APPEAL NO. 92427

A contested case hearing was held in (city), Texas, on July 13, 1992, (hearing officer) presiding. The issue was whether or not the appellant (claimant below) suffered an inhalation injury in the course and scope of his employment. Upon agreement of the parties, an additional issue of disability was added. The hearing officer held that the appellant did not sustain a compensable injury on (date of injury), or at any other time, in the course and scope of his employment, and that he does not have disability. Appellant asks this panel to review the hearing officer's decision, and contends that additional medical tests performed since the hearing show that the injury is job related. Appellant attached a copy of this medical report with his request for review. Appellant also claims that the hearing officer misstated the days and hours of his work schedule. Respondent (employer's workers' compensation insurance carrier below) contends that appellant's request for review was filed untimely. In the event that this panel does review the hearing officer's decision, respondent contends that appellant has failed to meet his burden of proof and that no expert testimony or statements or reports indicate that any of the problems appellant claims to suffer from were related to the inhalation of any substance he encountered during his employment.

DECISION

Finding no error on the part of the hearing officer, we affirm.

Appellant testified that from approximately October 13, 1990 until (date of injury), he was employed at the (employer), cleaning and oiling the lanes and buffing the approaches after hours (from 12 a.m. until 6 a.m.), seven days a week. His job required him to use approximately 1/2 gallon per night of a particular cleaning product, to which he was exposed about 1-1/2 hours a night. He was not given gloves or a mask or any other protective gear. He testified that he experienced breathing problems, nausea, and abdominal pain for which he first sought medical attention on (date of injury). He said on that date he complained to his supervisor, (GG), because the air conditioning had been turned off and there was no ventilation. He said he did not go back to work for employer after that date because they would not change the chemicals with which he was required to work.

Appellant introduced into evidence a label from the cleaning product which he had used at his job. Among other things, the label contained the following instructions:

First Aid: Inhalation: irritation of the respiratory tract or acute nervous system depression, characterized by headache, dizziness, confusion, or unconsciousness. Remove from exposure, restore breathing. Keep warm and quiet, notify a physician.

* * * * * *

Special Protection: Protective gloves are required for prolonged or repeated

contact. Use safety eyewear to protect against splash of liquid. Avoid prolonged skin contact with contaminated clothing.

The chemical formula itself was not included on the label.

Medical records admitted into evidence show that appellant was seen at (Hospital Emergency Room) in (city) on the evening of (date of injury) for nausea and vomiting. He was prescribed medication and was released to work on March 16th. On March 21st and 28th he was seen by (Dr. B) as an outpatient at (Hospital), where endoscopies disclosed hiatal hernia with esophagitis and colon polyps. Appellant said that because he still continued to have problems he was sent to doctors in (city). Radiology reports of chest x-rays from the (Hospitals) in July 1991, found a nodular density in the left hilar region, probably representing normal pulmonary vasculature, with the lungs otherwise clear. Notes also indicated chronic prostatitis. Subsequent x-rays in October and December 1991 showed the lungs unchanged. Because the doctors in (city) could not find anything wrong, appellant said he went back to doctors in (city) for treatment. Bills from (Dr. A) in May and June of 1992 show treatment for hemoptysis, defined as the expectoration of blood or blood-stained sputum, Dorland's Illustrated Medical Dictionary, 27th Ed. Appellant said Dr. A, a pulmonary specialist, had told him one lung was bleeding. A March 30, 1992 billing statement from (Dr. R) contained a diagnosis of gastroesophageal reflux disease. Appellant said he had not had the opportunity to ask the doctors he saw whether his condition was related to the product he had used while working with employer. He said, however, that he believed that his problems, including the hernia and prostate condition, were caused by the chemical exposure at work.

(Mr. N) testified that he is the manager of employer's facility. He said that the air conditioning at the facility would have been turned off during appellant's shift, but that the air handlers remained on. Mr. N denied that he has started using a different cleaning product since appellant's alleged injury. He said he has had no complaints from staff or patrons about reaction to the product. He said that, following notice of appellant's alleged injury, he called the manufacturer but was told they had never heard of any problems with anyone using the product. He said they did not tell him what the product contained.

Also in the record were unsworn, written statements from other employees who said the facility was not well ventilated at night and that one could smell fumes from the cleaning machine.

Appellant testified that he earned $4.35 an hour working for employer. He stated that this was a second job, and that he also worked full time for (employer), a halfway house, for $4.25 per hour. He said he still works for (employer), but that he has been unable to get another second job because of his respiratory problems.

We will first address the threshold issue of timely appeal. The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Sup. 1992)

(1989 Act), provides that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received. Article 8308-6.41(a). Appellant stated in his pleading that he received "this letter" on August 3rd. In the absence of any indication to the contrary, we will presume that this refers to the letter from the Division of Hearings and Review, Texas Workers' Compensation Commission, which transmits the hearing officer's decision. Because appellant's request for review was filed on August 18th, we find that the appeal was timely.

Turning to the merits, we note at the outset that the claimant in a workers' compensation case has the burden of proving that his injury arose in the course and scope of his employment. Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). "Injury" is defined in the 1989 Act 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 to mean a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. It includes other diseases or infections that result from the work-related disease, but does not include an ordinary disease of life to which the general public is exposed outside of employment, unless such disease is an incident to a compensable injury or occupational disease. Article 8308-1.03(36).

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 (Tex. App.-(city) 1990, no writ). Furthermore, where the matter of causation is not in an area of common knowledge or experience, expert or scientific evidence may be essential to establish the causation. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). A review of the evidence of record in this case shows an absence of medical evidence linking appellant's chemical exposure to his physical condition. We thus find the hearing officer's findings and conclusions relative to injury supported by sufficient evidence.

"Disability" is defined in the 1989 Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). The hearing officer also held that appellant is not prevented from obtaining and retaining employment at the wage he was earning prior to (date of injury), by the effects of a compensable injury. Having upheld the hearing officer's findings and conclusions that appellant was not injured in the course and scope of his employment and that he did not sustain a compensable injury, we do not need to address the hearing officer's conclusion that appellant did not have disability. Because there can be no disability in the absence of a compensable injury, the hearing officer's statement in the Statement of Evidence that appellant worked six to seven hours per week for employer is immaterial. (The record is clear the appellant testified he worked 6-7 hours a day, seven days a week, and we believe this misstatement was clerical rather than substantive.)

Appellant attached to his request for review a report of a CT scan of the chest dated July 24, 1992, which was subsequent to the contested case hearing. He contends that this test shows that his injury is related to the chemical exposure on the job. 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). We have previously declined to consider such evidence, including evidence that did not exist at the time of the hearing below, absent a showing that the information could not have been procured even with exercise of due diligence, that it is not merely cumulative, or that the information contained in the documents would probably produce a different result. *See* Texas Workers' Compensation Commission Appeal No. 92343 (Docket No. redacted) decided September 3, 1992. *See also* Holgin v. Texas Employers Insurance Association, 790 S.W.2d 97 (Tex. App.-Fort Worth 1990, writ denied) for discussion of motion for new trial in light of newly discovered medical evidence. In this case, it is unlikely that this document would produce a different result; while the report says densities of the lung "possibly" could be related to the inhalation of noxious fumes, the doctor's impression is equivocal, stating that the areas noted could "just as easily" be due to another condition. Thus, there is missing the requisite finding of causation which must link the disease to its work-related source. There was also no showing that appellant had no knowledge, prior to the hearing, of the doctor or the procedure from which this report was derived and that he had requested a continuance or other appropriate action. Consequently, we decline to consider this document.

The decision and order of the hearing officer are accordingly 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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Philip F. O'Neill
Appeals Judge