APPEAL NO. 93774

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 15, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the respondent (claimant) suffered a compensable injury on (date of injury); whether the appellant (carrier) timely contested compensability; and whether the claimant reached maximum medical improvement (MMI) in accordance with the report of a Texas Workers' Compensation Commission (Commission) appointed designated doctor. The hearing officer found that the claimant suffered an injury (chemical inhalation) in the course and scope of his employment and that the carrier waived its right to contest compensability for this injury. He referred the question of MMI to a Benefit Review Officer (BRO) to determine if (the) report meets the statutory and rule standards for a designated doctor's report and whether the parties should come to an agreement or to contest (the report). . .

The carrier appeals urging that it timely contested the compensability of the alleged injury based on the discovery of new evidence; that there was insufficient evidence to support a finding of compensable injury; and that there was no authority for the hearing officer to refer the issue of MMI back to a BRO for consideration. The claimant did not submit a response to this appeal.

DECISION

The decision of the hearing officer is affirmed in part and reversed and remanded in part.

The only evidence offered at the CCH (all of which was admitted) was the testimony of the claimant, the Benefit Review Conference (BRC) report, procedural requests in connection with setting a contested hearing, and the reports of (Dr. C), the Commission-selected designated doctor, and (Dr. S), a carrier-selected doctor. There are no reports directly from the claimant's treating doctors although information from these doctors is contained in other reports in evidence. This evidence discloses, and the hearing officer found, that the claimant worked as a "painter/sandblaster." On (date of injury), he was painting the inside of a tank when he suddenly felt feverish and had a shortness of breath. He claimed that he was using a faulty respirator in the tank that forced him to work without proper ventilation and a fresh source of outside air. He went that day to a clinic where, according to the claimant, a doctor diagnosed "chemical pneumonia" and referred him to (Dr. G). Shortly thereafter, Dr. G, claimant's treating physician, admitted the claimant to the hospital where he remained for about four weeks on antibiotics. According to the claimant and as found by the hearing officer, Dr. G diagnosed his condition as chemical pneumonia. About three or four days after his release, he was readmitted for a thoracotomy on November 25, 1991, to drain his right lung of fluid. He also tested positive for tuberculosis (TB) and antitubercular therapy was initiated. He remained in the hospital for another four weeks. He was again readmitted shortly after this second release for surgery to remove his gallbladder on December 24, 1991. Dr. C references another apparent hospitalization for unexplained fever.

On cross-examination, the claimant testified that he is a plaintiff in a class-action lawsuit against an asbestos manufacturer stemming from his employment when he was 17. (He is now 45.) He also stated he had been treated for hepatitis prior to his first hospitalization and has been living off and on in men's shelters. He also admitted that he saw Dr. S in December 1992, after missing two previously scheduled appointments, and that he was seen by Dr. C in March 1993. He is still under the care of Dr. G and regularly takes prescribed pain killers and muscle relaxers. With regard to the question of when he filed for workers' compensation benefits, the following exchange took place:

Q.And you were in the hospital for four weeks?

A.Well, altogether about 13 weeks.

Q.Okay. And the doctors suggested you file a workers' compensation claim?

A.No. The checks just started coming when I was in the hospital.

Q.The doctor went ahead and filed a workers' compensation claim for you?

A.I guess he did. I'm not sure who did.

* * * * *

Q.And had you (sic) the gallbladder surgery in December 1991?

A.December 24th.

* * * * *

Q.And that's when you were in the hospital when (Dr. G) sent in the worker's comp claim for you?

A.I think he's the one that did.

Q.And you just sort of received benefits?

A.I just started receiving the benefits.

On December 7, 1992, Dr. S, a professor of medicine at the College, examined the claimant. After recounting the claimant's history as presented by the claimant, reviewing "selected records" as mentioned in his report, and performing a physical examination, he concluded:

It is my impression that this gentleman developed a bacterial pneumonitis two

> months after his alleged exposure to spray paints. This pneumonitis was complicated with a para-pneumonic effusion. . . .
>
> It took him approximately 4 months to completely recover from his primary disease and surgical interventions, to the point where he is now recovered except for some persistent and likely post-surgical pleural discomfort. His relatively normal physiologic and radiographic profile, as well as my evaluation of his clinical status, suggests that he is not disabled and can return to work. I think it is extremely unlikely that his spray painting caused the pneumonia two months after the alleged exposure. Far more likely, he had a complicated bacterial pneumonia which took several months to resolve, and, was unrelated to his work exposure. Such pneumonias are uncommon, but do occur and are far more likely the cause of his problem than exposure to spray paint.

On March 1, 1993, Dr. C completed a Report of Medical Evaluation (TWCC-69), in which he certified that the claimant reached MMI on March 1, 1993, with a zero percent impairment rating (IR). He, too, presented a history of the claimant's condition as given by the claimant. At the time of the examination, the claimant still complained of chest pain and shortness of breath. Dr. C states that he was provided "only the summary reports of the various physicians and. . .none of the laboratory work nor any of the records of any of the hospitalizations." After performing a physical examination with chest x-rays, pulmonary function studies, and a review of material safety data sheets of the substances allegedly in use at the time of the injury, Dr. C concluded:

> . . .it is my opinion that this patient did sustain transient dysfunction as the result of poor industrial hygiene practices in the place of his employment. The effects of various inhaled solvents would be temporary and transitory, ordinarily expected to clear with a period of hours to a day or so.
>
> As regards the pleural effusion, there is no evidence connecting the pleural effusion and the pneumonia, in my opinion, to the occupation exposure.

WHETHER CARRIER TIMELY CONTROVERTED COMPENSABILITY OF CLAIMANT'S INJURY

The record before the Appeals Panel in this case is sparse. It contains no evidence of claimant's initial notice of injury and claim for compensation other than a reference to the fact that Dr. G allegedly filed the initial claim for medical and temporary income benefits (TIBS) or both sometime in November 1991 and payments began shortly thereafter. The carrier agreed at the CCH and in its brief on appeal that the claimant is alleging an injury to have occurred on (date of injury), and that "his treating physician filed a Notice of Injury after claimant had been hospitalized." After the claimant was finally released from the hospital,[1]

[1]The exact date of release is unclear from the record. However, claimant apparently was being treated on an

the carrier attempted at some point to obtain the consent of the claimant to have Dr. S examine him. The carrier further maintains that it did not schedule the claimant for an examination by Dr. S until April 22, 1992, a date more than six months after claimant's injury date and inception of his hospitalization. The claimant missed this appointment and two later ones[2] and was finally seen by Dr. S on December 7, 1992. The carrier contends that the claimant's failure to attend the scheduled appointments beginning on April 22, 1992, "made it impossible to completely and adequately investigate the (claimant's) claim."

Sections 409.021(c) and (d) provide that a carrier who does not contest compensability of an injury by the 60th day after receiving notice of the injury waives its right to contest compensability absent a finding of new evidence that "could not reasonably have been discovered earlier." The Appeals Panel has held that the 60 days provided for disputing compensability "should not begin to run until the carrier is `fairly informed"' of the name of the injured employee, identity of the employer, the appropriate date of the injury, and facts showing compensability. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)).

Both at the CCH and on appeal, the carrier concedes that it did not dispute compensability within the 60 day period but instead relies on the exception provided for discovery of evidence that could not have reasonably been discovered earlier, contained in Section 409.021(d).

The issue of whether evidence could have been reasonably discovered earlier is committed to the sound discretion of the hearing officer. Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992; Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. We will overturn a hearing officer's conclusion only if we deem it an abuse of discretion, that is if made without reference to any guiding standards or rules. *See* Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). Whether evidence could have been reasonably discovered earlier is a question of due diligence, that is, whether there was a lack of due diligence on the part of the carrier in not obtaining the evidence earlier. Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992.

In the case under consideration, the evidence discloses that a claim for compensation was presented sometime in November 1991, and benefits were paid shortly thereafter. The hearing officer found as a matter of fact that medical records relating to claimant's lung condition (pneumonia, biopsy, possible TB, and drainage) existed by November 30, 1992. Pursuant to Section 408.025, and applicable rules, disclosure of such medical records to the carrier may be compelled without authorization of the injured

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outpatient basis on January 14, 1992.

[2]The carrier, in its brief, asserts that the two later missed appointments were for May 29, 1993, and June 8, 1993. The dates should obviously be 1992.

employee. Nonetheless, the carrier contends on appeal that it had no basis to contest compensability until its own physician (Dr. S) examined the claimant. Furthermore, despite the fact that the carrier was paying medical benefits (including extensive hospitalization) beginning in November 1991, the carrier did not schedule an appointment for claimant to see Dr. S until April 22, 1992. In fact, there is no evidence in the record that the carrier did anything between November 1991 and April 1992 to investigate the claim based on a review of existing medical records. The evidence used by Dr. S to determine the cause of claimant's injuries may have been new to the carrier in late 1992, but, in our opinion, could have reasonably been discovered by the carrier within 60 days of November 30, 1991, by the exercise of due diligence in reviewing claimant's medical records. Under these circumstances the claimant's avoidance of appointments with Dr. S, if that is what happened, starting in April 1992, does not control the question of the existence of due diligence. Thus the hearing officer's conclusion that the carrier has not shown new evidence that could not have reasonably been discovered earlier and that therefore the carrier did not timely controvert compensability was not an abuse of discretion and is affirmed.

WHETHER CLAIMANT SUFFERED A COMPENSABLE INJURY

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ) and Martinez v. Travelers Insurance Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). An injury is defined in Section 401.011(26) as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." A disease not causally connected to employment is considered an "ordinary disease of life" and not compensable. *See* Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993. To be compensable, the claimant must link the alleged injury to an event at the work place and establish a causal relationship between the injury and the employment. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. Injury and resulting consequences may be proven by the testimony of the claimant alone, and medical evidence is not required to establish that a particular job-related activity caused the claimed injury, except in those cases where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Numerous decisions of the Appeals Panel have addressed the requirement to prove causation by expert medical evidence in cases involving allegations of injury from the inhalation of toxic or noxious fumes. *See*, e.g., Texas Workers' Compensation Commission Appeal No. 93744, *supra* (cancer and second-hand smoke); Texas Workers' Compensation Commission Appeal No. 92342, (asthma); Texas Workers' Compensation Commission Appeal No. 92187, *supra* (noxious fumes and vomiting, coughing, shortness of breath); Texas Workers' Compensation Commission Appeal No. 93138 (chemicals and nausea). We believe that the link between an incident of spray painting at work in a confined area without a source of fresh air and subsequent shortness of breath and dizziness can be established by the testimony of the claimant only. However, the connection, if any, between such inhalation and "chemical pneumonia," pleural effusion,

TB, and the need for a gallbladder removal does not involve matters within common experience such that compensability can be established through lay testimony alone.

The findings and conclusions of the hearing officer relevant to this issue are:

FINDINGS OF FACT

4.On (date of injury) [claimant] was painting the inside of a tank, wearing a respirator, when (he) inhaled bad air.

6.[Claimant] suffered an injury, however minor, on (date of injury). [Claimant's] doctor diagnosed [claimant] as having chemical pneumonia and hospitalized him for approximately four weeks.

CONCLUSIONS OF LAW

4.[Claimant] has shown by a preponderance of the evidence that he suffered chemical inhalation on (date of injury) in the course and scope of his employment. . .and the carrier is liable for benefits.

An issue at the CCH was whether the claimant suffered an injury in the course and scope of his employment. The claimant testified that he developed a fever and shortness of breath in the tank on (date of injury). He also asserted that, based on Dr. G's diagnosis, the inhalation caused chemical pneumonia, the later operation to drain his lungs, the subsequent need for removal of his gallbladder and his current pain. The claimant offered no expert medical evidence from Dr. G or other treating doctors and gave his own account of what Dr. G told him and what Dr. G considered was the cause of his condition. The only other evidence of what Dr. G may have concluded was contained in the reports of Drs. C and S. These reports contain descriptions of the treating physician's diagnoses without reference to a causal link between those diagnoses and the claimant's work activities. Drs. C and S, of course, do not support a causal link. From this state of the evidence, the hearing officer narrowly found that the claimant suffered "an injury," which he concluded was "chemical inhalation." For various reasons, the hearing officer "decline(d) to rule on whether claimant's pneumonia arose out of his alleged inhalation injury." In this case a compensable injury was claimed and proven, and it was further determined that the carrier did not timely contest the compensability of this injury; to allow the carrier to nonetheless challenge the existence of the injury at a CCH, even in the presence of convincing evidence that all the damage to the body was not caused by the injury, would render Section 409.021 meaningless. Under these circumstances, there would be nothing to waive. *See* Texas Workers' Compensation Commission Appeal No. 92278, decided August 10, 1992. There is sufficient evidence in the record to support the hearing officer's determination that there was a chemical inhalation injury. Because the compensability of the asserted injury was not timely controverted, the fact of the injury and its naturally resulting diseases was no longer subject to dispute. For this reason, the decision of the hearing officer that the claimant suffered a compensable injury on (date of injury), is affirmed.

WHETHER THE HEARING OFFICER PROPERLY REFERRED THE QUESTION OF MMI TO A BENEFIT REVIEW OFFICER

The determinations of the hearing officer relevant to this issue are:

FINDINGS OF FACT

12.The parties have not had the opportunity for a benefit review conference, with a [BRO] to determine if they can come to some sort of understanding between them regarding [Dr. C's] determination that [claimant] has reached maximum medical improvement with a 0% impairment, nor has the Commission had an opportunity to determine if it should accept [Dr. C's] report as the report of its designated doctor.

CONCLUSIONS OF LAW

6.Because the issue of whether the designated doctor's opinion is correct has not properly been the subject of a benefit review conference between the parties and clarification by the Commission, the issue whether [claimant] reached maximum medical improvement in accordance with the report of [Dr. C] is referred to the Benefit Review Officer for further Commission action to determine if [Dr. C's] report meets the statutory and rule standards for a designated doctor's report and whether the parties should come to an agreement or contest [Dr. C's] report under the proper statutory standards. . . .

The BRC antecedent to the CCH was held on January 6, 1993, some two months before Dr. C certified MMI and IR on a TWCC-21. Nonetheless, MMI was addressed at the BRC and remained unresolved. The BRO made no recommendation on this issue other than to comment that there was as of that time no certification of MMI. Section 410.151(b) and Rule 142.7 provide that issues not resolved or not raised at a BRC may, with the consent of the parties, be addressed at a CCH. Thus, the fact that a BRO did not attempt resolution of a disputed MMI is not controlling. The parties at the CCH clearly consented to raising this issue at the CCH. Under these circumstances and in the interests of administrative efficiency, the hearing officer should have made findings of fact and conclusions of law on the issue of MMI. His failure to do so was error. We reverse and remand with directions to the hearing office to address the issue whether the claimant reached MMI pursuant to Dr. C's certification. In reaching his decision, the hearing officer should submit all pertinent medical records to the designated doctor to assure that a thorough evaluation is conducted.

For the above reasons, we affirm the findings of the hearing officer that the carrier did not timely controvert compensability of the claimant's injuries and that the claimant sustained a compensable injury, but we reverse and remand for the development of appropriate evidence and determination of the MMI issue. Since reversal and remand

necessitate the issuance of a new decision and order by the hearing officer, a party, including, the carrier, who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge