APPEAL NO. 93020

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on September 18, 1992, (hearing officer) presiding. Because of the parties' stipulations, two of the three disputed issues from the benefit review conference were resolved. As to the remaining issue, what is the correct date of injury for this claim, the hearing officer held that a date of injury could not be determined, as the claimant had not suffered an injury at this time.

In his request for review, the claimant disputes the hearing officer's finding and conclusion that he has not suffered a compensable injury, which he states is shown by the evidence. The carrier contends in its reply that there is no objective evidence of an injury and that the hearing officer's decision should be affirmed.

DECISION

We affirm the decision and order of the hearing officer.

Claimant worked for (employer), as an asbestos abatement worker. He was certified by the State of Texas, but at the time of the hearing had allowed his certification to lapse because he did not want to work in that field anymore. Claimant said he was laid off from that job on July 30, 1991, approximately eight months after he was hired. He testified that around mid-October, while applying for another job, the prospective employer looked at the report from claimant's physical examination (done in May of 1991, when he still worked for employer) and told him he had something wrong with his lungs. Thereafter, claimant said he contacted an attorney and filed a report of injury. He said he was going to notify his employer, but he felt they already knew the results of his physical. He said that he was not aware of the results of the physical until later, when he requested it. The claimant stated his opinion that employer did not use prescribed procedures in their asbestos removal; that while he was issued and wore a mask and protective clothing, the employer left a lot of asbestos behind, did not always use water to prevent the fibers from becoming airborne, and did not have a hygienist on site daily.

The May 30, 1991 report from claimant's physical was made part of the record. An outpatient report signed by Dr K, stated, "[t]he heart is normal in size and configuration. The aorta and pulmonary vascular pattern is normal. The lung fields are clear but moderately hyperaerated with increase in the AP diameter and retrosternal air space compatible with acute and/or possibly chronic airway disease. There are no infiltrates or consolidative lesions noted." The impression was stated as "[m]oderate hyperaerated lung fields may represent acute and/or chronic airway disease." The documents from claimant's May 1991 physical also included a pulmonary study by Dr. F.

A June 15, 1990 respiratory therapy basic pulmonary function study from (Hospital) Cardiopulmonary and Neurology Department gave numerical and graphed values for the

test performed; a handwritten note at the bottom stated "Dx: No sym of lung disease." On the same date Dr. W, M.D., stated "[c]hest x-ray negative" and certified the claimant physically qualified to perform his job duties.

The carrier introduced a June 19, 1992 report from (Dr. M), who had analyzed claimant's medical reports and other documents (some of which were not included in the record of this case). Dr. M noted the normal respiratory study of June 15, 1990 and concurred with the results of that study. He also noted the May 30, 1991 chest x-ray interpretation and the May 31, 1991 pulmonary function test revealing no pulmonary impairment on spirometry or inspiratory and expiratory flow volume loops. In answer to the question whether the claimant appeared to have asbestosis as a result of his employment, Dr. M stated the latency period for asbestosis is a minimum of 10 years; thus, it would be impossible for him to have developed this condition under these circumstances. Dr. M stated:

> The diagnosis of asbestosis requires: 1) a history of exposure, 2) a suitable latency period, and 3) typical pulmonary or pleural abnormalities on a chest x-ray film. [Claimant] has a history of exposure to asbestos. However, all three conditions must be met before a diagnosis of asbestosis may be made. Therefore, [claimant] does not have asbestosis, either as a result of employment or outside of employment (footnote omitted).

Dr. M also stated that "hyperaeration of the lungs simply means an excess of air in the lungs and can be produced, in some cases, by deep inspiration. It can also be a normal variant." He concluded that claimant's pulmonary and respiratory studies and x-rays demonstrate no significant anatomic abnormalities nor abnormalities of pulmonary function.

The claimant testified at the hearing that his lungs hurt, his throat is sore, and he gets sick often. It did not appear from the evidence that claimant has seen a doctor for this condition. He stated that he had performed asbestos removal for three other employers, beginning in 1987.

The statutory definition of "injury," which includes the concept of occupational disease, is "damage or harm to the physical structure of the body and those diseases or infections naturally resulting therefrom." Article 8308-1.03(27). To be compensable, an injury must be causally connected to the work and not merely incidental to risks inherent to the public at large. Parker v. Employers Mutual Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). Further, in cases where a layman would not, from general experience and common knowledge, understand a causal connection between the employment and the injury, expert medical testimony is required. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1975, writ ref'd n.r.e.).

In this case, there was medical evidence in the record to allow the hearing officer to determine at the time of this hearing whether the claimant had suffered an injury from his employment. His physical exam reported the existence of a lung condition, evidence which was rebutted by carrier's expert's opinion that this condition can be usual and not harmful. The hearing officer is the sole judge of the relevance and materiality of the evidence and its weight and credibility. Article 8308-6.34(e). He is entitled to weigh and resolve conflicting evidence, including medical evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer's determination that the claimant had not suffered an injury as defined in the Texas Workers' Compensation Act of 1989 was supported by sufficient evidence in the record. We find this determination not so against the great weight of the evidence as to be unfair and unjust. In re King's Estate, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge