APPEAL NO. 94309

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §§ 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 2, 1994. The issues at the hearing were whether the respondent (claimant) suffered a compensable injury in the nature of an occupational disease (bronchitis) on or about (date of Injury); whether he had disability from June 19, 1993, to the date of the hearing; and whether he elected benefits under his group health insurance, thereby barring recovery under the Texas Workers' Compensation Act. The hearing officer determined that the claimant's bronchitis was a compensable injury, that he had disability as claimed and that he was not barred from recovery under the Texas Workers' Compensation Act. The appellant (employer/carrier) appeals arguing that the evidence was insufficient to establish that the claimant suffered an occupational disease or that he had disability. It further contends that the claimant made a binding election of benefits under his group health plan which now prevent the claimant from pursuing a workers' compensation claim in this matter. The claimant submitted no matters in response to this appeal.

DECISION

The decision and order of the hearing officer are affirmed in part and reversed in part and a new decision rendered that the claimant did not suffer a compensable injury and that he did not have disability.

The claimant worked for approximately five years as a street department employee for the (Employer). His duties included painting and maintaining lines and traffic markings on city roads and spraying weed killer, insecticides and pesticides during certain times of the year. He testified that the chemicals he used included xylene, toluene, naphtha "and many other chemicals." He stated that when he sprayed weed killer, it often got all over him and that he had no proper training or protective equipment. He said that in the middle of (date of injury) he and a coworker, (Mr. P), were spraying pesticides in high winds and heavy rain. As a result of this spraying he said he became dizzy and nauseated; he developed diarrhea, headaches, and his lips went numb. He said he reported this incident to his supervisors and they knew the trouble the chemicals were causing him.[1] The claimant testified that his only contact with chemicals was at work and admitted smoking about a half pack of cigarettes a day. He admitted to prior lung problems in 1990 (pneumonia) which he also considered work related, but said he was told (though not by whom) not to say anything about it. He said he shared the job of mixing and spraying chemicals 50-50 with Mr. P. He has been off work since (date of injury), because, he says, of his bronchitis.

[1]The claimant tied this incident to (date of injury), because that was the day he said he rescued a distressed bird from a ditch he had just sprayed and transported it to a wildlife refuge where it apparently died. He also recounted an incident on or about (date of injury), where after a period of spraying, he said he coughed up blood. Although the date of the alleged injury in this case was on or about (date of injury), he testified that he sprayed almost everyday in June 1993.

The claimant also introduced a series of Material Safety Data Sheets (MSDSs) which listed the contents and safety measures for handling products called Ind-Sol 50, Ind-Sol 80, Ind-Sol 435, and Ind-Sol 90, which apparently are solvents and which the claimant contended he was spraying in June 1993. There was scant evidence about what these chemicals were used for or how they were used by the claimant. In any event, overdose associated with inhalation was described in the MSDSs as causing irritation of mucous membranes and the upper respiratory tract, including nosebleeds, sore throat and coughing. However, respiratory protective devices were not normally needed "except as conditions warrant." An MSDS was also introduced for aerosol paint containing 35 primary ingredients, including toluene and xylene and for methyl ethyl ketone and naphtha with the effects of overexposure to include nose, throat, and respiratory irritation, headaches, nausea and dizziness.

The claimant first visited Dr. L on (date of injury), complaining of headache, vomiting, diarrhea and a sore throat incurred "after spraying chemicals." After an upper GI and gallbladder examination on June 22, 1993, the claimant was hospitalized under the care of Dr. W from July 6, 1993, to July 14, 1993, because of worsening symptoms. Dr. W reported the symptoms on July 6, 1993, to be severe right flank and abdominal pains and that the claimant "claimed that he had been exposed to insecticide at work and probably he developed a myalgia." He reported the claimant's lungs as "[c]lear to auscultation and percussion." His admitting diagnosis was "[p]yelonephritis, rule out nephrolithiasis." A colonoscopy was performed on July 12, 1993, which revealed nonspecific colitis, and internal hemorrhoids. An esophagogastroduodenoscopy of the same date revealed an ulcer, esophagitis, a hiatal hernia and duodenitis. The mucosa of the proximal and middle esophagus was normal. The claimant's discharge diagnosis was severe gastroesophagitis, colitis, hemorrhoids, distal esophageal ulcer, hiatal hernia, duodenitis, and hematuria. No mention is made of bronchitis and a chest x-ray taken on July 16, 1993, showed a clear left lung and "[r]esolving pneumonic infiltrates right lung."

On August 3, 1993, Dr. W referred the claimant to Dr. J, for a pulmonary evaluation. Dr. J gave as the reason for referral "chemical inhalation." He noted that the claimant had been seen by him in July 1990 for exposure to pneumonia. Dr. J recorded that the claimant gave a history of smoking a half pack of cigarettes per day and said that he had some burning of the nasal passages as well as cough. Dr. J's initial impression was "[h]istory of exposure to chemical, history of chronic cough consistent with bronchitis." On August 9, 1993, he stated "[s]uspected chemical inhalation causing bronchitis" and sought approval for a "diagnostic bronchoscopy" which was never given. On October 25, 1993, Dr. J noted "chemical inhalation with bronchitis symptoms" and again expressed the desirability of a bronchoscopy. An x-ray on August 3, 1993, was interpreted by Dr. J to show lung fields clear, with no infiltrates or pleural fluid. A CAT scan of the claimant's chest on August 4, 1993, showed no significant abnormality, no central bronchial obstruction, and no pleural effusion. Other laboratory data was introduced with little or no explanation of its meaning other than references to some lung infection and other inconclusive tests.

Mr. P testified that he had observed the claimant spraying and painting in the past. He said they were given no training in the use of the various chemicals. He recalled that he was working with the claimant on (date of injury), but did not notice anything unusual about the claimant even though he said he was dizzy. He also testified that he saw the claimant spit up blood that day. He said that he (Mr. P) did 90% of the spraying and was doing the mixing in June 1993 and never got sick. He recalled that there was no strong smell of chemicals in the truck and that the claimant was a moderate to heavy smoker, meaning one cigarette after another for eight hours.

Mr. WI, the street department foreman and the claimant's direct supervisor confirmed that he assisted the claimant in taking the distressed bird to the shelter on June 15, 1993. He said he considered the claimant a heavy smoker, that is about a pack and a half a day. In his experience, he has not known of anyone who got sick from spraying and believes that in June 1993, Mr. P did most of the spraying and mixing of chemicals.

Mr. WR, the street superintendent testified that he knew of no one who got sick from the spraying of chemicals. He also considered the claimant to be a heavy smoker. He said that when the claimant tried to come back to work in August 1993, but without a doctor's release, the claimant told him he did not know what was causing his problems.

The carrier introduced into evidence a medical toxicology consultation prepared by Dr. C, a certified toxicologist. Dr. C did a records review of the claimant's medical condition. He noted that tests for the presence of heavy metals in the claimant's system were negative and arsenic was within normal limits. Having reviewed MSDSs of substances with which the claimant "may have" been involved, but not further precisely identified, he concluded in a report of December 20, 1993:

> While there exist limited circumstances under which any of these substances have potential for serious human toxicity (including Diquat, 2,4-dichlorophenoxyacetic acid, sodium cacodylate and light petroleum naphtha), the clinical course sustained by this patient is, in reasonable medical probability, not consistent with the expected course as the result of exposure to any of these substances, singly or in combination . . . it is my opinion, in reasonable medical probability, that his illness since mid 1993 is unrelated to any potential exposure to substances commonly used for weed and insect control and, in particular, substances for which Material Safety Data Sheets have been provided . . . .

He confirmed this opinion in a letter of January 27, 1994, in which he commented that certain pulmonary function testing done on the claimant while hospitalized are of unknown reliability and "in reasonable medical probability, that neither solvents nor their dissolved pesticides have the potential to induce the clinical responses manifest in this patient."

The carrier appeals the following determinations of the hearing officer:

FINDINGS OF FACT

4. The Claimant was diagnosed as having bronchitis, which the medical evidence indicates is due to chemical inhalation and is work-related.

5. As a result of his work-related injury of (date of injury), or thereabout [sic], the Claimant has been unable to obtain and retain employment at the preinjury wage from (date of injury) through the date of this hearing.

6. The Claimant initially chose to pay for his medical bills with his group health benefits. However, the Claimant did not make an informed choice when he chose to pay for his medical bills with his insurance.

CONCLUSIONS OF LAW

2. The Claimant's bronchitis is a result of the compensable injury sustained on or about (date of injury).

3. The Claimant did have disability from (date of injury) through the date of this hearing resulting from the injury sustained on (date of injury).

4. The Claimant did not elect to pursue a remedy when he chose to pay for his medical bills with his insurance. Therefore, the Claimant is not barred from recovery under the Texas Workers' Compensation Act.

We note at the outset of our discussion, that the only injury claimed to be caused by chemical inhalation that is the subject of this hearing is bronchitis. Though extensive medical evidence was introduced about the claimant's gastrointestinal problems, most of which he claims is a compensable injury, he would not agree to his medical condition other than bronchitis being considered by the hearing officer. Our review of compensability is thus limited to the issue of whether bronchitis, in this case, was a compensable occupational disease.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 410.011(26). Included in the definition of injury is an occupational disease which is further defined to mean "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body," but 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." Section 410.011(34). To establish an occupational disease, the

evidence must show a causal connection between the employment and the disease, that is, that the disease is inherent in the employment as opposed to employment generally or at least present in an increased degree. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Where as here, a causal connection is not a matter of general knowledge, the determination of compensability is ultimately a matter of whether the claimant can prove by reasonable medical probability that there is a causal connection between the claimed injury and the employment. Schaefer v. Texas Employers' Insurance Association, 612 S.W. 2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993. The fact that proof of causation is difficult does not relieve the claimant of the burden of proof. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. However, the claimant can give probative, non-expert testimony on the circumstances of the employment that are alleged to have caused the occupational disease. Texas Workers' Compensation Commission Appeal No. 93668, *supra*. Whether the necessary causation exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994.

The carrier contends, essentially, that the claimant failed to establish with reasonable medical probability that the chemicals he used at work caused his bronchitis. We agree. Although the claimant testified that his responsibilities included both road painting and application of herbicides and pesticides, his testimony and that of Mr. P concerning the circumstances of the chemical exposure that he claims caused his bronchitis in June 1993, involved only the application of herbicides and pesticides, not paint spraying. The alleged chemicals involved, as represented by the claimant, included industrial solvents and aerosol paint made up of numerous constituents, but most prominently (in his view) xylene and toluene. The claimant's evidence about these chemicals derives solely from MSDSs, procured by the claimant from the employer. There is no other evidence directly connecting or identifying any of these chemicals with those he used in June 1993, which allegedly caused his bronchitis. *Compare* Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992, where the claimant was found not to have established a compensable injury by simply alleging exposure to "noxious" fumes with Texas Workers' Compensation Commission Appeal No. 94188, decided March 25, 1994, where the claimant identified silicone as one of the offending chemicals, the employer admitted silicone was in use at the time of the injury, and the treating doctor listed silicone as one of the chemicals he considered in arriving at a medical conclusion that the silicone was a causative factor in the aggravation of an allergic rhinitis condition. Of the three doctors the claimant sought care from, neither Dr. L nor Dr. W, nor the records of the claimant's July 1993 hospitalization, diagnose bronchitis, but concentrate solely on gastrointestinal problems which are not the subject of this dispute. Only Dr. J diagnoses "chemical inhalation with bronchitis symptoms," but identifies no chemicals that he considers to be the cause of the bronchitis other than to say on August 3, 1993, "[r]ecently while working for (Employer). . . [claimant] was exposed to some type of a fume which later on he was told contained Ind-sol 80 which apparently is an industrial solvent." This amounts to no more than the claimant testifying that this chemical caused his bronchitis which, as non-expert opinion on a subject requiring expert evidence, carries

no probative value.[2] Dr. J's diagnosis also does not consider or note what impact, if any, the claimant's admitted heavy use of cigarettes had on his condition. Dr. C's report observes that the records of the claimant's health care show no specific etiology for his bronchitis. Having reviewed the record in this case, we believe that the claimant has not met his burden of proving that his bronchitis was an occupational disease. The decision of the hearing officer that the claimant's bronchitis is a result of a work-related chemical inhalation amounts to no more than speculation and is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. For this reason, we reverse and render a decision for the carrier that the claimant's bronchitis is not a compensable occupation injury. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In so doing, we emphasize that our decision today goes only to the issue of the compensability of the bronchitis and does not attempt to address the compensability of any other medical condition claimed to be caused by chemical exposure.

We also find error in the hearing officer's determination that the claimant had disability, as the 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). For this reason, we reverse and render a decision that the claimant does not have disability as a result of his bronchitis.

The carrier also appeals the decision of the hearing officer that the claimant did not make an informed choice to pursue his remedy under his group health insurance rather than under the 1989 Act. The question of election of remedies has been addressed a number of times by the Appeals Panel. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993. As that case indicates, election of remedies is a disfavored doctrine, and it will not be assumed absent direct evidence showing the choice of exclusive remedies is fully and clearly understood. The sequential assertion of group health benefits and workers' compensation benefits for medical care is generally not in itself considered such an inconsistency in remedies as to amount to a manifest injustice to a carrier. Appeal No. 93662, and cases cited therein. In the case under appeal, the claimant testified, and there was no contrary evidence on this point, that he sought group health insurance to pay for medical care because he needed the care and the workers' compensation carrier would not pay for it. The hearing officer found that under these circumstances the claimant did not make an effective election of remedies. Neither at the hearing nor in its appeal, has the carrier offered a reason why the hearing officer was wrong in this decision or how it thereby suffered an injustice. We believe that the testimony of the claimant constituted sufficient evidence for the hearing officer's findings of fact on this issue and we will not reverse it on appeal. Cain, supra; Pool, supra.

[2]Dr. J also wrote a note "To Whom it May Concern" on August 25, 1993, which says only: "This letter is to state that [claimant] has bronchitis due to chemical inhalation which is work related." Because this is no more than a conclusion without rationale or identified chemicals, we consider it of no more probative value than his diagnosis of August 3, 1993.

The decision and order of the hearing officer that the claimant did not elect to pursue a remedy when he chose to pay medical bills with his health insurance are affirmed. The decision and order of the hearing officer that the claimant suffered a compensable injury and has disability are reversed and a new decision is rendered that the claimant did not sustain a compensable injury and does not have disability.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neil l
Appeals Judge