APPEAL NO. 92352

A contested case hearing was held on June 22, 1992, in (city), Texas, with (hearing officer) presiding. The hearing was held under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The issue before the hearing officer was whether claimant (appellant herein) sustained an occupational disease which arose out of and in the course and scope of his employment with (employer) on (date of injury). The hearing officer held that appellant did not offer any evidence of probative effect which established a causal connection between his physical, emotional and psychological problems and his employment, and thus he did not have an occupational disease which arose out of and in the course and scope of his employment on (date of injury).

Appellant disputes several findings of fact and conclusions of law, stating in essence that the weight of the evidence is to the contrary. He also contends the statement of evidence omitted or misstated certain evidence. Finally, he criticizes certain prehearing and hearing matters, and claims that employer prevented the obtaining of a key piece of evidence. Appellant attached two documents to the request for appeal. The respondent basically argues that the findings of fact and conclusions of law are not against the great weight and preponderance of the evidence. Respondent also argues that this panel cannot consider the attachments to appellant's pleading.

DECISION

We affirm the decision and order of the hearing officer.

Appellant was employed as a driver for employer, a job which required him to maintain and fill propane tanks. To perform his job, he had to sometimes travel long distances in his vehicle, a 1984 model propane powered truck. He testified that on July 25, 1988 he was checking out a tank under a customer's house when it caught fire. He suffered some physical injury as a result of that event, but he also suffered psychological problems for which he was seen and treated by a psychiatrist, (Dr. W) and a clinical psychologist, (Dr. N). These problems included depression, withdrawal, sleeping and eating problems, and difficulty concentrating.

Appellant testified that on (date of injury), while on his way to (city) to make a service call, he felt he was going to pass out. He was riding with the windows down in his truck at the time. He stopped his truck and walked around for a while, then proceeded on. When he returned to (city) later that day, he went to see Dr. W, who sent him to get a blood test for carbon monoxide (CO). He also talked to Dr. N about his condition. He had previously discussed with both these doctors the possibility that his problems could be related to heat and toxicity factors related to his truck. He said his physical symptoms, which would come and go, included muscle spasms, numbness in his fingers and feet, and burning eyes. He also said he suffered from impaired thinking and recurrent bronchitis. Some time after (date of injury) he contacted the Occupational Safety and Health Administration (OSHA) of the

U.S. Department of Labor and the Texas Workers' Compensation Commission's (Commission) OSHCON program about potential chemical exposure, and requested that tests be performed. He also received written materials from OSHA about CO and propane. He filed a workers' compensation claim around January 1992. Because the form asked for date of injury, he said he put (date of injury), which he said was the date his condition became so bad he had to "start digging into it." He said he did not miss any work between that date and the date he stopped working for employer around April of 1992.

On September 9, 1991, (Division), tested the CO level in appellant's truck. He testified that he used a Draeger sampler, which is designed to test for multiple types of compounds. The test, which was performed while driving the truck with the windows rolled up, was negative for CO.

(Mr. B), a health consultant for the Commission, examined the truck and located possible entry points for fumes. He ran three tests for CO on February 13, 1992. In the first test, he monitored the truck running inside a building, with the windows closed and the heater on. In the second, he monitored the truck running outside the building with the cab enclosed and the heater on, and in the third scenario he monitored the truck with the cab closed and the heater on while driving down the road. In both scenarios where the truck was stationary the exposure level was 50 parts per million (ppm). Mr. B testified that 50 ppm constitutes the OSHA permissible exposure limit for CO over an eight hour time period. In the scenario where the truck was in motion, only traces of CO were detected. The May 22, 1992 Commission OSHCON report of the February 13th tests said with regard to CO that the monitoring performed was a grab sample and not necessarily an indication of overexposure. Mr. B verified that the grab samples were only to determine if there was a presence of CO and whether further tests needed to be run. An OSHA test for overexposure, he said, would be an eight hour, weighted average sample test to determine exposure to CO over an eight hour period.

Mr. B also monitored for propane under the same three scenarios. Where the truck was inside the building, he recorded a level of 50 ppm. On the outside of the building and when the truck was in motion, he found only trace amounts of propane. However, he said he could smell propane odor around the truck, which he said employer's mechanic told him should not be the case if the propane was burning completely. He also said it was probably correct that a person's exposure to same or similar readings as the ones he recorded would not be out of the ordinary.

Dr. W, appellant's psychiatrist, testified that he first saw appellant on May 1, 1989 because of the stress and depression appellant was suffering as a result of the fire. He said other problems may have caused appellant's depression to linger on, such as problems with his truck and a personality conflict with his supervisor. He said appellant came to his office one afternoon without an appointment and they discussed the possibility of CO causing some of his problems. Dr. W ordered a blood test for CO on (date of injury), the report of which showed a 1% level. Dr. W testified that CO levels between .5% and 2% are

not considered significant. He said how quickly CO disperses from the blood was an area outside his expertise.

Dr. N, a clinical psychologist with a Ph.D., had been treating appellant since March 13, 1989 for posttraumatic stress disorder. He testified that in the course of his treatment he had hypothesized that there was some relationship between either heat or toxicity from the working environment, and appellant's physical and other problems. This was because it was Dr. N's observation that appellant's condition was worse in the winter, better when he was completely away from his truck, and better in the summer because of the ventilation. It was Dr. N who suggested that appellant get his vehicle tested for CO.

(Mr. J), the manager of employer, testified that the 1984 truck used by appellant had had exhaust valve problems that had been repaired, and that a fan had been installed after appellant complained about the heat in the cab. He also said a representative of OSHA came out, looked at the Commission's test results, talked to him and to employer's mechanics, and said there was no need to test the truck. He denied that the truck had been taken out of service permanently, and said the cab currently is being rebuilt to replace fenders and to repair the floorboard.

Appellant and his wife and daughter, who had ridden in the truck, testified that the truck had no air conditioning and got extremely hot. Appellant's wife said the heater could not be turned off and a thermometer in the truck registered 120 degrees. They also testified that there was a hole in the floorboard. A February 10, 1992 Texas Department of Public Safety (DPS) examination report found the following violations: holes and cracks in floor, unprotected wire through floor, and exhaust leak. Appellant testified that that report took the truck out of service and that he had not been in it since; however, Mr. J testified that appellant drove the truck after the DPS report, and appellant later stated that the DPS did not tell him that the truck could not be operated.

Appellant also testified that an OSHA representative told him that they could not legally test a truck that had been taken out of service. He said he was supposed to have received a letter from OSHA stating that the truck had not been tested for that reason.

The crux of appellant's request for review concerned the hearing officer's holdings with regard to appellant's failure to establish a connection between his condition and his employment.

Finding of Fact No. 9 was that appellant did not offer any evidence of probative effect which established a causal connection between his physical, emotional and psychological problems and his employment with employer. Appellant contends he offered into evidence everything available to prove that his truck could be the source of his problems, but that the one test he needed was not done because his employer would not cooperate with OSHA. Conclusion of Law No. 2 states that appellant did not have an occupational disease which arose out of and in the course and scope of employment with employer on (date of injury).

Appellant argues that from the OSHCON tests and from information from OSHA and from Claimant's Exhibits 1 (1984 owner's manual for the truck) and 45 (the DPS report), "this could very well be what has been causing [appellant's] health problems." We agree with the hearing officer that the key showing of causal connection was not made, and that even with further testing there still would have had to be medical or other expert evidence linking the disease to appellant's work place.

In a workers' compensation case, the burden of proof is on the claimant to establish that an injury occurred in the course and scope of his employment. "Injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting therefrom. The term also includes occupational diseases." Article 8308-1.03(27). "Occupational disease" is defined in the Act as follows: ". . . a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. The term includes other diseases or infections that necessarily result 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. The term includes repetitive trauma injuries." Article 8308-1.03(36).

An occupational disease, unlike an accidental injury, need not be traceable to a specific time, place, or event. However, to establish an occupational disease, there must be probative evidence of a causal connection between the claimant's employment and the disease. INA of Texas v. Adams, 793 S.W.2d 265, 267 (Tex. App.-Beaumont 1990). Causation may be established where general experience or common sense dictates that reasonable men know, or can anticipate, that an event is generally followed by another event; where there is a scientific generalization, a sharp categorical law, which theorizes that a result is always directly traceable to a cause, forming a sequence of events from a harmful consequence to the act itself; or by probabilities of causation articulated by scientific experts. *Id*.

A review of the evidence in the record reveals the following. In the course of appellant's treatment for the psychological effects of the fire, his psychologist began to suspect an environmental cause, either heat or toxicity. On (date of injury) appellant suffered the near blackout which caused him to visit his doctors; a CO blood test was performed that day and was found by Dr. W to be within normal limits. The operator's manual for the vehicle (Claimant's Exhibit 1) warns against CO emissions from engine exhaust gas, which it says can cause unconsciousness, and recommends a well-maintained exhaust and ventilation system. An OSHA-supplied publication admitted into evidence (Claimant's Exhibit 28) says that CO is an ever-present hazard in the automotive industry, garages and service stations, and that road transport drivers may be endangered if there is a leak of engine exhaust gas into the driving cab. However, it also says that any process where incomplete burning of organic material may occur is a potential source of CO emissions; therefore, sources of CO exposure are "quite ubiquitous." The same publication says, "[a] sizeable proportion of the work force in any country has a significant occupational

CO exposure." Another publication from OSHA (Claimant's Exhibit 17) says inhalation effects from acute overexposure can include headache, drowsiness, dizziness, excitation, rapid breathing, excess salivation, nausea, vomiting, hallucinations, confusion, convulsions, and unconsciousness. Effects of chronic overexposure include gradually increasing central nervous system damage, with loss of sensation in the fingers, poor memory, positive Romberg's sign, and mental deterioration. The DPS report (Claimant's Exhibit 45) noted an exhaust leak on February 10, 1992. However, the CO and propane sampling done by two different individuals five months prior to, and shortly after, the DPS report, found CO and propane in only trace amounts when the vehicle was moving.

The Texas Supreme Court has held that a claimant must establish a causal connection between an occupational disease and his employment. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). We find that the evidence in this case does not establish that vital link between the two factors. Schaefer involved a diagnosed condition (a rare form of tuberculosis) caused by a type of bacteria which was not shown to be present where the claimant worked. This case presents a somewhat obverse situation: here appellant worked at a job where CO and propane emissions were indigenous. Yet testing showed CO to be in not significant amounts in his bloodstream, and both CO and propane to be in trace amounts in his moving vehicle. Most crucial, there was no medical diagnosis linking together appellant's symptoms and physical conditions and the recorded amounts of these compounds. As the Supreme Court said in Parker v. Mutual Liability Insurance Company, 440 S.W.2d 43 (Tex. 1969): ". . . 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 . . ." at 46.

In his request for review, appellant also contends he was told by the hearing officer at a prehearing conference that whatever was in the summary (we presume this refers to the summary from the benefit review conference) would be addressed at the hearing, and that he was "bewildered" when the disputed issue was presented at the hearing. Specifically, he contests his inability to explore issues relating to his 1988 accident. The 1989 Act provides that issues not raised at the benefit review conference may not be considered except by consent of the parties or upon a finding of good cause. Article 8308-6.31(a). The unresolved issue from the benefit review conference was whether appellant was injured in the course and scope of his employment. While the unresolved issue did not itself specify a date of injury, this hearing officer lacked jurisdiction to address an "old law" claim. In any event, testimony was allowed about the effects of the 1988 injury on appellant, and the treatment he was receiving.

Appellant says he was forced to subpoena from employer a copy of the OSHCON report, which he did not receive until halfway through the hearing. Neither this panel nor this Commission is the proper forum to determine whether the employer's failure to voluntarily furnish the report violated federal regulations. We note that the document was admitted into evidence.

Appellant cites several disagreements with the statement of evidence contained in the hearing officer's decision. This statement is a necessarily brief summary of a 7 1/2 hour hearing. This panel's consideration, after review of the entire record in the case, is focused on whether the findings of fact and conclusions of law are supported by the evidence. Unless a hearing officer made a clearly erroneous, nonfactually supportable assertion in the statement of evidence, we would not presume that the facts recited therein mean that he did not consider other facts nor that he failed to take into consideration every piece of evidence in the record.

Appellant says Finding of Fact No. 5, which says he experienced muscle spasms, impaired thinking, numbness and burning eyes on (date of injury), did not include his feeling of passing out. We find that finding of fact to be supported by the evidence and is sufficient to stand for the proposition that appellant experienced physical symptoms on the date mentioned.

Finding of Fact No. 6 says appellant was diagnosed as having emotional and psychological problems prior to (date of injury) and subsequent to (date of injury) by his health care providers. Appellant says the problem with his truck was also an issue prior to (date of injury), as is mentioned in both doctors' narratives. We do not find error in this finding of fact, which is limited to the diagnoses of a psychiatrist and a clinical psychologist. It is true that the doctors, particularly Dr. N, suspected that the truck could be a cause of other physical problems, and recommended that tests be performed. The results of these tests, which were not performed nor analyzed by Drs. W and N, are contained in subsequent findings of fact.

Finding of Fact No. 7, that appellant's carboxyhemoglobin level was tested on (date of injury) for CO toxicity and was within normal limits, is supported by the evidence of record. Appellant contends the test was not performed properly. Dr. N expressed concerns that the test may not have been accurate; however, Dr. W, who recommended the test, found the results within acceptable limits. Appellant's argument on this point in his closing statement was not evidence. It was the hearing officer's responsibility to weigh this conflicting evidence, and we find that this finding of fact was supported by the evidence of record.

Finding of Fact No. 8 says that two separate toxicity tests for CO were performed on the truck subsequent to (date of injury) and revealed no toxic levels. Appellant refers us to Claimant's Exhibit 53, which contains the results of Mr. B's CO sampling, which noted the following: "No overexposure due to the fact that this was a grab sample and not a TWA sample taken over (sic) all it indicated was that there was a sufficient level of carbon monoxide in the cab to present a problem." We also find this statement of the hearing officer to be supported by the evidence. Regardless of the method of testing used, no medical or other evidence linked the recorded levels to an injury. Therefore, we find the hearing officer's characterization of the testing to be sufficient to support the conclusion of

law that appellant did not have an occupational disease.

Finally, we cannot consider the two documents appellant attached to his request for review. Under the 1989 Act the Appeals Panel is limited in its consideration of evidentiary matters to the record developed at the contested case hearing. Article 8308-6.42(a)(1). Appellant does not argue that these documents constituted newly discovered evidence that could not have been acquired in the normal course of hearing procedure through due diligence; indeed, one of the documents is addressed to appellant himself and is dated prior to the hearing. Our decision is thus confined to the record as developed at the hearing.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge