APPEAL NO. 92444

A contested case hearing was held in (city), Texas, on July 31, 1992, (hearing officer) presiding as hearing officer. He determined that the appellant did not prove by a preponderance of the evidence that his illness was causally connected to his employment and denied benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT, ANN., art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Appellant urges us to reverse and render a new decision because he has shown by a preponderance of the evidence a causal connection between his illness and his employment. In the alternative, appellant asks that we reverse and remand in order that additional evidence may be produced on his behalf now that he has the assistance of counsel. In an untimely "Supplemental Brief in Support of Notice of Appeal," appellant asks that we consider an attached letter and reverse and render a new decision or, alternatively, reverse and remand for the taking of further evidence. Respondent seeks our affirmance of the hearing officer.

DECISION

Finding sufficient probative evidence to support the hearing officer's decision and not finding his determinations to be against the great weight and preponderance of the evidence, we affirm.

This case involves a very unfortunate situation wherein the appellant is suffering a severe illness. The only issue before the hearing office was whether the appellant's illness on (date of injury), was a compensable injury or disease under the 1989 Act. More narrowly, the question was one of the causal connection between the illness and the employment. The hearing officer set forth a fair and thorough summary of the evidence in his Decision and Order and we adopt it herein. Succinctly, the appellant had worked for (employer) for close to 20 years. He described himself as an operator in shipping with duties involving the shipping of paper products all over the world. His duties were basically located in a shipping warehouse and a shipping office although he would occasionally go to other areas of the company. He also had to go into box cars and trucks as a part of his shipping duties. On (date of injury), he went to work as he normally did and denies anything out of the ordinary (although he was to work a longer shift than normal as had occurred for several days) until about 9 o'clock when he became dizzy, staggered, had blurred vision and slurred speech and felt nauseous. After advising his supervisor, he went home about 10 o'clock and has not returned to work since. His wife took him to the emergency room of a hospital where he was diagnosed as having an inner ear problem and given some medication. The next day his condition deteriorated and he went to another doctor who sent him to the hospital in (city), where he began what was to become a very lengthy course of testing, intensive case and treatment which included hospitalization at a university hospital center, examination at a university college of medicine, and a rehabilitation center. According to the reports, he was near death at least at one point.

The appellant denied that he had been using any type of weed killer several days prior to (date of injury) (a notation in the Employer's First Report of Injury indicated this) or

that he told one of the doctors that he did not work around toxins. He testified that his illness was caused by toxins in the work place. On cross examination, he stated he could not say if there were any chemicals in the shipping warehouse on (date of injury) but that "there has been" and that it is a large warehouse. He acknowledged he did not know of any chemical he came into contact with on (date of injury). He testified that he was exposed to chemicals but didn't know of any that particular date, pointed out that a paper mill is "basically chemically inclined" and that others had complained about it. He stated that he can remember that there was some "perchloroethylene" brought into the shipping office but that it "was a while since then." He states he told (Dr. P) about the chemicals at the plant, including perchloroethylene.

A coworker of the appellant testified that they did work around "different things" which could be in barrels and that "most everything out there could be a toxin in some way." He could not state whether the appellant was exposed to any toxic substance around the (date) of (month). The Employer's First Report of Injury indicates the appellant "works in the paper shipping warehouse" and "there are no chemicals in the warehouse."

The medical evidence is far from unanimous in diagnosing the appellant's specific illness or condition much less the cause of the illness. Medical evidence variously diagnoses the illness as: Guillain-Barre syndrome; CM fissure a variant of Guillain-Barre syndrome; and acute inflammatory demyelinating polyneuropathy, bacterial pneumonia, respiratory failure secondary to neuropathy, and hepatitis secondary to medications.

Regarding causal connection between the illness and the employment, the evidence varies from the description of Guillain-Barre syndrome in The Merck Manuel of Diagnosis and Therapy, 15 Ed. which states "Etiology is unknown" to the report of two doctors at the university medical center and university college of medicine where the appellant was examined and treated. (Dr. M) who saw the appellant at the university medical center reports:

> I am diagnosing this as an acute severe polyneuropathy and, as stated above, am unable to speculate as to whether this may or may not have been related to a neurotoxin exposure at work without complete knowledge of those chemicals he came in direct contact with.

Without indicating specifically what information had been provided to him, Dr. M stated in a deposition accomplished on July 27, 1992, that he did not have sufficient information on July 23, 1991 to determine whether the appellant's condition was related to his work and that no information had been provided to him since July 23, 1991 that would allow him to determine whether the appellant's condition was related to his work.

Dr. P who has been seeing the appellant at the university college of medicine states in several different reports as follows:

> Sorry, I couldn't figure out what his trouble was due to . . . Usually, when we see a difficult case of neuropathy that we can't figure out it is either due to an occult

cancer or due to chemicals in the environment. We found no cancer but he has had plenty of exposure to chemicals in the environment in the paper mill. (May 3, 1992)

So far I think the most likely thing is that your nerves have been damaged by the chemicals that you were exposed to, and perchloroethylene can certainly produce those problems. (June 4, 1992)

It looks like . . . you have a toxic porphyria based on what we found. What the toxin is we do not know, but it could be lead. I think you should return to the hospital for further evaluation. (July 23, 1992)

A claimant has the burden of proof to establish that his injury or disease arose in the course and scope of his employment. Parker v. Employers Mutual Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). The term injury includes occupational diseases. (Article 8308-1.03(27). To establish an occupational disease, there must be probative evidence of a causal connection between a claimant's employment and the disease. INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ). 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.). In reviewing the evidence in this case we observe there is extremely limited evidence concerning any specific toxins or chemicals in the appellant's work place, the shipping warehouse. For that matter, there is no evidence that there were any toxins or chemicals to which the appellant was exposed on or near (date of injury), the day he specifically urges that his illness or injury occurred. There was only generalized testimony concerning the matter that chemicals are associated with a paper mill and an indication that one specifically mentioned chemical, perchloroethylene, had been used by the paper mill in the past but was apparently discontinued at some time. Too, the medical evidence was in conflict on the particular ailment the appellant was suffering and the cause of whatever ailment he had. In sum, the hearing officer had a particularly onerous task in evaluating the evidence and arriving at his findings of fact, conclusions and decision.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the fact finder, he resolves conflicts in the evidence, including any conflicts among medical witnesses. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ); Texas Workers' Compensation Commission Appeal No. 92342 (Docket No. redacted) decided September 4, 1992. We do not find that the hearing officer's determination that the appellant did not establish a causal connection between his illness and his employment to be against the great weight and preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92178 (Docket No. redacted) decided June 17, 1992; Texas Workers' Compensation Commission Appeal No. 92187 (Docket No. redacted) decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 92352 (Docket No. redacted) decided September 8, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 91106 (Docket No.

redacted) decided January 10, 1992; Texas Workers' Compensation Commission Appeal No. 92200 (Docket No. redacted) decided June 2, 1992.

In an untimely Supplemental Brief, the appellant asks us to consider a document dated August 6, 1992, in arriving at our decision and either reverse and render or reverse and remand. We decline to do either. As we have previously held, the appeals panel does not have fact finding powers; this is reserved to the hearing officer. Article 8308-6.34(g). We only consider the record developed at the hearing. Article 8308-6.42(a)(1). Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. redacted) decided February 14, 1992. Where there is a claim of newly discovered evidence, as there is here, we evaluate the evidence to determine if there is a sound basis to cause a remand for further consideration and development of evidence. In doing so, we look to the guidelines provided in Texas case authority. It is incumbent on a party who seeks a new trial on grounds of newly discovered evidence to establish: (1) the evidence has come to the knowledge of the party since the hearing; (2) it was not owing to want of due diligence that it did not come sooner; (3) the evidence is not just cumulative; and (4) the evidence is so material it would probably produce a different result if a new hearing were granted. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 92124 (Docket No. redacted) decided May 11, 1992. We have reviewed the document submitted, a letter dated August 6, 1992, from Dr. P to the doctor treating the appellant in (city), Texas. The letter reviews and summarizes the case, and according to Dr. P's introductory statement, the letter was being sent at the appellant's request. There is nothing in the letter to indicate that any evidence has come to light that was not included or available in Dr. P's earlier reports. In this August 6, 1992 letter he states: "So putting everything together, I think it is highly probable that this man has a toxic porphyria related to environmental chemical exposure activating his liver enzymes to over produce porphyrins and to damage his nerves." From the context of the letter and the other reports in evidence from Dr. P, we believe the proffered document is little more than cumulative of the evidence before the hearing officer and it is not likely that the document is so material that it would probably produce a different result. Appeal No. 92124, *supra*.

For all the above reasons, the decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Panel

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge