APPEAL NO. 93306

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on March 10, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) neither sustained an occupational disease which arose out of and in the course and scope of his employment on (date of injury), nor did claimant have disability. Claimant appeals finding fault with several of the hearing officer's findings of fact, sets forth legal positions concerning the claim, urges that the hearing officer abused his discretion in denying a continuance, and requests the decision be reversed and a new decision rendered. Respondent (carrier) states that the claimant has not sustained his burden of proof to establish an occupational disease and asks that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the decision of the hearing, we affirm.

This is a second contested case hearing involving essentially the same matter. The first hearing was held on June 22, 1992, and involved a claimed injury on (date of injury). A decision was rendered in that case on June 25, 1992, and the carrier was determined not to be liable. That case was appealed to the Appeals Panel and the hearing officer's decision was affirmed in Texas Workers' Compensation Commission Appeal No. 92352, decided September 8, 1992. During the present hearing, the transcript of that proceeding was admitted into evidence without objection and references were made to exhibits and testimony at that hearing. Indeed, there was limited new evidence offered at the hearing on March 10, 1993.

The thrust of this case involves a claimant who was subjected to a startling and traumatic incident while in the course and scope of his employment in July of 1988 when an explosion occurred under a house where he was working. His job included delivering and working with propane. His physical injuries did not appear great at the time and involved some back problems and singeing of his hair. Because of continued difficulties he experienced (including depression, withdrawal, sleeping and eating problems, difficulty concentrating), he was seen by several health care providers in 1989/1990 and was diagnosed and treated for post traumatic stress disorder (PTSD). (There is a reference in the record that the claimant entered into a compromise settlement agreement on this "old law" claim, the 1989 Act only covering injuries occurring on and after January 1, 1991. 1989 Act, Section 17:18). His problems did not appear to abate, and he filed the first claim asserting an occupational disease on (date of injury), resulting from perceived problems with the truck he drove. He believed that heat and carbon monoxide fumes to which he may have been exposed in his job were causing or aggravating his problems which included a number of physical and mental symptoms. Medical tests performed at the time did not disclose any toxicity on the part of the claimant, and tests performed on the truck he had been driving since it was new in 1984 indicated that any exposure levels were within OSHA

standards. A Texas Department of Public Safety examination report of (date of injury), indicated three violations on the truck in question: holes and cracks in floor, unprotected wire through floor, and exhaust leak. The evidence in the hearing held on June 22, 1992, is set out in some detail in Appeal No. 92352, *supra*, and need not be repeated here. In any event, the claimant continued in his employment and appears to have continued to suffer from PTSD.

The instant claim also asserts an occupational disease with an injury date of (date of injury). In his testimony at the March 10, 1993, hearing, the claimant testified to the effect that his claimed occupational disease of (date of injury), was the same or similar to the occupational disease he alleges he suffered on (date of injury): "the stress of the truck, the fumes that were probably in the cab." He also stated that he's claiming he has PTSD and that's what he's been diagnosed with. He feels that the continual driving of the truck induced or aggravated his occupational disease of anxiety and neurosis. He stopped working for the employer in May, 1992, but apparently obtained other employment and stated he continued working because he had to. In any event, in response to a specific question as to whether he was experiencing the same problems now that he raised in the prior contested case hearing, the claimant stated "yes, other than my ability to take heat, they're about the same--nothing different," that they are "about the same, they get worse at times, better at times--about the same" and that his medical/physical problems are the same problems he was having on both (date of injury) and (date of injury). He also indicated that no health care provider took him off work at any time, and that he had no tests other than those considered at the previous hearing concerning any fumes in the truck in question or that indicate toxicity in his body. He stated that he is a Viet Nam veteran and is being seen by the VA. A report from a VA doctor dated "3/1/93" was admitted into evidence and indicates "post-traumatic stress disorder, due to traumatic accident."

We first address the complaint on appeal that a requested continuance was erroneously not granted. We find absolutely no merit to this assertion. Not only was the continuance in question the third one requested (the other two were granted) by the claimant and objected to by the carrier, the claimant's counsel stated clearly on the record that the "claimant wants to withdraw the request." The withdrawal was accepted and the hearing commenced. There is no basis to this assertion of error.

We have reviewed each assertion of error in the hearing officer's findings. After reviewing the complete record, we determine there is sufficient evidence to support the findings of the hearing officer. The hearing officer found that the claimant was previously denied compensation after a hearing for virtually the same medical problems, that he knew in 1989 that he had been diagnosed with PTSD and that his medical problems were diagnosed as PTSD on March 1, 1993. He also found that the claimant's medical records did not establish a causal connection between his medical problems and his employment on or prior to (date of injury), that he did not sustain an occupational disease while working

for the employer on and prior to (date of injury), and that on and subsequent to (date of injury), he had the ability to obtain and retain employment at wages equivalent to wages he was earning prior to (date of injury). Claimant complains that the hearing officer considered the prior claim in making his determinations in this case. We note that the complete transcript of the prior hearing was admitted into evidence without objection, that the parties repeatedly referred to matters in the prior hearing as germane to the present hearing, that the claimant stated that all the conditions were virtually the same between the first claimed injury of (date of injury), and the present one of (date of injury), and that the evidence, except for the VA medical report, was virtually the same. Under these circumstances, we do not find any error in the hearing officer's reference to the prior hearing and observe that he considered the evidence offered and the testimony of the claimant and determined anew that there was no causal connection between the claimant's medical problems and his employment on or prior to (date of injury), and that the claimant had not sustained an occupational disease while working for the employer on and prior to (date of injury).

The strongest evidence offered by the claimant to show that his medical problems were causally related to his work (recognizing that he had been diagnosed with PTSD in 1989 following the traumatic incident of July 1988) was the speculation that he might possibly be more susceptible to heat or carbon monoxide which could aggravate his PTSD. This was postulated by one of the claimant's health care providers. While there is little doubt that the claimant does truly suffers from PTSD, the evidence does not establish that it is causally connected to his employment on or prior to (date of injury) back to the effective date for the coverage of injuries under the 1989 Act--January 1, 1991. To establish an occupational disease, there must be probative evidence of a causal connection between the employment and the disease. INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ). The hearing officer, as the fact finder, determined the evidence did not factually establish this. The evidence in this case sufficiently supports the hearing officer's findings.

Claimant also complains about the hearing officer's finding of no disability and states this is apparently based upon claimant's ability to obtain and retain employment on and subsequent to (date of injury), at wages equivalent to what he had been earning. The complaint goes on to state that the "fact that (claimant) has continued to work after his injury does not preclude a finding of permanent and total incapacity." We note that disability under the 1989 Act is defined in economic terms as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." It does not relate to the "old law" concepts of "permanent and total incapacity." The evidence here was sufficient to support the hearing officer's conclusion of no disability and his finding that claimant had the ability to obtain and retain employment at wages equivalent to those he was earning prior to (date of injury).

Finding no error on the part of the hearing officer and finding sufficient evidence to

support his findings and conclusions, his decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Gary L. Kilgore
Appeals Judge