APPEAL NO. 92559

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On July 13 and September 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent, claimant herein, was injured through repetitious physical trauma in breathing fiberglass and gave proper notice of injury. Appellant, carrier herein, asserts that the hearing officer erred in finding that an injury occurred, in finding that injury had occurred prior to (month year), and in finding that the claimant gave timely notice. The claimant states that there is sufficient evidence to uphold the decision of the hearing officer.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Claimant was employed since 1987 by a supplier of fiberglass to companies that used it in the manufacture of goods, such as air conditioners. He cut fiberglass. Fiberglass dust covered the floor. Even a witness for the carrier testified that the work environment was dusty and "dirty", pointing out that the owner of the building "did seal off the windows of our building." One window near claimant and two doors were open and upright fans attempted to blow the fiberglass in the air to one of these openings. Masks were provided but not required; for a period of time there were insufficient masks to allow a worker to change one as often as thought to be necessary because of dust buildup. The claimant testified that there was so little air at certain times that breathing through the mask was not possible. On the other hand, claimant said he could, and did, smoke while at work and could not do that if he were wearing a mask. He last smoked the day of the hearing. He has trouble breathing.

Claimant saw his family doctor on (date of injury). The medical record for that day shows a nurses' entry stating that claimant had had the flu that "won't go away" and coughed dark sputum. Claimant testified that from that visit his doctor referred him to the (Center) at (city) and told him his problem may be related to his work--the referral could say with more certainty what the cause was. Claimant testified that he then told his supervisor, Mr. M, the general manager of the plant, on March 18, 1991 that he was having trouble breathing, that his doctor felt it might be connected to his work, and that he had been referred to UT to check it out further. The supervisor, Mr. M, said that claimant did not tell him of the breathing problem until the day he quit work in June 1991.

Mr. M was asked the following question by the carrier:

Had you ever had any conversation with (claimant) before June 17th, 91, wherein he related to you that he thought he had a breathing problem because he was working around the fiberglass or he was being sent to a doctor to examine a breathing problem he had and whether or not it was related to his work situation?

Mr. M answered it as follows:

No, it was never stated until the June date that it was confirmed by a doctor to be work-related.

Later in this examination, Mr. M was asked by the carrier:

And if someone comes to you and reports a problem related to work, what do you do?

Mr. M answered this question as follows:

Well, it depends on the situation. If there is no doctor's documentation, then I make recommendations that they either go see their own personal doctor or a doctor that I could send them to. I could not write it down as a work-related accident until a doctor told me it was a work-related accident.

Claimant was first seen at the (Center) on (date), by Dr. P. Dr. P, on May 17, 1991 said in a letter to claimant that it was possible that his lung disease was exacerbated by fiberglass and possible that urea, phenol, and formaldehyde (part of the fiberglass particles) are exacerbating his condition. Thereafter in a narrative summary dated December 5, 1991, Dr. P refers to improvement in claimant when he does not work for a period of time and adds that claimant has been evaluated by a pulmonologist, Dr. G, "who agreed that his symptoms were probably related to the workplace." By letter dated March 11, 1992 to claimant's attorney, Dr. P said that she had advised claimant not to work around respiratory irritants, and referred to claimant as having chronic obstructive pulmonary disease.

A very significant issue at this hearing was the date of injury because the employer ceased carrying workers' compensation insurance on April 1, 1991. The testimony of claimant that he told his supervisor, Mr. M, on March 18, 1991, not only addressed the question of timely reporting, but also affects this issue. In addition, claimant called Mr. S to testify. Although Mr. S had been fired by employer at the time of the hearing, he testified that he was present on March 18, 1991, in the break room when claimant told Mr. M that he saw a doctor about problems he had breathing on the job. Mr. S could remember that this was in (month year) because it happened one day prior to his brother's birthday, his son was in the hospital from March 23 to March 28, 1991, his father died March 28, 1991, and he started a probation period in March for a past DWI offense.

Claimant did fill out three forms giving notice of his injury. The first was on a TWCC-2 (Rev. 4-90). In a blank that states "date of first knowledge disease was work related month day year ," claimant put "4 25 91", but he also wrote in that area "started to get real bad in March (illegible) saw a doctor on March 10, 1991." He then filled out a TWCC-41 (2/91) in which the blank, "date of injury" contains "(date of injury)" (this date has a thin line running through it which may or may not be an attempt to mark out that entry). The blank

also contains the words "first doctor referral to UT." Finally, claimant submitted a typed and signed TWCC-41 (2/91) which said the date of injury was (date of injury). Both the TWCC-41 forms also contain a blank that says, "when did you first know disease was work related". Claimant answered both of these blanks as (month year). (The last blank referred to in the TWCC-41 does not follow the words of Article 8308-5.01 of the 1989 Act which refers to knowing "that the injury may be related to the employment.")

Carrier attacks the decision that a repetitious trauma injury occurred because it says that causation was not shown, adding that Schaefer v. Texas Employers Ins. Ass'n, 612 S.W.2d 199 (Tex. 1980) controlled. The court in Schaefer was faced with a disease and whether a particular organism was present in the area claimant worked that could cause that disease. In the case before us, the question involves a repetitious physical trauma type of occupational disease. As such, we believe U.S. Fidelity & Guaranty Co. v. Bearden, 700 S.W.2d 247, (Tex. App.-Tyler 1985, no writ) is more applicable to this case. It too dealt with dust as aggravating a lung condition. The court in Bearden considered Schaefer but affirmed the lower court's decision for claimant based on repeated inhalation of dust from chicken feed and from the chicken house itself. In addition, the Supreme Court in Western Casualty & Surety Co. v. Gonzales, 518 S.W.2d 524 (Tex. 1975), said, "[t]his court has never required that the medical expert explain or even understand the precise biochemistry or mechanism by which the initial trauma affects the health or organs of the injured party."

Carrier also cites Texas Workers' Compensation Commission Appeals No. 92122 and 91088 for the proposition that what "an employee feels. . .was causing his injury is insufficient to establish the date on which the employee knew or should have known that the disease may be related to the employment." (These appeals are dated May 4, 1992 and January 15, 1992, respectively.) In Appeal No. 92122, the claimant was said to be "aware" of his disease not later than July 17th when he visited a doctor, although claimant thought before that date that his wrist problem was work related. That opinion read, in part, "it does appear that appellant's notice to Employer of his occupational disease was untimely because he became "aware" of his disease not later than July 17th but apparently didn't notify Employer before August 19th." Similarly in Appeal No. 91088, a claimant had had problems with his knees for months and on May 29th the claimant testified his knees were very painful and he told his supervisor that day. The next day he made an appointment to see his doctor on June 11th. On June 12th claimant filled out a notification form. While the opinion said that claimant first "knew that a work-related injury had occurred. . .after he saw Dr. G on June 11th", that case was not even based on repetitive physical trauma. On the other hand, Texas Workers' Compensation Commission Appeal No. 91097, dated January 16, 1992, reviewed a repetitious physical trauma case in which a worker "thought she had female problems." That appeal upheld a decision that her use of a sewing machine caused leg and back problems. In that case the worker first knew the problem could be work related after she saw her doctor. In none of these three opinions did the appeals panel say that a worker could not know that an injury may be related to the employment in a repetitious physical trauma case without verification from a doctor, although in the last cited case we referred to Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), in

pointing out that laymen do not know the medical cause for many problems encountered.

The evidence before the hearing officer was sufficient for him to conclude that a repetitious physical trauma injury occurred. Medical evidence indicated a probability that claimant's lung problems were related to his work environment and the treating doctor observed improvement in claimant when he was not on the job for a period of time. The claimant's testimony plus that of Mr. S provide a sufficient basis to conclude that claimant told his supervisor that his breathing problem may be work related in (month year); a close reading of the testimony quoted from Mr. M does not show that he directly contradicted what claimant testified in regard to notification. Finally, claimant in giving notice in (month year), even though he was not certain of the causation, provided sufficient evidence to conclude that repetitious physical trauma took place prior to (month year).

The decision of the hearing officer is sufficiently supported by the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge