APPEAL NO. 92202
FILED JULY 6, 1992

On April 23, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, the appellant herein, had not sustained an injury on _____, in the course and scope of his employment with (employer). Appellant contended that he had suffered an injury when he inhaled an unknown toxic substance while dismantling scaffolding at the site of the (refinery) in (city), Texas.

The appellant asks that the decision be reviewed and reversed, arguing that there was not substantial evidence supporting the determinations of the hearing officer. Specifically, the appellant complains of the Finding of Fact No. 3, and Conclusions of Law 3 and 4. The appellant complains that the hearing officer, who is not a medical doctor, should not have evaluated the medical evidence because of lack of qualification to do so. Further, the appellant argues that the hearing officer erred by excluding from evidence a newspaper article purporting to detail harmful emissions from this refinery, and indicates that the fact that the carrier objected itself indicates the weight of such evidence.

Respondent replies that the appeal does not comply with the requisites for an appeal under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. Article 8308-6.41 (Vernon Supp. 1992); that the decision was supported by the evidence; that the appellant seeks to have the burden of proof shifted to the carrier; and that the hearing officer did not err in her exclusion of the newspaper article.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

Mr. W, the appellant, began work for employment on April 4, 1991; at the time, the client for whom the employer provided scaffolding was performing work at the refinery in (city), Texas. Appellant reports that he worked the late night/early morning shift, and that, on _____, at approximately 1:30 - 2:00 a.m., he was working to dismantle some scaffolding when he smelled what is described on the record only as a "strong" odor. Appellant recalled that there was some spraying going on in the immediate vicinity, although not directly above him. He stated that the odor made him nauseous, and that he went to "the shack" on the premises where he stayed until 7:00 a.m., when he went home. His symptoms included vomiting, coughing, fever and shortness of breath. He indicated that no one knew where he was during that time and he did not report where he was going.

Appellant stated that he stayed home the next day, and began, in addition to other symptoms, to cough up blood. He called his supervisor, AP, and told him that an inhalation on the job site made him ill. He was then "fired, more or less," and told to come in and get his check.

Appellant said that he went to hospital on _____, because he had gotten worse, and was running a 101 degree fever, in addition to continued nausea, headaches,

vomiting, and coughing blood. He was referred to the hospital by the employer. X-rays and blood tests were taken, and medication prescribed, which did not make him feel better. He stated that the doctors did not discuss a diagnosis with him or say what was wrong. The next time appellant went to a doctor was on May 16th, when he went to (hospital). He states that he was told by staff at this hospital that his problems were caused by chemical inhalation.

Appellant stated he had been treated for coughing and throat problems beginning in January 1991. He stated, however, that symptoms of shortness of breath and coughing up blood only occurred after _____. When asked on cross-examination why medical records from January 1991 indicated shortness of breath, he stated that this was inaccurate and he did not report this symptom. He was treated for this problem on a follow-up basis on March 20, 1991, but states that he was never told about a scheduled April 10th appointment.

DJ, a coworker of appellant, stated that he worked on the same shift as appellant, and that the unit where the scaffolding was located was inactive. He stated that if employees are working around chemicals, they are usually told. He did not smell anything, nor did he see spraying being done in the immediate area. He recalled that in late April or early May of 1991, employer's employees were given respirators to use, although they were not told that there were any emissions. However, he did recall that an evacuation signal was given around this time. He agreed that wind can carry toxic emissions from one part of a plant work site to another.

RB testified that he was appellant's supervisor on _____. He stated that he felt that appellant had looked tired from the first day he started work. He stated that there was no spraying or painting going on that he was aware of, nor did any member of his crew, including appellant, report any odors or emissions on that date. He stated that he saw appellant working between 2:00 a.m. and 7:00 a.m. on _____, and further said that appellant could not have gone to a shack to rest, because there was no "shack."

Appellant's attorney tendered an article from the July 21, 1991, issue of the (newspaper) that describes the concern of residents around the refinery about toxic gas emissions, specifically hydrogen sulfide and sulphur dioxide, at unspecified times generally described as April and May of 1991, which are attributed to failure of new equipment. Although the article indicates that a lawsuit was filed, no pleadings from the lawsuit were tendered. Respondent's objection to admission of the article, as not relevant to events occurring on _____, was sustained.

A written statement submitted by appellant from MM, who says he worked nights during the month of April at ____, says that there was no spray painting going on, and that the unit was not operating, but that there was some insulating being done. He states that "absolutely" no chemicals or other products were being used in the unit.

Roughly 89 pages of medical records were put into evidence by appellant. Most are

test results. Some notes are in "doctor's handwriting" and are not completely legible. Although appellant's attorney argued that test results proved the existence of high amounts of "chemicals" in appellant's body, there is virtually no evidence that explains why any of the purportedly high chemical indicators would be related at all to the alleged emission, or whether such "high" readings are indeed significant from a health standpoint. "Alkaline phosphate" is shown as high in both January 1991 and April 1991. A hearing officer is not a medical professional, as appellant points out on appeal, but neither are most judges or jury members. Therefore, it is advisable for a litigant, particularly one with the burden of proof, to provide the trier of fact with all information needed to make a decision, and to organize tendered evidence in a manner that makes the proponent's points clear.

Neither were all the symptoms experienced by appellant tied to the purported emissions. Although appellant developed some evidence through RB and DJ (who had taken some safety courses in toxic emissions, but were not experts) that inhalation of hydrogen sulfide or sulphur dioxide could cause coughing, nausea, and vomiting, the 101 degree fever experienced by appellant was not accounted for in their testimony or in the record as a symptom of either gas. The presence of fever could indicate to the trier of fact that appellant's disease was more consistent with an ordinary disease of life, rather than a compensable injury.

When expert medical opinion is presented to draw a connection between conditions at a work place and an injury, that medical opinion must establish that an injury is linked to the workplace as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1990). In Hernandez v. Texas Employers' Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), the court noted that lay testimony as to onset of asthma, coupled with testimony about the workplace, was insufficient to establish that an injury occurred in the course and scope of employment, noting that expert testimony was generally necessary where the claimed injury is a disease. Id, at p. 253. 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. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In this case, given that appellant was on the job two days, that he experienced bronchial and upper respiratory symptoms prior to the alleged date of injury, that he was treated for them up to the date of injury, and that the existence of an emission was disputed, we believe that the circumstances of this case do not involve matters within the category of common experience such that the compensability of appellant's injury can be established through lay testimony alone. *See also* Texas Workers' Compensation Commission Appeal No. 92187 (Docket No. _____) decided June 29, 1992. To the extent that a few medical record notes indicate a chemical exposure (and at least one record does so with a question mark beside it), it is not evident that such notations are any more than a recitation of the history given to the doctor by the appellant.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). A claimant must link any contended physical injury to an event at the work place. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-1961, no writ). Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ).

The exclusion of the newspaper article from the record was not error. Although conformity to the rules of evidence is not necessary, Art. 8308-6.34(e), disregard of those rules altogether is not mandated. Newspaper articles are generally inadmissible for the truth of the matters stated therein. *See* Deramus v. Thornton, 333 S.W.2d 824 (Tex. 1960). The respondent's point, that the matters reported therein were not probative of whether an emission occurred on _____, was well taken. Frankly, the newspaper article tends to corroborate DJ's statement that an emission occurred later in the month, but not on _____, and it is doubtful its admission would have compelled a different result.

There being sufficient evidence to support the decision of the hearing officer, we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge