

APPEAL NO. 93018

On November 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The respondent (the carrier herein) stipulated at the hearing that the appellant (the claimant herein) was injured in the course and scope of her employment on (date of injury). The issues at the hearing were whether the claimant's current complaints and problems are causally related to her injury of (date of injury), and whether the carrier properly contested the compensability of the claimant's injury within 60 days (of the date the carrier was notified of the injury) or did the carrier waive its right to dispute the injury. The hearing officer determined that the claimant's present symptoms are not related to the claimant's injury of (date of injury), and that the carrier is not obligated to provide benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et. seq.* (Vernon Supp. 1992) (1989 Act) for the claimant's present symptoms. The hearing officer's findings of fact related to the claimant's nausea, dizziness, and vertigo, but did not address the claimant's claim that her eye problems are related to her injury. The hearing officer made no findings of fact or conclusions of law regarding the issue of whether the carrier timely contested the compensability of the injury. The claimant disputes the hearing officer's decision and requests that we reverse the decision. The carrier requests that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is reversed and remanded for further consideration and development of evidence, as appropriate, and for findings of fact and conclusions of law relating to the issues of whether the carrier contested the compensability of the claimant's injury in accordance with the requirements of Article 8308-5.21 and Tex. W.C. Comm'n, 28 TEX. ADMIN CODE SEC. 124.6, and whether the claimant's eye problems are causally connected to the injury of (date of injury).

At the hearing the carrier was represented by an attorney. The claimant was not represented by an attorney but was assisted by a Commission Ombudsman.

On (date of injury), the claimant worked as a forms control clerk for the employer, Farmers Insurance Company, and was in the supply room with a coemployee, DH, when they smelled an odor the claimant described as a "real bad smokey, burning smell." The claimant said that her head started pounding real bad and she felt sick and faint. The claimant said that the office manager told her that building services personnel had "shut down the chiller and they were putting a sanitizer through." After lunch that day, she said she was nauseous, her head was pounding, and she was weak. She reported to her boss "what happened," he filled out an accident report, and she went home. The claimant added that another office worker got sick that day but stayed at work.

The claimant said she was sick that night, went to Dr. G the next day, and told the doctor about smelling the odor the previous day and getting sick. She said that Dr. G gave her pills for nausea and headaches and did blood and urine tests. She said she attempted

to work over the next week or so but had headaches, felt nauseous, had no energy, and her body was shaky, so she returned home after only a few hours of work each day. She said she almost fainted at work on two of the days she attempted to work. She went back to Dr. G who referred her to Dr. P. She said that Dr. P told her that the air needed to be tested in her office building and that if she went back to work she should work on a different floor. She returned to Dr. G who referred her to Dr. J, a neurologist. She said that all tests run by Dr. J were negative, so he sent her back to Dr. G. At the carrier's request she went to Dr. H, an allergy specialist, who she said, suggested she go to an ear, nose, and throat specialist because her problems were not related to an allergy. She went to Dr. M, an ear, nose, and throat doctor, was examined by Mr. H P.A., Dr. Ms assistant, and was given an electronystagmography (ENG) which she said revealed a peripheral lesion in her right ear. The claimant testified that Mr. Hurd explained to her that she had an inflammation in a nerve of her right ear which makes her dizzy with a feeling of vertigo, and that she was told it would take six to eight months to get better. She said that she asked Mr. Hurd if her problem could be related to her "chemical exposure" and that he told her that it could be, or that it could be Meniere's disease, or that it could be an ear infection. The claimant added that Mr. Hurd told her not to go back to work until her ear cleared up. She said that "the dizziness and the vertigo was all attributed to the nerve in my ear," and explained that there was nothing wrong with her ear before the incident at work on (date of injury).

The claimant said that she still experiences dizziness and vertigo because her ear is not "cleared up," and that the stress of the contested case hearing made her condition worse. She said she returned to work on February 24, 1992, but had a feeling of vertigo, nausea, and a headache when she was standing in line in the office cafeteria which is on another floor than where she works. She said she returned to her office and felt herself blacking out. The claimant also said that she did not smell any bad odors at the office building on February 24th, but that she was told by two coworkers that there was a bad, smokey, burning smell in the basement of the office building on that day. She said that Dr. G told her not to return to work until the air was tested there.

In March 1992, the claimant said she started having problems with her eyes so in April 1992, she went to Dr. M who she said found abrasions in her right eye, infections in both eyes, and who told her to throw her contact lenses away. The claimant said she next went to Dr. B at the request of the carrier to determine whether there was a relationship between her problems and her "exposure."

The claimant testified that her bouts of dizziness and feeling of vertigo are not confined to her office building. She testified that she can feel dizzy at anytime and at any place, including department stores, other buildings besides her office building, her car, and outdoors. She added that she feels dizzy when she stands up out of a car, when she turns too fast, sometimes when she is walking, and even sometimes when sitting. She also said that she always has "the vertigo, the dizziness," and that sometimes when she goes into

buildings she gets dizzy and has "my vertigo" and that that happens at a lot of places. She said that Mr. Hurd told her that her problem was going to continue until the nerve in her ear healed. However, she said that it seemed to her that her office building makes her worse and that all of the doctors she went to told her not to go back into her office building if being in the building made her sick. She said her employer told her that the air in the office building would not be checked. She said that she didn't know what was in her office building that made her worse.

When the claimant was asked "[a]re you claiming that all of the current problems that you are having with your eyes and with the neurological problem in your ear are all related to the original exposure in December 1991?", the claimant answered "yes." But she added that "it was reemphasized and redone when I returned to work in February."

DH, the coworker who was in the supply room with the claimant on (date of injury), testified that on that day there was a foul odor in the supply room that smelled like smoke. She said that before and after that day she never smelled an odor in the office building like she had on that day. She said that she did not get sick, but that the claimant told her the claimant had gotten sick that afternoon. She added that some other coworkers had headaches on the day of the incident, but was unaware of those coworkers having problems after that day.

Three coworkers of the claimant stated in written statements that they also smelled an odor in the office building on (date of injury). The odor was described as a "weird smell," a smell like "wires burning," and an "electrical smell burning." One coworker stated that she got a headache from the odor, another said she got a headache and was nauseous, and the third said she was not affected. None reported having continued symptoms from smelling the odor after that day. All said that the claimant did get sick that day. One of the coworkers stated that whenever the claimant attempted to return to work after that day, the claimant would get "washed out and white" and that the claimant almost passed out on one occasion. No witness, including the claimant, recalled there being any visible smoke or vapor in the office building when they smelled the odor.

JB, a human resources specialist for the employer, testified that there was no dispute that there was some sort of exposure that occurred to the claimant on (date of injury). He said that he checked with the maintenance department to see what work was being done on that day and was informed that the only maintenance work being done was the replacement of electrical switches on the air conditioner unit located on the top of the building. He said he checked with the supervisor on the floor on which the claimant worked and was told that no one other than the claimant had been injured or had reported a "loss" from the foul odor. He said that he was not aware of anyone other than the claimant having filed a workers' compensation claim in connection with the incident.

Numerous medical documents were in evidence. Dr. G reported that on December 6, 1991, the claimant said she had a severe headache, vomiting, and abdominal pain after she noticed a smoky smell on December 5th. In July 1992, Dr. GI reported that the claimant did not have headaches or ear problems, nor did she have any abnormality on examination of head and ears until December 1991. In another July 1992 report, Dr. G stated that "[the claimant's] symptoms that she has been followed for over the last few months could have been caused by a chemical exposure at her place of employment." She added that it is unknown what the exposure may have been since the employer did not investigate for possible chemical leakage, and stated that "[i]t is, however, well known that many chemicals can cause, with sufficient exposure, symptoms such as [the claimant] has had."

Dr. J reported on January 2, 1992, that the claimant complained of headaches, dizziness, nausea, and vomiting which the claimant told him started on (date of injury), when she smelled an odor of "burning smoke" at work. Dr. J said his impression of the claimant's condition was possible migraine and possible chemical sensitivity. He recommended an MRI of the brain, an EEG, and a lumbar puncture, all of which were later reported as normal or negative.

Dr. H progress notes for the claimant showed that the claimant reported to him that she had been exposed to chemicals, possibly a sanitizer that was put through the chiller at work on (date of injury), that her head pounded, and that she had felt dizzy ever since the incident. On March 11, 1992, he gave his impression of the claimant's condition as "positional vertigo--likely related to labyrinthitis--possibly due to toxic exposure versus Meniere's disease versus idiopathic." Dr. H added that there are no objective diagnostic tests for idiosyncratic or toxic exposures to chemicals, fumes, etc.; that often time the cause of vertigo remains unknown; that he did not think the claimant was completely disabled from working, but recommended that she not return to her work. He recommended an ear, nose, and throat evaluation.

Records from the Associates in Otolaryngology, where the claimant went for her ENT evaluation, revealed that the claimant was evaluated for persistent vertigo and had an ENG performed which indicated, in connection with her right ear, "a unilateral weakness in the right indicating a right peripheral vestibular, i.e., nerve or end organ, pathology." Mr. Hurd reported that Dr. MI reviewed the results of the ENG and the lab and agreed with his assessment of "labyrinthitis." According to Dorland's Illustrated Medical Dictionary, 27th Edition, "labyrinthitis" is defined as an inflammation of the labyrinth (i.e., a system of intercommunicating cavities or canals, especially that constituting the internal ear); otitis interna. "Otitis interna" is defined as an inflammation of the internal ear; labyrinthitis.

In a report dated May 13, 1992, Dr. B reviewed the evaluations of the other doctors the claimant had seen and stated that "there has been an insufficient emphasis relating to the patient's sinusitis which was occurring concomitant with her episode of vertigo. The

etiology of this patient's vertigo is unknown, but it is unlikely that this patient has vertigo related to exposure, per se."

Dr. M, reported on June 30, 1992, that he had examined the claimant for irritated eyes in April 1992, and that his examination revealed corneal abrasions and multiple infiltrates in both eyes as a result of wearing infected contact lens. He further stated that "as you already know, she was exposed to an unknown chemical substance through the air vents at her place of employment on December 5, 1992 (sic) and had complained of migraine headaches, vertigo, and pain in both of her eyes. It is impossible to speculate whether or not this exposure has caused her eye infection. However, she was wearing her contacts at the time of the incidence (sic) and they more than likely became infected with the chemical substance. This in turn could have caused the eye infection."

The hearing officer made the following pertinent findings of fact and conclusion of law:

Finding of Facts

No. 4. The claimant sustained an injury in the course and scope of her employment on (date of injury).

No. 5. The claimant has experienced nausea, dizziness, vertigo, and associated ailments.

No. 6. The claimant has undergone extensive medical tests which provide no causal relationship between the incident of (date of injury), and the claimant's present symptoms.

No. 7. The claimant has been diagnosed as having an inner ear inflammation, which is the source of the claimant's present symptoms.

No. 8. There is no causal relationship between the incident of (date of injury), and the claimant's inner ear inflammation.

Conclusion of Law

No. 2. The claimant's present symptoms are not related to the claimant's compensable injury of (date of injury).

In reviewing the hearing officer's decision, we recognize that under Article 8308-

6.34(e) the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. We do not substitute our opinion for that of the hearing officer where the hearing officer's determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992. Having reviewed the record, we believe that the hearing officer could reasonably conclude from the evidence that the claimant's vertigo, which she was extensively evaluated for by several doctors, was caused by her inner ear inflammation.

The question then became whether the claimant's inner ear infection was caused by the smokey odor she and her coworkers smelled at work on (date of injury). There was no evidence as to what the odor was or what, if any, chemicals the claimant may have been exposed to. The claimant's testimony concerning the possibility of a sanitizing agent in the air vents was contradicted by Mr. B's testimony that only electrical switches were being replaced on the air conditioner on the day in question. His testimony comports with the description of the odor as being an electrical smell or wires burning. While there was medical evidence that the claimant's problems could possibly be related to her exposure to an unknown chemical at work, we do not believe that that evidence rises to the level of reasonable medical probability in this case. For one thing, the substance that the claimant was exposed to is unknown. When a subject is of such scientific or technical nature that the fact finder cannot properly be assumed to have, or to be able to form, an opinion of his or her own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in that subject has any probative value. See Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). How one could develop an ear infection from being exposed to a smokey odor at work, is a subject we believe requires expert opinion to establish causation. That expert testimony should be based on a "reasonable probability" of a causal connection between an act and an injury. Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). The expert evidence in this case only establishes a "possibility" of such a causal connection, and there is expert evidence which showed that it was unlikely that the claimant's vertigo was a result of exposure to an unknown substance at work.

Our determination that the evidence was sufficient to support the hearing officer's findings of fact and conclusion of law does not, however, mean that we agree with the hearing officer's decision denying benefits to the claimant, because the hearing officer failed to address the issue of whether the carrier timely contested the compensability of the injury. Article 8308-5.21(a) provides in pertinent part that if the carrier does not contest compensability of the injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability, and further provides that the carrier shall be allowed to reopen the issue of compensability if there is a

finding of evidence that could not have been reasonably discovered earlier. Rule 124.6 also addresses the notice of refused or disputed claim. The Appeals Panel has considered the provisions of Article 8308-5.21 in several decisions, including Texas Workers' Compensation Commission Appeal No. 91035, decided November 7, 1991; Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992; Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992; Texas Workers' Compensation Commission Appeal No. 92060, decided April 1, 1992; Texas Workers' Compensation Commission Appeal No. 92122, decided May 4 1992; and Texas Workers' Compensation Commission Appeal No. 92278, decided August 10, 1992. In Appeal No. 92122, *supra*, the Appeals Panel stated that "[a]s for the timeliness of respondent's contest of compensability, if appellant were correct that respondent did not timely contest the compensability of his occupational disease, then the remaining issue concerning the causation of the occupational disease would become moot." In Appeal No. 92278, *supra*, we affirmed the hearing officer's decision awarding death benefits to the deceased employee, despite our determination that the evidence supported the hearing officer's conclusion that the employee failed to prove by a preponderance of the medical evidence that his work was a substantial contributing factor of his heart attack, because the hearing officer's determination that the carrier in that case had failed to timely contest compensability and had thus waived its right to contest compensability was supported by the evidence. See also Appeal No. 91035, *supra*, in which the insurance carrier received a doctor's statement (within the 60-day time period for contesting compensability) that the injured employee had arthritis, but failed to contest medical care for that condition within 60 days from its notice of injury.

The issue of whether the carrier timely contested compensability of the claimant's injury was properly before the hearing officer as that issue was reported in the Benefit Review Conference (BRC) report as an issue raised but not resolved after the BRC, and was also announced as an issue by the hearing officer at the beginning of the hearing. Article 8308-6.34(g) requires the hearing officer to make findings of fact and conclusions of law. In this case, no findings of fact or conclusions of law were made by the hearing officer concerning the disputed issue of whether the carrier contested compensability of the injury within the period provided by Article 8308-5.21, consequently we reverse the decision of the hearing officer and remand for further consideration and development of the evidence, as appropriate, and for findings of fact and conclusions of law on the disputed issue of whether the carrier timely contested compensability of the injury. On remand, the hearing officer should also address the claimant's claim that her eye problems are related to her injury of (date of injury). Pending resolution of the remand, a final decision has not been made in this case.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge