APPEAL NO. 93094

This appeal arises under the Texas Workers' Compensation Commission Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On December 22, 1992, a contested case hearing (CCH) was held in (city), Texas, with (Hearing officer) presiding as hearing officer. The unresolved issue from the benefit review conference (BRC) was "[w]hether or not [claimant] had a compensable injury on (date of injury)." By implied agreement of the parties, the issue was reformed to be whether claimant sustained an occupational disease. The hearing officer determined that the appellant, claimant herein, did not sustain a compensable injury in the course and scope of her employment with (employer), the employer. Claimant contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds that the appeal was not timely filed or, in the alternative, the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant's appeal was timely filed. Although the cover letter of the decision is dated January 8, 1993, a review of the distribution log shows the decision was not actually placed in the mail until January 11, 1993. Claimant in her appeal does not assert when the decision was received, therefore the provisions of Commission Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h)) are invoked. Rule 102.5(h) provides:

> (h)For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

In that the decision was distributed on January 11, 1992, the "deemed" date of receipt is January 16, 1993. Article 8308-6.41(a) requires that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received. . . ." Fifteen days from the deemed receipt date would be Sunday, January 31, 1993. Claimant's appeal was undated but was postmarked January 30, 1993 and consequently was timely filed pursuant to Rule 143.3(c)(1).

As indicated in the introductory paragraph, the unresolved issue at the BRC was whether claimant had a compensable injury on (date of injury). As noted by the hearing officer in his discussion, it became clear that both the carrier and the claimant understood the issue to be an occupational disease which became known on (date of injury) rather than a specific event which occurred on that date. The hearing officer, in treating this

case as an occupational disease case, states "[t]here has been substantial compliance with the Rules and Statute." Claimant does not appeal this change in the characterization of the issue. Clearly the actions and evidence presented by the parties indicates they consented to the reformed issue. Further, as there was no objection that this case be considered as an occupational disease case, "the orderly resolution of disputes suggests that waiver is appropriately applied." Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991.

As to the facts, claimant testified she was a senior accounting clerk for the employer, who was a maintenance subcontractor of a national chemical company. The testimony was that when the chemical company shuts down a refinery, the employer's work force increases. Claimant stated during the period of August through December 1991, the employer's work force increased from less than 200 to between 850 and 1,000 people. As the payroll accountant and senior accounting clerk, the claimant stated it was her responsibility to ensure all of the paperwork on the new employees was properly executed. Claimant testified this, on occasion, caused her to work 30 hours straight. Claimant testified she began to experience breathing problems in November and December 1991, as well as having complaints of tiredness, memory loss, nausea, abdominal pains and dizzy spells. Initially, claimant testified, she thought her problems were gynecological in nature and she went to see a gynecologist. Claimant stated on January 13, 1992 she saw a doctor who suggested that cigarette smoke or fumes at the site might be causing her problems. The doctor took claimant off work for two weeks. Claimant worked intermittently February through April 1992. Claimant was laid off in a reduction in force on May 8, 1992.

The claimant testified, and carrier agreed, that claimant worked in a trailer which had been converted into an office. Approximately five to seven people worked in the trailer. Claimant states she was the only nonsmoker. The employer's risk manager testified only one or two of the other workers were smokers and that they smoked outside of the trailer due to a previous complaint about smoking from the claimant.

On cross-examination claimant testified she had been prematurely discharged from the military because of breathing difficulties related to anxiety. Claimant, also on cross-examination, testified that one of the doctors she had seen referred her to a psychiatrist. Claimant said the doctor (it is not clear which one) also told her she should move out of the area (which has numerous petrochemical plants) because the environment was contributing to her distress.

Claimant introduced several articles and pamphlets about the hazards of smoking. One article is entitled "The Harm Smoking Inflicts on the Non-smoker." Other articles deal with smoking and health, smoking and cancer, and "Smoking - a habit that should be broken." The carrier generally objected to the articles in that they were not specific

regarding claimant's problems. The articles were admitted over carrier's objection. The only medical report in evidence is a three page narrative report dated April 13, 1992 from . (Dr. N), on a referral from (Dr. P). The report recounts claimant's complaints, history and physical examination. Dr. N noted claimant's ". . . maximum voluntary ventilation is depressed below expected level, which may be an effort-dependent problem." Dr. N concluded that claimant's "[s]ymptoms are consistent with nonspecific bronchitis which may be due to any of a number of irritants." The doctor did recommend claimant ". . . should not be subjected to secondhand smoke, particularly in a closed work space" and that claimant could return to work full-time.

Claimant's appeal has numbered paragraphs and appears to be directed at specific findings of fact made by the hearing officer. In some cases, claimant is attempting to present further evidence by way of her appeal statements. Our review of the evidence is limited to the record developed at the hearing and we will not consider other evidence which was available to claimant at the CCH. *See* Article 8308-6.42(1); Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992, and Texas Workers' Compensation Commission Appeal No. 92272, decided August 5, 1992.

Occupational disease is defined in Article 8308-1.03(36) 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 test whether a disease is compensable under workers' compensation is if there exists a causal connection, either direct or indirect, between the disease and the employment. *See* Hernandez v. T.E.I.A., 783 S.W.2d 250 (Tex. Civ. App.-Corpus Christi 1989, no writ). We are unaware of any Texas cases involving a similar set of circumstances where it is alleged the inhalation of secondary smoke in the work place was the basis of an occupational disease. Hernandez, *supra*, involves a situation where an employee alleges her asthmatic and allergic conditions were caused by dust, lint and chemical dyes in her work place. The court in that case held that generally lay testimony is sufficient to establish a causal connection where, based upon common knowledge, the fact finder could understand a causal connection between the employment and the injury. The Hernandez court, however, went on to point out that where, as in the instant case, the cause of disease is more difficult to ascertain ". . . expert testimony may be required where a claimant alleges that employment caused or aggravated a disease and the fact finder lacks ability, from common knowledge, to find a causal connection." Hernandez, *supra*, at page 253. We would point out the similarities between the complained of asthma allegedly due to dust, lint and chemical dyes in Hernandez and claimant's

nonspecific bronchitis allegedly due to secondhand smoke in the instant case. In Hernandez, as in the instant case, expert medical testimony was required due to the uncertain nature of the cause of the complained of condition. We note, as does the hearing officer, "[t]here is virtually no evidence other than the hearsay testimony of the claimant that any of the symptoms resulted from exposure to cigarette smoke." The only expert medical evidence is that of Dr. N, as previously summarized. Although he does suggest claimant "not be subjected to secondhand smoke" his comment on causation is only that "[s]ymptoms are consistent with nonspecific bronchitis which may be due to exposure to any of a number of irritants." There is no expert medical testimony that links claimant's symptoms to her employment or the inhalation of secondary smoke.

Claimant submitted several articles on the hazards of smoking, as enumerated above; however, only one dealt with secondhand smoke. That article mentions certain standards of 9 ppm carbon monoxide as being dangerous and that "it is easy to trace in the blood of nonsmokers . . . how much smoke they have inhaled." Claimant, however, produced no tests, evidence or studies showing either how many ppm carbon monoxide were present in the trailer while she was there or any blood tests showing how much smoke she may have inhaled. The cited article contains many more generalizations "that smoking irritates most nonsmokers" and can cause a myriad of complaints and symptoms. We would submit that such generalizations about the hazards of secondhand smoke falls short of the requirement for expert medical testimony required to establish a causal connection between claimant's nonspecific symptoms and conditions existing in her employment. Claimant has failed to prove a causal connection between her symptoms and any secondhand smoke to which she may have been exposed at work.

As used by in section 1.03(36), cited earlier, "ordinary disease of life" is a term of art having a meaning distinct from the common meaning of the words. Although claimant failed to prove a causal connection between her condition and any secondary smoke she may have encountered at work, we would note some aspects of claimant's appeal which touch on this point and which bear mention. The hearing officer found "[s]everal people who worked in the office smoked" and "[c]laimant was exposed to no smoke or fumes to which the general public is not." Claimant takes issue with both findings and states "[a]ll of the other people (sic) worked in the trailer were smokers" and "[q]uestion about the general public keeps coming up . . . the general public was not closed in a trailer for 6 mths + for 12 to 30+ hrs straight at one time for 100+ hrs a week." We would note that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. *See* Article 8308-6.34(e). There was evidence from the carrier that only one or two of the other occupants of the trailer were smokers and that they smoked outside of the trailer because of claimant' earlier complaints which had resulted in the posting of "no smoking" signs. What the general public is exposed to becomes relevant in determining what constitutes "an ordinary disease of life." One of the leading cases in this area is Bewley v. Texas Employers Insurance Association, 568 S.W.2d 208 (Tex. Civ. App.-

Waco 1978, writ ref'd n.r.e.) which held that illness or disease, including a cold, sore throat and pneumonia, resulting from employment-related exposure to water and inclement weather was "an ordinary disease of life to which the general public is exposed and not compensable." *See* Texas Workers' Compensation Commission Appeal No. 92525, decided November 19, 1992. Without deciding that exposure to secondhand smoke might constitute such an ordinary disease of life to which the general public is exposed, we do note the hearing officer's finding that the area where claimant was employed has as its primary industry petrochemical plants and by inference the air in that area may contain noxious fumes and irritants. Health problems caused by such noxious fumes and irritants might well be considered an ordinary disease of life under the Bewley analysis.

We find no error in the hearing officer's findings and conclusions and find there is sufficient evidence to support the determinations of the hearing officer. The hearing officer's decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge