease specialist and was referred to Doctor Cross. She saw him on October 15, 1991, who diagnosed that she had airway dysfunction, possibly related to inhalation of fumes.

The appellant presented the testimony of (Dr. T) who was the director of health services for appellant. Dr. T stated she had not treated the respondent for the (date of injury) complaints because respondent went to another physician. However, Dr. T had seen her on previous occasions, one of which was on February 11, 1985, when the respondent was transferred from a laboratory position, where chemicals were present, to her current office position where there are no chemicals, because she complained about fatigue, wheeziness, nausea, and dry eyes. Dr. T also states that there was an environmental inspection of respondent's area in 1989 because she complained of a hearing loss related to office machine noise. Dr. T indicated that there had not been any reports of any injury of the respondent's nature in her area, but that she was aware the respondent's supervisor had some respiratory problems. When the respondent complained about the (date of injury) problem, Dr. T requested an environmental evaluation.

On cross-examination, Dr. T stated she could not comment on Dr. M's diagnosis since she had not examined the respondent. However, she felt this information was enough to warrant an environmental inspection. Dr. T states that the respondent's complaints are subjective and that in reviewing Dr. M's report she noted a lack of any tests and that all that appears in his report is what the patient states.

(Mr. Y), the appellant's safety manager, testified that he conducted an environment inspection of the respondent's office area beginning on October 24, 1991, and continuing periodically through March, 1992. Tests of the air were sent to independent laboratories.

According to Mr. Y, and his written report, all the tests were normal. He testified that there were no prior complaints about "noxious" fumes in that area and if there had been, they would have performed tests. To his knowledge, there was no problem with or variance in the air conditioning or ventilation system between (date of injury), and the inspection period beginning in October. He stated they could not find any problem with "noxious" fumes or contaminants in the air and that there was sampling done in that area between (date of injury), and October, 1991.

The appellant finds fault with the hearing officer's following Findings of Fact and Conclusion of Law:

FINDINGS OF FACT

3.On (date of injury), the claimant went to work and began to feel dizzy and felt a loss of balance after she arrived at her office due to the inhalation of noxious fumes.

4.When the claimant went to lunch on (date of injury), in the cafeteria in the same building but on a different floor from her office, she felt better and relieved from the symptoms she was experiencing (i.e. dizziness, loss of balance) in her office.

5.Once the claimant returned to her office after lunch on (date of injury), the dizziness and loss of balance she had experienced earlier that day returned. The claimant left work on (date of injury) at 3:30 p.m. at the suggestion of her supervisor, (Ms. R).

6.On (date), the claimant went to work, but had to leave work early because she began to feel dizzy and experience a loss of balance.

8.The claimant went to see (Dr. M), who is a specialist in internal medicine, on and after September 19, 1991. Dr. M, on September, 19, 1991, diagnosed that the claimant's condition was: 1) noxious fume inhalation producing headache and malaise, 2) fibrocystic disease of the breast, and 3) edema of the lower extremities.

10.The (employer) had an environmental assessment done beginning on October 24, 1991, in the office suite that was occupied by the claimant of (date of injury). The results of the various tests do not illuminate upon the status of the environment of the office suite as it existed on (date of injury).

CONCLUSIONS OF LAW

3.The claimant sustained a compensable injury on (date of injury), due to noxious fume inhalation while in the course and scope of her employment with (employer).

Injury is defined under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.03(27) (Vernon Supp. 1992) (1989 Act) as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm. The term also includes occupational diseases." To be a compensable injury, the injury must arise "out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10) (1989 Act).

A claimant has the burden of proving by a preponderance of the evidence that an injury occurred while in the course and scope of the employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In proving a compensable injury, a claimant must link the contended injury to an event at the work place and establish a causal relationship between the injury and the employment. Texas Workers' Compensation Commission Appeal No. 92108 (redacted Docket No.) decided May 8, 1992. Where the subject of injury is not so scientific or technical in nature as to require expert testimony, lay testimony and circumstantial evidence may suffice to establish causation. *See* Travelers Insurance Company v. Strech, 416 S.W.2d 591 (Tex. Civ. App.-Eastland 1967, writ ref'd n.r.e.); Northern Assurance Company of America v. Taylor, 540 S.W.2d 832 (Tex. Civ. App.-Texarkana 1976, writ ref'd n.r.e.). However, 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 injury and the employment.

The case before us raises the issue of "noxious" fumes and the effects thereof on the body. Under the particular circumstances of this case, we do not believe these matters fit within the category of common experience; rather, they involve technical or scientific issues which require some degree of expertise in establishing causal relationship analogous to the requirements of technical expertise in establishing some occupational diseases. In Parker v. Employer Mutual Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969) the Supreme Court of Texas noted that the fact that a determination of causation is difficult does not excuse a plaintiff from introducing evidence proving causation. The court set forth the several causation theories developed in common law upon which the issue is submitted to the jury, namely: (1) where the general experience or common sense dictate that reasonable men know, or can anticipate, that an event is generally followed by another event; (2) where there is a scientific generalization, a sharp categorical law, which theorizes that a result is always directly traceable back to a cause, that is, the harmful consequences provide a traceable chain of causation back to the act itself, and this is the traditional use courts have made of expert testimony; and (3) where probabilities of causation are articulated by scientific experts and are deemed sufficient to allow the cause to proceed to the jury. Also, expert medical testimony, if the testimony is that there is a "reasonable probability" of a causal connection, is sufficient to go to a jury. In the Parker case, the court

noted its decision in Insurance Co. of North America v. Myers, 411 S.W.2d 710 (Tex. 1966) where the substance of a doctor's testimony on a matter of causal connection was to the effect that it was only a "possibility," that: "causal connection must rest in reasonable probabilities; otherwise, the inference that such actually did occur can be no more than speculation or conjecture."

In Texas Workers' Compensation Commission Appeal No. 92085 (redacted Docket No.) decided April 16, 1992, we discussed another Supreme Court of Texas decision on the matter of causation thusly:

> In Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980), the employee, a plumber who routinely had to crawl under houses to perform repairs and installations, contended that his "atypical tuberculosis" had been caused by his exposure to soil contaminated with a variety of fecal matter including that of birds and other fowl. The employee also raised birds commercially. The employee's evidence included the testimony of his treating physician to the effect that in his opinion, based on reasonable medical probability, the employee's disease resulted from his employment. The insurance carrier showed, however, that the employee was diagnosed as having "Group III mycobacterium intracellularis;" that the employee's particular subgroup of bacterium (Group III) was composed of at least thirty serotypes (subgroups which varied substantially in their disease producing capacities; that the employee's Group III bacteria was not serotyped or subgrouped so as to determine whether or not it was an avian strain (considered the most pathogenic); and, the bacterium with which the employee was infected had "not been isolated in any of the environments where he worked or lived." *Id* at 201. The Texas Supreme Court observed that "the specific problem is establishing a casual (sic) connection between the disease and Schaefer's employment...." *Id* at 202. The court noted that causation may be proved by expert testimony but that even that caliber of evidence must amount to more than speculation or conjecture.

The situation in the case before us is markedly different from the factual setting in Morgan v. Compugraphic Corporation, 675 S.W.2d 729 (Tex 1984), where the Texas Supreme Court stated that lay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine with reasonable probability, the causal relationship between the event and the condition. In that case, the plaintiff had always been in good health prior to returning to work and finding her work station, upon return, situated so that her face was two inches from a typesetting machine which was admittedly, by default, leaking chemical fumes and that soon after resuming her employment and being exposed to the fumes emanating from the typesetting machine she began experiencing breathing and swelling problems and, subsequently blurred vision and headaches. With the evidence in this posture, and the leakage of chemical fumes admitted, the court determined such evidence established a sequence of

events from which the trier of fact could infer, without an expert's medical testimony, that the release of chemical fumes caused the injury.

In the case *sub judice*, our concern goes not only to the lack of evidence that "noxious"[1] fumes were present at all in the work place on (date of injury) and (date), but further, that any condition at the work place was causally connected to the respondents condition or "injury." The only indication of "noxious" fumes in the appellant's office area was from the appellant who described as "noxious fumes" some odor she states she detected in the office on (date of injury). There was no evidence to indicate that anything of a harmful nature was present in the work place other than the respondent's speculation or conjecture that some "noxious" fumes must be present because she felt dizzy, fatigued, and lost her balance when she stood up. Other evidence of record indicated she had felt these same or similar symptoms for several weeks to several months prior to (date of injury) (medical report of Dr. M). Dr. T also testified that the respondent had indicated previous respiratory problems. Additionally, the respondent testified she continued to experience these symptoms right up to the time of the hearing, some seven months after (date of injury). Also in evidence was the report of the extensive environmental assessments which gave no indication of "noxious" fumes in the respondent's work place. While the assessment was not actually undertaken until the latter part of October, the safety manager testified the air conditioning and ventilation system was the same and that no alterations had been made during the period of (date of injury) through the testing date. Further, there were no reports of any fumes or odors in the respondent's work area. We find, under the circumstances, that the description of "noxious" fumes by the respondent, a witness without any indicated expertise or specialized knowledge in identifying or determining the effects of substances of a "noxious" characteristic, is little more than speculation or conjecture amounting to no evidence. Parker, *supra*; Schaefer, *supra*; compare Texas

[1] Noxious is defined in Webster's Ninth New Collegiate Dictionary as 1. physically harmful or destructive to living beings.

Workers' Compensation Commission Appeal No. 92059 (redacted Docket No.) decided March 23, 1992.

With the absence of evidence concerning "noxious" fumes in the work place, the medical evidence in this case does not provide the necessary linkage or causal relationship to establish that a compensable injury was sustained by respondent. In this regard, it is not evident that Dr. M's diagnosis of "noxious fume inhalation producing headaches and malaise," is any more than a mere recitation of the history given to him by the respondent. In rejecting the medical testimony in Schaefer, *supra*, the court indicated the doctor assumed factors crucial in the chain linking the employment and the disease and that consequently the doctor's opinion on causation amounted to no more than suggesting a "possibility." That is the situation in the instant case. The subsequent diagnosis of the pulmonary disease specialist that the respondent had "airway dysfunction, possibly related to inhalation of fumes" does not provide the critical evidence necessary to establish the necessary causation. Compare Texas Workers' Compensation Commission Appeal No. 91106 (redacted Docket No.) decided January 10, 1992.

Concluding there is no evidence that the injury or condition suffered by the respondent arose out of and in the course of employment, we cannot sustain the decision of the hearing officer.

The decision is reversed and we render a new decision that the appellant is not liable for any benefits under the Texas Workers' Compensation Act.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge