APPEAL NO. 93578

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 83 08-1.01 through 11.10 (Vernon Supp. 1993). On April 19, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding; subsequently, the hearing was reopened on June 18, 1993, to reconsider evidence that had been offered but not admitted at the April hearing. The hearing officer determined that appellant (claimant) did not show good cause why no claim was filed within one year of the incident (hydrofluoric acid inhalation on (date of injury)) and therefore is entitled to no benefits. Claimant asserts that since a doctor told him on March 14, 1991, that he had a bronchial infection, he had no basis for knowing that his problem was caused by hydrofluoric acid inhalation until another doctor told him that in November 1992. Respondent (carrier) replies that the evidence sufficiently supports the hearing officer.

DECISION

We affirm.

The issues were stated at the hearing as: (1) whether claimant had good cause for failing to file a claim not later than one year after the date of claimed injury on (date of injury), and (2) whether claimant has any disability as a result of the incident.

Article 8308-6.42(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested." The claimant appeals the decision of the hearing officer by asserting that the decision that claimant did not have good cause for failing to file a claim within one year was in error.

The Appeals Panel determines:

That the decision that the claimant failed without good cause to file his claim within one year is sufficiently supported by the evidence.

Claimant is a welder; on (date of injury), he was welding inside a large container that had contained hydrofluoric acid at a refinery while working for (employer). Smoke from the welding was not dissipated quickly from inside the vessel. Claimant vomited that day and that night he felt sick as with the flu. He testified that some other welders had similar symptoms. He worked at this task on succeeding days and left this job on March 8, 1991. (Claimant worked as an independent contract welder on various jobs including (contractor) between May and November, 1992.) On March 14, 1991, claimant saw (Dr. J) in (city), Texas. The history notes exposure to "fumes and hydrofluoric acid", a bloody cough, and muscle pain. Dr. J found claimant's lungs were clear. A chest x-ray was normal. His white count was low, but other blood and chemistry tests were normal. Dr. J prescribed "erythromycin for bronchitis" and concluded by noting that most of claimant's symptoms were probably of an infectious etiology, but "it was probably irritated by exposure."

Article 8308-5.01 (a) of the 1989 Act provides, in part, "(f)or an occupational disease, the claim must be filed not later than one year after the date on which the employee knew or should have known that the disease was related to the employment." Claimant filed a claim for injury due to the fume exposure of (date of injury), on August 24, 1992. The only medical document in the record reflecting care given between (date of injury) and August 24, 1992, is the above visit of March 14, 1991 to Dr. J.
(We note that the issue in regard to the claim questioned only good cause for failure to file within one year, not that the period of one year did not start to run until some time after the incident.)

Claimant saw (Dr. B) in November 1992, at the suggestion of the carrier. Dr. B relates a history given of the (date of injury), exposure. Claimant stated he had headaches, sinus, problems and dizziness. Dr. B found that his lungs were clear, but noted that his nasal membranes were swollen. The physical examination was generalized as "normal." Dr. B did note claimant's reference to a skin irritation, which claimant said had not been treated by a physician because he was "having trouble getting payment for
his workers' compensation case . . . ." Dr. B added that claimant added that he turned the matter in to OSHA which investigated and cited the company.

Four medical documents of claimant's were originally not admitted because of failure to show compliance with exchange requirements, but on the reopening of the hearing, all were admitted. One, was dated November 3, 1992, and was simply an off-work note by (Dr. M). The next was a January, 1993, statement of (Dr. G) which said that the first time he saw claimant was in January, 1993. He relates claimant's problems as post traumatic stress disorder, post traumatic headache syndrome, atypical chest pain, muscle pain, and joint pain. In his narrative, he also mentioned obstructive lung disease secondary to hydrofluoric acid inhalation. Next, was a February 1993, report of (Dr. A) which indicated that he first saw claimant in February 1993. He relates the history given by claimant, noting the normal x-ray. He states that "pulmonary functions show only very mild small airways disease . . . ." He did note "some injury to his tracheobronchial tree and his mucous membranes . . ." from the exposure. The fourth doctor's record was a psychologist's reference to payment for services pointing out that the treatment of claimant was for a "neurologic impairment; it was dated March 15, 1993. Claimant's last medical document had been admitted initially; it showed that claimant had a "chronic allergic conjunctivitis" that was probably related to the exposure; it prescribed reading glasses and said eye drops would be needed hereafter. This report was dated April 15, 1993. None of these reports indicated recent onset of symptoms or discussed a rationale in regard to why claimant delayed filing his claim.

Claimant acknowledged that there was a problem getting the company to pay to see a doctor other than one they selected. He did see (Dr. C) at a minor emergency clinic in August or September, 1991, for allergic problems and mucous. (No documents were

offered as to this visit.) Claimant said that the first doctor who told him that the chemical exposure caused his problems was Dr. M in November 1992, and Dr. M referred him to Dr. G. As shown above, the only document offered from Dr. M was a short, off-work note.

Claimant in testifying as to why he delayed filing a claim, said that he was not sure the exposure was the cause. He also said that when he filled out the accident report with the company, they assured him that they would take care of his medical bills, so he did not file sooner. (There was no issue questioning that the notice to employer, required within 30 days, was given.) He acknowledged though, that the company had refused to pay medical bills of a doctor he selected. He later added that he did not think he had to file a claim.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could believe that claimant consistently gave a history of the exposure of February 1991, to the doctors he saw from 1991 through 1993. The first doctor indicated that claimant's infectious problem was "probably irritated by exposure"--claimant had described his history of exposure to hydrofluoric acid fumes to that doctor. Little was said of the next visit to Dr. C, for allergic problems. Airway problems were noted by physicians who later saw claimant in 1993, but their severity was described either as mild or as not near the top of a list of impressions. The evidence indicates that claimant reported the incident to OSHA, and no evidence shows a significant difference in what he knew of the connection between the exposure and his problems when he made the claim in August 1992 from what he had known after seeing Dr. J in March, 1991. Claimant says he first was told medically of the connection in November 1992, which is over two months <u>after</u> he filed the claim. In addition, claimant's reference to the employer's offer to take care of his medical bills was put into question within the first month after the incident. Finally, claimant's statement that he did not know he had to file a claim does not provide good cause for not filing on time. *See* Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993.

The hearing officer, in determining whether good cause existed for failure to timely file a claim, had to consider whether claimant acted as a reasonably prudent person or as an ordinarily prudent person; this question is usually one of fact for the finder of fact -the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. The hearing officer found that claimant believed from the outset that his medical problems were caused by the chemical exposure in February 1991 and that claimant did not consider the symptoms from the exposure to be trivial.

While the above findings of fact regarding claimant's belief about causation and whether the symptoms were trivial were not specifically attacked on appeal, those findings are supported by sufficient evidence of record. The conclusion of law that indicates claimant did not show good cause for failing to file a claim within one year is supported by

the findings and the evidence. The absence of good cause for failure to timely file a claim means that there is no compensable claim and that makes the question of disability moot; nevertheless the record reflects that claimant worked a large portion of the time between the incident and November 1992.

The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Thomas A. Knapp
Appeals Judge