APPEAL NO. 931094

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., 8308-1.01 *et seq*). On August 18, 1993, and October 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant's inhalation injury of (date of injury), was limited to nausea, headache, and stomach pain. He found that disability therefrom ended on August 17, 1992, and maximum medical improvement (MMI) was reached on February 10, 1993, with 0% impairment. Appellant (carrier) asserts that respondent/cross appellant (claimant) had no disability and that MMI should have been found on August 17, 1992. Claimant questions the help he received from the ombudsman, states that he was not able to get a lawyer, and asserts mishandling of his claim.

DECISION

We affirm.

At the hearing the issues were stated to be: what is the extent of claimant's injury sustained on (date of injury); does claimant have any disability as a result of that incident; whether claimant has reached MMI; and if so, what is the impairment rating.

Section 410.204(a) states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal, carrier only questions the issues of disability and date of MMI. Claimant does not question any decision of the hearing officer, but attacks the manner of processing the case (ombudsman help, no legal assistance, and "mishandling").

The Appeals Panel determines:

That the evidence sufficiently supports findings of fact that relate claimant's inability to work until August 17, 1992, to the incident in question and that give presumptive weight to the designated doctor's opinion as to when MMI was reached-February 10, 1993.

That claimant received ombudsman assistance and was granted a continuance to seek added help; no reversible error was found.

Claimant testified that he had worked for (employer) a "week or two" on (date of injury), when he smelled a "real foul odor." He was working with another employee cleaning a site so that a store could be opened to the public. Eight recorded statements of employees were admitted in evidence; it was not controverted that the smell came from a delivery truck that visited the warehouse that day. The goods delivered did not smell, but there had been a spill within the truck of a product delivered to another customer. Some statements indicated that the odoriferous substance may have been absorbed by the pallets that held the delivered goods. The exact substance was not known, but the designated doctor, (Dr.

C) reported that the source was probably a petroleum solvent and ether substance or a similar hydrocarbon, naphthalene, ether substance. He characterized the first as "incapable of explaining any long term problems beyond a few hours to a day or two" and the next, as "could cause transient disagreeable effects such as dizziness, light-headedness and headache but these would be reversible."

Upon the departure of the delivery truck, several doors to the warehouse were opened to promote ventilation. (JC), the supervisor of claimant, said the smell gave him a headache. (CW) stated that claimant complained of a headache and nausea at the time, and "there were some people that had a headache maybe at the time, but it went away that day." (CB) said that "L" thought the odor gave her a headache. The odor was compared to paint and to glue by various witnesses.

As stated, there is no appeal of the hearing officer's finding that claimant was exposed to a toxic substance that resulted in symptoms of nausea, headache, and stomach pain.

The carrier points to medical evidence for its position that claimant had no disability. Claimant's initial treating doctor, (Dr. M) did no laboratory work on him but indicated on August 17, 1992, that claimant could return to work. Dr. M also said that he told claimant at that time that his problems did not result from the chemical fumes. Claimant also saw (Dr. ME) who stated that claimant should be seen by a toxicologist. The designated doctor, Dr. C, is a toxicologist, who was earlier described as acknowledging possible causation of "transient" effects. He states that the exposure is "of no long term significance." He noted that claimant's pulmonary function studies were normal. He added that he knew of no toxic substance that could cause claimant's current (February 10, 1993) problems. Thereafter, (Dr. K), also a toxicologist, stated that claimant had gastritis and duodenitis and added, "(w)hile no specific toxic exposure could directly cause this, he has been under considerable stress from his fear related to his chemical exposure; and, fear-related anxiety and stress can cause . . . gastritis and duodenitis."

The hearing officer asked the designated doctor to comment in regard to this assertion by Dr. K; Dr. C replied that the gastritis is "unrelated to the workplace." (Dr. C did not address the duodenitis one way or the other.)

The carrier cites Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. That case dealt with an issue of injury, however, and there is no appeal to the finding that an injury occurred in this case. In addition, Appeal No. 92187 dealt with one employee smelling a smell that no one else smelled. Appeal No. 92187, pointed out in citing Morgan v. Compugraphic Corporation, 675 S.W.2d 729 (Tex. 1984), that Morgan was distinguishable in that chemical fumes were admittedly present; in the case before us, not only is there no issue as to injury, other employees also complained of the smell and exhibited symptoms at the time, unlike Appeal No. 92187.

While the record of Dr. M does not support a finding of disability, since he clearly states his opinion that the exposure did not cause claimant's problems, Dr. M does make it clear

that claimant was able to work after that time. There is no presumption tied to any doctor's opinion in regard to disability as there is to the designated doctor's opinion in regard to MMI and impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 93383, decided June 30, 1993. The hearing officer's finding of disability for less than three weeks was supported by Dr. C's opinion that "transient disagreeable effects" could be caused by the injury and by claimant's testimony that he was unable to work during the period specified by the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. As trier of fact he could believe some, but not all of claimant's testimony and medical opinions. *See* Ashcraft v. United Supermarkets Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). He could decide which medical opinion to give more weight. *See* Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). In addition, deductions made by an expert are not binding on the trier of fact. *See* Gregory v. T.E.I.A., 530 S.W.2d 105 (Tex. 1975). In comparing medical evidence, the hearing officer could consider its thoroughness and credibility, its consistency and accuracy, and may look to the basis or foundation provided for opinions set forth. *See* Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993. Under the 1989 Act, testimony of lay witnesses may be used in determining an issue of disability. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Unlike determinations of MMI (other than by expiration of time), disability findings are not required to be based on reasonable medical probability by the 1989 Act. The hearing officer's determination that claimant had disability through August 17, 1992, was sufficiently supported by the evidence.

The carrier states that MMI should be no later than August 17, 1992, when Dr. M found MMI. It also points out that Dr. C says it is possible that claimant reached MMI prior to the date that he found, February 10, 1993. Dr. C, when queried as to an earlier MMI date, stated clearly that while an earlier date was possible, February 10, 1993, was the date he could certify within "reasonable medical probability". With Dr. K not indicating that MMI had been reached, the hearing officer's determination that the great weight of other medical evidence was not to the contrary of the designated doctor as to MMI is sufficiently supported by the evidence.

Claimant at the hearing of August 18, 1993, referred to insufficient help by an ombudsman. When questioned, claimant said that he really wanted to get a lawyer. The hearing officer pointed out that claimant had already been given a continuance to get a lawyer, but the claimant did not want to proceed with the help of the ombudsman; the hearing officer then continued the proceeding until October 7, 1993. When the hearing convened on October 7, 1993, the hearing officer was told that claimant could not obtain a lawyer. When asked by the hearing officer if he were "happy" with the assistance of the ombudsman (a different ombudsman was in attendance at this session), the claimant said, "I'm not totally happy . . . but I'll accept it . . . . " The hearing officer then recessed the hearing to enable the claimant and ombudsman to confer further. When the recess was over, the hearing proceeded. The Texas Workers' Compensation Commission (Commission) is not responsible under the 1989 Act for providing a lawyer to claimants. The ombudsman is

provided to assist and does not serve as legal counsel. There is no provision in the 1989 Act or Rules of the Commission to delay indefinitely a hearing because the claimant is not satisfied with the ombudsman. In this case there was not even a specific act of incompetence shown by claimant on the part of an ombudsman or the commission. The claimant's stated appellate points are without merit.

The claimant's appeal will also be considered a request to review the findings on his behalf.

The decision that the injury was limited to headache, nausea, and stomach pain was sufficiently supported by the evidence provided by the designated doctor. In questions of injury or extent of injury, the designated doctor is entitled to no presumption, but his opinion may be given the weight considered appropriate by the hearing officer. *See* Texas Workers' Compensation Appeal No. 93290, decided June 1, 1993. Dr. C's opinion as to effects beyond headache, nausea, and stomach pain was consistent with the opinion of Dr. M. Dr. K disagreed, and his opinion was admitted and considered, but was not found to outweigh the other evidence as to extent of injury. *See* Peebles v. Home Indemnity Co., 617 S.W.2d 274 (Tex. Civ. App.-San Antonio 1981, no writ), which indicated that evidence of a neurosis after physical trauma should be admitted for the trier of fact to consider.

Again, the medical evidence of Dr. M and Dr. C does not contradict the finding of the hearing officer that disability did not extend beyond a short period. While the hearing officer may consider lay testimony as to disability, he is not required to give it more weight than that of medical evidence. The finding of a limited period of disability is consistent with the limited extent of injury found by the hearing officer. That a longer period of disability was not found is sufficiently supported by the evidence.

The MMI and impairment rating were found by the hearing officer to be those set forth by the designated doctor. There is no other impairment rating from which the hearing officer could choose if he did not find that the designated doctor's rating was entitled to a presumption under Section 408.125. The MMI date of February 10, 1993, was different from that of Dr. M, who said the MMI date was August 17, 1992, and from that of Dr. K, who said in September, 1993, that claimant would reach MMI in "2-3 months". Having given more weight to the designated doctor as to extent of injury than to the opinion of Dr. K, the hearing officer was sufficiently supported by the evidence in finding that the great weight of medical evidence was not contrary to the designated doctor's opinion as to the date MMI was reached.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge