APPEAL NO. 92604

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On August 19, 1992, a contested case hearing was held to determine four disputed issues, to wit: (1) did respondent (claimant) suffer an injury within the course and scope of his employment; (2) did claimant give timely notice of the injury to employer; (3) has claimant been unable to work at wages equivalent to his prior wages due to the injury; and (4) what is the correct wage rate to be used for this claim. The hearing officer determined that claimant contracted an occupational disease (mixed dust pneumoconiosis) within the course and scope of his employment, gave timely notice of such to his employer on April 20, 1992, had an average weekly wage of $537.71, but failed to meet his burden of proving he could not obtain or retain employment at wages comparable to his preinjury wage due to his compensable injury. Appellant (carrier) appeals from the determination that claimant contracted an occupational disease within the course and scope of his employment and asserts the absence of proof the disease was work related. Carrier also contends the hearing officer erred in the determination of claimant's average weekly wage. Claimant did not appeal from the adverse determination of the disability issue but does assert the correctness of the challenged determinations and seeks affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified through a translator that he worked from May 1981 to April 20, 1992 for (employer) sandblasting, coating, and painting tanks. At times he did sandblasting for as long as six to seven hours a day and did not do sandblasting for any other employer. While he wore various types of masks from time to time when painting and sandblasting, including a newer mask employer provided for the past two years, claimant said they were not very effective with the dust. In November and December 1991, he was ill with what he thought were cold and flu symptoms. He decided to seek medical treatment on March 10, 1992, because he was feeling bad and throwing up phlegm and blood. Claimant's medical records showed that on the evening of March 10, 1992, claimant, then a 31 year old non-smoker, visited the (Hospital) emergency room with complaints of productive cough and of chest pain into his back near the scapula for the past six months, which were getting worse. These records stated claimant worked as a sandblaster and had only recently begun to use a respirator. His chest x-rays were normal. In April 1992, claimant saw (Dr. W), a pulmonary medicine practitioner. Claimant said Dr. W performed tests, ruled out tuberculosis, and referred him for a lung tissue biopsy. Dr. W wrote claimant's counsel on April 10, 1992, advising that a high resolution CT scan of claimant's chest showed prominent hila but nothing specific to document pneumoconiosis, and that a lung biopsy would be necessary to confirm the diagnosis.

Dr. W also wrote employer on April 16th stating that due to claimant's condition it

was imperative he not return to work at that time and that claimant "has an occupational disease that prohibits him from working in a sandblasting or dusty environment." Claimant said he took that letter to (Mr. A), who owns employer's business, and that Mr. A simply took the letter from him and did not offer him any other job. Mr. A testified to the contrary. However, the evidence relating to the disputed issue of disability need not be recounted since there is no request for review of that determination.

Mr. A testified that employer sandblasts metal structures in the oil fields, including the inside of tanks, and that employer uses silica based abrasives for sandblasting. In his letter of April 10, 1992 to (Dr. V) at the (clinic) in (City), Texas, Dr. W said he was referring claimant for a transbronchial lung biopsy. He stated that claimant "has a long history of sandblasting associated with progressive dyspnea," and also has some bronchospasm, some prominence of the hila, and some increased interstitial markings. Dr. V's report of June 2, 1992, said that claimant was referred because of possible silicosis. This report mentioned claimant's history of sandblasting for ten years, his use of a mask most but not all the time, the onset of his symptoms approximately six or seven months earlier, his treatment with bronchodilators and antibiotics, and the persistence of his shortness of breath and respiratory difficulties now attributed to the possibility of silicosis. Dr. V's assessment noted a history of reactive airway disease and a history of exposure to sandblasting. Dr. V stated that "the possibility of silicosis is quite real and although a diagnosis cannot be established clearly, [claimant] was referred to us for the possibility of a transbronchial biopsy." He also said the biopsy material would be sent to (Dr. A) for evaluation for the possibility of silicosis.

The lung tissue biopsy report of June 3rd prepared for Dr. V contained the diagnosis of chronic noncaseating granulomatous inflammation. A lung tissue specimen was then sent to Dr. A, a professor of pathology and Director of Environmental and Occupational Pathology at the (College of Medicine). Dr. A's report of July 20, 1992 stated that the biopsy material, which revealed abnormalities consistent with a mixture of silica, silicates, and other dusts, was "diagnostic of a pneumoconiosis" which could be classified after a microanalysis. The report then said that a microanalysis of claimant's lung tissue "confirmed a very high concentration of inorganic particles in the tissue," specifically, 656 million particles per cubic centimeter of tissue which included silica, aluminum silicates, metals, and miscellaneous silicates. According to Dr. A, "[t]hese results confirmed a mixed pneumoconiosis with sufficient concentration of silica to implicate silicas as one of the major toxic particle types."

The hearing officer, finding that claimant contracted an occupational disease (mixed dust pneumoconiosis) over the last ten years in his employment as a sandblaster with employer, concluded claimant contracted an occupational disease within the course and scope of his employment. Article 8308-1.03(36) defines occupational disease as:

> "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 naturally 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."

We have previously observed that the definition of occupational disease in Article 8308-1.03(36) is substantially similar to that in the predecessor statute and should receive the same construction. Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991.

Pneumoconiosis is defined in Dorland's Illustrated Medical Dictionary, page 1318, 27th edition, 1988, as: "a condition characterized by permanent deposition of substantial amounts of particulate matter in the lungs, usually of occupational or environmental origin, and by the tissue reaction to its presence. It may range from relatively harmless forms of anthracosis or siderosis to the destructive fibrosis of silicosis." Carrier does not challenge the diagnosis of mixed pneumoconiosis, as such, nor does carrier contend that claimant's disease was an ordinary disease of life. *Compare* Texas Workers' Compensation Commission Appeal No. 92413, decided September 18, 1992, where the claimant's pneumonia was determined to be an ordinary disease of life. Rather, carrier asserts the evidence is both legally and factually insufficient to prove that claimant's disease was caused by his employment. Carrier contends the absence of expert medical evidence linking the disease to claimant's employment renders the hearing officer's determination erroneous. Carrier argues that since this case involves a disease of complex origin, as distinguished from an accidental injury whose causation is discernable by laymen, claimant's burden was to prove the causal connection by medical evidence to a reasonable medical probability. Carrier contends that claimant presented no evidence from a medical expert which drew a causal connection between his disease and his employment, and posits that our decision is controlled by Texas Workers' Compensation Commission Appeal No. 92157, decided June 1, 1992, and Appeal No. 92085, decided April 16, 1992, and the Texas cases cited therein. Claimant has argued, in effect, that his uncontradicted history of sandblasting only for employer for ten years, as reflected in the context of his medical reports, together with the content of his medical evidence, sufficiently links his pneumoconiosis to his employment.

In determining a "no evidence" point, we consider only the evidence and inferences which tend to support the finding, disregard all evidence and inferences to the contrary, and we should uphold the finding if any evidence of probative force supports it. An "insufficient evidence" point requires our review of all the evidence which supports and contradicts the finding, and we should uphold the finding unless we conclude it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

We have previously discussed the principles concerning proof of causation of occupational disease. In Texas Workers' Compensation Commission Appeal No. 91004,

decided August 14, 1991, the claimant contended that her hemoptysis (spitting up blood coughed from the lungs) or emphysema was caused by her duties as a motel housekeeper which involved physical exertion and exposed her to dust, chemicals, and smoke. The hearing officer found there was no evidence that the claimant's hemoptysis or emphysema was caused or aggravated by her employment and we agreed. Citing Texas authorities, we stated the following respecting the proof of causation of occupational disease:

> Probative evidence of a causal connection between the employment and a claimant's disease necessary to establish an occupational disease can be provided in several ways. Causation can be found where:
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> (1) general experience or common sense dictate that reasonable men know, or can anticipate, that an event is generally followed by another event;
>
> (2) there is a scientific generalization, a sharp categorical law which theorizes that a result is always directly traceable back to a cause; or
>
> (3) probabilities of causation articulated by scientific experts are sufficient and more than mere coincidence. (Citations omitted.)

In Appeal No. 91004 we found that none of these methods of establishing causation was supported by probative evidence.

In Texas Workers' Compensation Commission Appeal No. 91026, *supra*, we again had occasion to review the Texas authorities on the proof of causation of occupational diseases, albeit of the repetitive trauma genre. We there said that "[w]hether the issue of causation is framed in terms of the disease being indigenous to the work or present in an increased degree [Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana 1982, no writ)] . . . or that the disease must be inherent in that type of employment [Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd, n.r.e.)], or but for the employment, would claimant have suffered the harm [Parker v. Employer's Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969)], what is required is evidence of probative force of a causal connection between the employment and occupational disease [Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123, 126 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.)]."

As can be seen from these authorities, and contrary to the apparent suggestion of the carrier, the articulation of the probabilities of causation by a scientific expert is not the exclusive manner of proving the cause of an occupational disease. In Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991, where we first addressed the subject of occupational disease under the 1989 Act, the carrier challenged both the legal and factual sufficiency (as it does here) of the hearing officer's

determination that the claimant contracted a compensable occupational disease from exposure to heavy metal at the workplace where he ground brass, bronze, and nickel for at least 11 years. We said that the claimant's testimony established the existence of heavy metals in mist, dust, or particulates in the workplace and cited several Texas authorities for the proposition that lay testimony of a claimant's working conditions may be considered along with the medical testimony connecting the condition to the injury. *See, e.g*. Texas Employers Insurance Association v. Etheredge, 272 S.W.2d 869 (Tex. 1954).

In the instant case, employer's owner testified that employer's business includes sandblasting, that claimant had been employed by employer for ten years as a coater, painter, and sandblaster, that employer's sandblasting abrasives include silica based abrasives, and that the employees have masks and are trained in wearing them. Claimant testified he did sandblasting work for employer exclusively for ten years, sometimes up to six or seven hours a day. His sandblasting projects included the interior of tanks where the sand falls to the floor but "is also in the air because the wind itself makes it do that." Claimant would also shovel the used sand out of the tanks. He said paper masks were once used but newer masks were provided by employer for the past two years. When asked whether the masks kept him from breathing all of the dust, claimant responded that the masks did not help very much "because sometimes when you are inside the tank working real hard and strong, you absorb quite a bit." He said he "would have to clean [his] nose out and shake the stuff out." Claimant, a 31 year old man whose medical records indicated he did not smoke, also testified he had not been in a dusty environment apart from work. We regard this lay testimony as some evidence that claimant was exposed to silicates in the workplace. In view of this evidence, we do not find controlling one of the cases relied on by carrier, Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980), for the same reason we did not find it to control in Appeal No. 91002, *supra*, that is, because "Schaefer's foundation was the absence of any evidence that any bacteria were present at the work site." In Schaefer, the claimant's expert presumed the presence of certain bacteria in the work environment but there was no evidence of the presence of such bacteria. In Appeal No. 91002, we found the evidence sufficient to support the hearing officer's determination that the claimant contracted a compensable occupational disease. The medical evidence of causation was stronger in Appeal No. 91002, however, because the claimant's doctor stated that the claimant's exposure to heavy metal in the workplace was the cause of his disease within "reasonable medical probability." (*See also* U.S. Fidelity & Guaranty Co. v. Bearden, 700 S.W.2d 247 (Tex. App.-Tyler 1985, no writ) involving the repeated inhalation of chicken feed and chicken house dusts.) It is the omission of just such an opinion in any of claimant's doctors' reports that carrier here points to as the critical deficiency in claimant's evidence of causation.

Considering the several modes of proving the causation of an occupational disease, as set out above, we find that the hearing officer had sufficient probative evidence in the testimony of claimant and his employer's owner, and in claimant's medical records, to find that claimant's pneumoconiosis was causally related to his employment as a sandblaster. Not only does the testimony amply establish claimant's long-term

exposure to silicates in the workplace, but Dr. W, in his April 16th letter, told the employer that claimant had an "occupational disease," and a fair reading of the medical records shows that while silicosis was the temporary diagnosis, a biopsy of lung tissue and a microanalysis of such material was necessary to reach the final diagnosis and classification of claimant's lung disease, itself not disputed.

Carrier replies on Appeal No. 92157, *supra*, and Appeal No. 92085, *supra*, in support of its contention that claimant was required but failed to produce evidence, based upon a reasonable medical probability, that his mixed pneumoconiosis was causally connected to his employment. We believe both decisions are distinguishable, however. In Appeal No 92157, the claimant, a licensed vocational nurse, contracted a viral infection, apparently hepatitis, and attributed it to her having been splashed in an eye with blood while removing a catheter from a heart patient. One doctor pointedly stated he did not believe there was any link between the blood exposure and the claimant's illness, while another doctor said such a link was a possibility and felt another opinion from an infectious disease doctor may be helpful. In Appeal No. 92085, the claimant contended she contracted hepatitis while working as a housekeeper at a hospital where she emptied trash containers, and cleaned water fountains, restrooms, and cafeteria tables used by infected patients. The claimant testified she was exposed to blood and blood products but provided no details. In the instant case, a large number of silicate particles were found in claimant's lung tissue and his employer testified that silica based abrasives were used in the sandblasting.

We have recognized that "[w]here the matter of causation is not in an area of common experience, expert or scientific evidence may be essential to establish the causation." Texas Workers' Compensation Commission Appeal No. 92202, decided July 6, 1992. However, we believe our decision in Appeal No. 92202 is distinguishable on the facts, and that the two Texas cases cited in that opinion are similarly distinguishable. In Appeal No. 92202, the claimant commenced work at a refinery on April 4, 1991, and two days later, while dismantling a scaffold at an inactive unit, said he smelled a strong odor which made him nauseous. He left his work area but remained at the refinery until the end of his shift when he went home. He experienced vomiting, coughing, fever, and shortness of breath and the next day experienced the additional symptom of coughing blood. He had been treated for coughing and throat problems in January 1991 and his medical records also reflected shortness of breath at that time. The claimant's coworker on the same shift did not smell anything and his supervisor reported that no spraying or painting was going on, and that no one else reported odors or emissions on that date. Not only was the existence of an odor or the occurrence of an emission in dispute, but the claimant's evidence did not relate the amounts of "chemicals" in his body to the alleged emission nor establish whether such chemicals in such amounts were significant. We said that to the extent the claimant's medical records indicated a chemical exposure, it was not evident that the medical notes were any more than the claimant's recitation of the history he gave to the doctor. Considering that the claimant had been on the job two days, that he had experienced and been treated for bronchial and upper respiratory problems before the alleged injury date, and that the very existence of an emission was in

dispute, we said "we believe that the circumstances of this case do not involve matters within the category of common experience such that the compensability of appellant's injury can be established through lay testimony alone."

We have already distinguished Schaefer v. Texas Employers Insurance Association, *supra*. In Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250, (Tex. App.-Corpus Christi 1989, no writ), another case relied on by carrier, the claimant contended that her asthma and allergic conditions were caused by the dust, lint, and chemical dyes to which she was exposed during her years of work in a clothing manufacturing and sewing plant. There was no medical evidence that the condition of the workplace contributed to the claimant's asthma and claimant's doctor said he could not give an opinion based on reasonable probability as to what caused the claimant to contract asthma in the first place and that the cause of her asthma was still unknown. In that case, the court said that expert medical evidence was required due to the uncertain nature of the cause of asthma, and there was no expert medical testimony which linked the claimant's inhalation of lint particles at work to her developing asthma. We are satisfied that claimant in this case has met his burden of proof in linking his pneumoconiosis to his workplace.

As for the remaining asserted error regarding the hearing officer's determination of claimant's average weekly wage (AWW), we find it without merit. The hearing officer, upon admitting a wage statement and hearing testimony that an employee with claimant's tenure accrued two weeks of vacation per year, made the following factual finding and legal conclusion:

FINDINGS OF FACT

> 7. EMPLOYER'S wage statement is incomplete, including weeks when CLAIMANT was injured or on workers' compensation. CLAIMANT worked a total of 372 hours in the seven full weeks reported on the wage statement, earning $3,683.75 during this period. EMPLOYER provides workers of CLAIMANT'S longevity two weeks of paid vacation using a 40 hour week for purposes of payment. CLAIMANT'S hourly wage for regular duty was per hour (sic).

CONCLUSIONS OF LAW

> 4. An alternative calculation of [AWW] is justified in this case. CLAIMANT's [AWW] is $539.71 based on the seven full weeks CLAIMANT worked from January 12, 1992 through February 29, 1992, with $13.46 added to the average weekly wage for the value of vacation accrued.

In its request for review the carrier simply states that according to the wage statement claimant's AWW was $405.61 and goes on to assert, without any elucidation, that the

hearing officer's recalculation to $539.71 was "inconsistent" with the 1989 Act and the Rules of the Texas Workers' Compensation Commission (Commission). In his response claimant stated he could not respond to this appealed issue because he did not understand the carrier's objection. We cannot know, nor will we speculate, whether carrier is challenging one, several, or all of the multiple facts found by the hearing officer in Finding of Fact No. 7. For instance, carrier does not directly differ with the hearing officer's finding that the employer's wage statement in evidence is incomplete. Article 8308-4.10 provides the Commission with authority in certain circumstances, including the employee's loss of time due to illness during the 13-week wage calculation period, to determine the employee's AWW by any method it considers fair, just, and reasonable to all parties and consistent with the methods established in that section of the 1989 Act. With respect to the hearing officer's inclusion of the value of vacation time in his calculation, we note that Article 8308-1.03(47) defines wages to include every form of remuneration payable for a given period to an employee for personal services. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 128.1(b). *And see* Employers Reinsurance Corporation v. Beaty, 576 S.W.2d 481 (Tex. Civ. App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.) where remuneration for holidays and vacations were held to constitute part of workers' wages for purposes of determining average daily wage.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge