APPEAL NO. 92421
FILED OCTOBER 1, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1992). On July 7, 1992, (hearing officer) conducted a contested case hearing in_____, and held that claimant, respondent herein, sustained a repetitious trauma injury that was compensable. Appellant asserts that the decision reflects error both in the determination of injury and that the employer had notice.

DECISION

Finding that the record does not contain medical evidence of causation and that there is insufficient evidence of causation, we reverse and render.

Respondent worked as a high school coordinator for an institute. Because her responsibilities required her to visit high schools in a wide area, she was provided a car. Over a period of four months from September 1991 through January 1992, respondent drove the car with an exhaust leak forward of the passenger compartment which caused emissions to enter the car. By sworn statement, another employee, Mr. E, relates that he saw respondent on October 9, 1991 and January 24, 1992, and at other times. He said that she sounded and looked sick and complained about the car's fumes. Respondent reported the leak and provided strong evidence of the source of the leak through a car repair employee who examined the car. The leak was not fixed; we agree with the hearing officer that the reason why the leak was not fixed was not an issue before the hearing officer and that negligence does not have to be shown in order to recover under workers' compensation. Respondent quit her job with employer on January 31, 1992.

The hearing officer made no finding that any emission caused respondent's asthma, rhinitis, or upper respiratory symptoms. Finding of Fact No. 13 should not be interpreted as finding causation when it addresses the notice issue and states:

> The claimant chose not to communicate with the employer after January 31, 1992, and did not report to the employer that her acute asthma or allergic rhinitis was the result of driving the employer's automobile after these medical conditions were diagnosed on _____.

The evidence as to what was diagnosed on _____ is found in respondent's testimony and her medical records. No statement, prepared for the hearing by a physician, was offered and no physician testified. Respondent stated, in answer to a question by the hearing officer as to who diagnosed that the medical problems were related to the car, that Dr. D ultimately did but that Dr. R could not find another cause; respondent alluded to Dr. R's report saying that anyone with a history of sensitivity as far as lungs were concerned would be triggered by carbon monoxide exposure. Respondent said that she guessed it

would be Dr. R on February 3 who made the diagnosis. She added that Dr. D on several reports documented carbon monoxide exposure. (The first indication in evidence of Dr. D's treatment of respondent was not until February 23, 1992.) A bill from Dr. R reflected that respondent was seen on _____, as a new patient. The bill lists tests and charges and states "Diagnosis: 493.90 Asthma." Another document dated _____, from Dr. R shows numbers and graph results of respiration tests, but gives no explanation, summary, or conclusion. Dr. R on February 26, 1992 wrote to Dr. B, who had previously seen respondent. This letter referred to respondent's history including the exhaust leak, asthma during pregnancy, and smoking for eight years. He mentioned several tests and stated that skin tests were "essentially negative." Dr. R added:

> With her past history of smoking and asthma during pregnancy it would be impossible for me to ascertain completely that the exposure to carbon monoxide was the cause of this recent exacerbation in symptoms, although certainly anyone with evidence of chronic lung disease such as hyperactive airway disease or asthma, would be triggered by exposure to an irritant such as carbon monoxide.

The hearing officer also made Finding of Fact No. 8, which said:

> Breathing carbon monoxide gasses will not cause asthma or exacerbate a pre-existing asthmatic condition.

The hearing officer's Finding of Fact No. 8 appears to reflect the testimony of appellant's witness Mr. J, who is an industrial hygienist. He said that carbon monoxide, while a poison and a contaminant, is not an asthmogenic agent and is not an irritant. In his opinion there was no medical evidence that carbon monoxide caused respondent's asthma. He added that most asthma seen today by allergy specialists is brought about by factors from within the patient, such as stress and emotion. Fewer instances of asthma are brought about by exposure to asthmogenic agents. He added that he would not diagnose what caused respondent's problems because he is not a medical doctor.

If Finding of Fact No. 13 is considered to be a finding as to causation on _____, the basis upon which that finding was made, reference to carbon monoxide as an irritant, was contradicted by Finding of Fact No. 8.

Mr. J did say later in his testimony that occupational risk factors for asthma were primarily chemicals and organic dust. Exhaust fumes do contain small amounts of sulphur dioxide and oxides of nitrogen, which are irritants and as such, can aggravate asthma. He added that these gases are not known to cause occupational asthma and that while it is possible that they could temporarily aggravate asthma, in this case it was "highly unlikely." No other evidence was offered concerning sulphur dioxide or oxides of nitrogen. Mr. J did question whether a person could continue to have symptoms after an irritating trigger had been removed. The hearing officer evidently based Finding of Fact No. 9, "[b]reathing dioxides of nitrogen and sulphur dioxide gas will cause asthma and will exacerbate a pre-

existing asthmatic condition," on Mr. J's testimony. This finding does not say, through, that those gases caused respondent's asthma.

Before discussing the medical evidence attributable to Dr. D, whose records indicate he first saw respondent on February 23, 1992, we note that Dr. R also saw respondent on February 25, as reflected by a bill for that date. It shows the diagnosis again to be "493.90 Asthma." A lung test with numbers and charts, similar to the one of February 3, discussed above, was also done on February 25. A patient questionnaire completed by respondent was also admitted from Dr. R's records as was a radiology consult report that said respondent had normal sinuses and clear lungs. There was a short narrative dated February 25 with no doctor's name that said respondent was improved--it did not discuss etiology.

Records from Dr. D show three bills, four documents related to testing, and four doctor's notes or narratives relating to respondent. Each bill has codes for charges and under the heading "diagnosis" each has a circle around asthma and "rhinitis (all, chronic, vaso)." There is no other rhinitis listed and rhinoconjunctivitis follows sequentially. There are three tests reflecting lung mechanics that are similar to ones done by Dr. R but with more numbers and some graphs; these are dated February 28, March 11, and June 24, 1992. One referral form indicates that respondent was referred for a CAT scan of the sinuses on July 6, 1992.

On February 28, 1992, Dr. D recorded that he saw respondent as a second opinion to define whether exposure to carbon monoxide from an emission leak in a car was the cause of her symptoms. He states the history he is given which includes that since she quit her job and has been treated by Dr. R her symptoms have improved. He observed "(s)he states that Dr. (R) made the diagnosis of asthma and would not confirm whether or not this was related to a carbon monoxide exposure." Dr. D's impression was "(a)sthma based on history, evidently objective documentation by Dr. (R), overall better, etiology or precipitating cause of exacerbation is unclear. Possibly related to carbon monoxide exposure if this has been well documented."

On March 11, 1992, Dr. D recorded that respondent is doing a little worse since discontinuing medication in the last 24 hours. His examination showed clear rhinorrhea and clear lungs. His impression was "1. Non-allergic rhinitis based on previous work-up. 2. Mild airway hyperactivity with worsening following discontinuation of bronchodilators, etiology still not totally clear, I suspect some obstruction non-reversible component."

On March 30, 1992, Dr. D recorded that respondent reported increased symptoms when she ran out of a medication. His examination found respondent to be "essentially normal." Her lungs and rhinorrhea were clear. She had mild nasal mucosal edema. His impression was:

1. Non-allergic rhinitis based on negative skin testing by Dr. (R).

2. History and symptoms consistent with mild airway hyperactivity.

3. Pulmonary function testing has revealed an FEV1 which actually decreased from 2.6 to 2.33 following holding medications for testing. This may reflect some airway hyperactivity and bronchospasm.

On June 24, 1992, Dr. D recorded that respondent returned after an interval of time and felt miserable. Her physical examination showed normal vital signs. There was frequent throat clearing, marked nasal mucosal edema, clear rhinorrhea, "normal-appearing TMs without any obvious fluid, lymphoid hyperplasia of the posterior pharynx, no lymphadenopathy, and clear lungs on auscultation." His impression was:

1. Upper respiratory symptoms, etiology unclear; negative sinus x-ray in the past--needs CAT scan. (emphasis added)

2. Negative skin testing by Dr. (R) (not done by me although symptoms were not present prior to the carbon monoxide exposure, and I don't think she will be positive, therefore, will hold off on repeat skin testing).

3. Pulmonary symptoms suggestive of asthma with reversibility noted by Dr. (R) in the past.

4. Marked anxiety from current situation.

Dr. R did not say what the cause of respondent's symptoms was. The closest he came was in his letter of February 26, in which he said first that it is impossible to "ascertain completely" what the cause was, but then opined that anyone with chronic lung disease would be triggered by an irritant such as carbon monoxide. According to the entry by Dr. D dated February 28, 1992, respondent was aware that Dr. R could not say what the cause of her symptoms was and came to him to help determine cause. (As stated, the hearing officer also found that carbon monoxide will not cause or aggravate asthma.) Dr. D, after following respondent over a period of four months, does not even state that asthma is the diagnosis, but that "symptoms suggestive of asthma" were present. He does not say what the cause of any of her problems is, including both asthma and rhinitis, although he said in his first examination of respondent that carbon monoxide was possible if well documented. He, in fact, says that he cannot say what the cause is by saying "etiology unclear."

While the hearing officer says in Finding of Fact No. 10 that respondent has been diagnosed as having allergic rhinitis, that diagnosis was an early one made by Dr. B, which respondent herself discounted pointing out that Dr. B on June 8, 1992, wrote that his statement about allergic rhinitis was just an impression and that he referred respondent to Dr. R for definitive diagnosis. This finding may be compared to the hearing officer's Conclusion of Law No. 3 that said exposure to emissions caused the "development of

chronic rhinitis." The only place where the words "chronic rhinitis" are seen is in the bills of Dr. D. As stated, those bills refer to a code for payment and say, "rhinitis (all, chronic, vaso)." Dr. D in his narratives refers twice to rhinitis as non-allergic, but never says "chronic". The bills include, after "rhinitis," not just "chronic," but also "vaso." Dorland's Illustrated Medical Dictionary, Twenty-sixth Edition, lists vasomotor rhinitis as "1. a form of nonallergic rhinitis in which the same symptoms as in allergic rhinitis, are brought on by such stimuli as mild chilling, fatigue, anger, and anxiety."

In Hernandez v. TEIA, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ) the court of appeals upheld an instructed verdict for TEIA. In that case the claimant worked in a clothing plant in which lint covered the floor with no ventilation system for dissipating it. Claimant had many symptoms such as nasal drainage, wheezing and shortness of breath and quit her job. The court looked to causation without determining whether her diagnosed problem, asthma and allergic rhinitis, were "ordinary diseases of life." (The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 91026 (Docket No. _____) decided October 18, 1991, used a similarly defined standard to determine if there was a causal connection between the employment and occupational disease.) The court said "whether a disease is compensable under workers' compensation is if there exists a causal connection, either direct or indirect, between the disease and the employment." It then said "(a)bsent evidence of that causal link, her disease is not compensable and is an `ordinary disease of life'." Claimant's doctor testified that many things could "trigger" the symptoms, but did not give an opinion as to what caused the asthma or the allergic rhinitis. There was no evidence of a change in the plant at the time in question, but Hernandez testified that after staying home to get well, when she went back to work, the symptoms would come back. The court referred to Parker v. Employers Mut. Liab. Ins. Co. of Wis., 440 S.W.2d 43 (Tex. 1969) which stated that expert testimony was needed to show that radiation from working around radioactive material for four years caused claimant's cancer. The doctors who testified said it "could" cause it but they did not say that it did. The Parker court then said that while expert testimony that did not show causation could be combined with other evidence to reach a reasonable medical probability, that occurred "when the trauma is an uncomplicated injury produced by a single mechanical force of which laymen can appreciate the consequences." The Hernandez court then said "expert medical testimony is required due to the uncertain nature of the cause of asthma." It found that no medical evidence linked lint particles at work to developing asthma. Both Parker and Hernandez courts affirmed no recovery for the claimant. Also see Texas Workers' Compensation Commission Appeal No 92093 (Docket No _____) dated April 24, 1992, which affirmed a decision that a health worker's hepatitis was not shown to becaused by sticking herself with a needle after using it on a patient so the claim was not payable.

As stated previously, no finding of fact was made that said the asthma, rhinitis, or upper respiratory symptoms experienced by respondent were caused by the car's emissions. In addition, there is no evidence that any physician treating respondent concluded that the emissions of the car respondent drove caused or aggravated her symptoms. Some reference to carbon monoxide as a possible cause by Dr. D or to an

aggravating substance by Dr. R was insufficient to make the linkage and the hearing officer specifically found that carbon monoxide would not cause or aggravate asthma. Conclusion of Law No. 3 is the basis for the decision that respondent was compensably injured, but it is not sufficiently based on any finding of fact and the evidence is not sufficient to allow affirmance even if Hernandez, and Parker, supra, were not as stringent in regard to the need for expert evidence of cause. Because we reach this conclusion, an analysis of whether actual notice occurred is not necessary, but the record indicates that the notice issue would not have called for reversal.

The decision and order of the hearing officer is reversed and rendered that the appellant is not liable for the payment of benefits to the respondent.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge