APPEAL NO. 94350

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On January 26 and February 14, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues to be determined were whether the claimant, JL, who is the appellant, sustained a compensable injury through an occupational disease with a date of injury of (date of injury); the identity of the correct carrier for the claim; the date of injury; the date the claimant knew or should have known that the disease may be related to his employment; whether claimant had timely reported his injury within 30 days of this date, and, if not, whether he had good cause for the failure to do so; and whether the claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year, and, if not, whether he had good cause for his failure to do so. The alleged occupational disease was silicosis or other lung problems arising out of the course and scope of claimant's employment as a sandblaster with (employer). Two carriers were present in the hearing, (hereinafter Carrier #1), which carried workers' compensation insurance for the employer on the last date claimant was employed there (March 5, 1992), and (hereinafter Carrier #2), whose role was not explained in the record nor the subject of any findings of fact or stipulations, but whose response to the appeals identifies it as the insurance carrier for the employer during the period of time that a claim for compensation was filed.

The hearing officer determined that claimant had failed to prove that he had a "condition" arising out of the course and scope of his employment. Notwithstanding the conclusion of law that claimant did not have an occupational disease, the hearing officer determined that the "last injurious exposure" to the non-existent disease occurred at the time the claimant was employed by the employer and thus, Carrier #1 was the carrier responsible for the claim. The hearing officer further found that a date of injury could not be established because "claimant has no reason to believe" that he had a work-related condition; however, the hearing officer found that claimant filed timely reports of injury and a claim with the Commission, even though his time periods had not yet started to run.

Claimant has appealed the hearing officer's determination that claimant had not proven he had a disease, or that any condition was work-related, arguing the evidence he believes to be in his favor. Carrier #1 and Carrier #2 both respond that the decision of the hearing officer was correct on both matters.

Carrier #1 appeals the hearing officer's findings and conclusions that no date of injury can be established, that claimant timely reported his injury and timely filed a claim, and that Carrier #1 is the correct carrier. Carrier #2 responds that Carrier #1 is the correct carrier. Although not timely filed as an appeal, the response of Carrier #2 asks that a finding be made that claimant knew or should have known of his disease in July 1992 and failed to timely give notice of his injury to the employer. The claimant responds that the decision that Carrier #1 was the proper carrier should be upheld. The response to Carrier #1's point as to date of injury appears to be that a solid diagnosis was not made of the injury until summer of 1993, and respectfully submits that the proper date of injury should be found to be (date of injury).

DECISION

We affirm the decision of the hearing officer with respect to the lack of proof of an occupational disease arising in the course and scope of claimant's employment with the employer. We reverse the determination that Carrier #1 is the proper carrier and render a decision that because there is no proven injury, there is no "last injurious exposure" that can be determined and that neither carrier is liable. We agree that the hearing officer erred in his determination that no date of injury can be established or that timely notice was given, but find such error not to be reversible error in light of the ultimate finding that there is no compensable injury.

The claimant began to work for the employer in 1988, and continued to work until he resigned on March 5, 1992. His primary responsibility was to work as a sandblaster, doing "blasting" both on the inside and outside of tanks. He also performed some painting. For all jobs, claimant testified he wore masks. His sandblasting mask consisted of a full face mask and compressed air respirator. Claimant testified that he knew, as a matter of fact, that the respirator had filters in it. He further testified that when he was blasting inside an enclosed tank, the air unit would be located outside the enclosed area. Smaller paper masks were worn only for painting. The claimant stated that he followed company rules and always wore his masks, a fact corroborated in the testimony of his former co-worker (Mr. M). Claimant was asked if the masks in question would keep all of the dust out of his nose and mouth, and he answered, "well, yes." He was then asked again if he never had dust in his mouth or nose and then indicated he would have a "little bit."

Claimant said that he smoked for six years, approximately eight cigarettes a day, until he quit in 1993. Claimant said that in May 1992, he saw a doctor in (country) because of cold symptoms, had a checkup, and had a chest x-ray taken at that time which was normal.

Claimant said that he hired his attorney (the date was not clearly established) to assist him when "we" could not get unemployment benefits, and when the employer asked employees to sign an "application" saying that they were not ill, and "we" did not want to sign it. The reference to "we" was perhaps later explained by Mr. M, the former co-worker, who indicated that several employees resigned from the employer when confronted with this application and went as a group to see claimant's attorney.

The claimant said that around July 1992, he had been experiencing some back pain and shortness of breath. He said that his attorney suggested that he go see (Dr. W). However, claimant testified he hadn't told his attorney he was feeling ill. Further, the claimant asserted that there was no discussion with his attorney about a possibility that he could have an occupationally-related disease. According to the claimant's testimony, he was simply given Dr. W's name by his attorney, whose office then set up an appointment for July 16, 1992, with no discussion at all about the reason or need for the appointment.

Dr. W's records on claimant included a letter from claimant's attorney dated July 2, 1992, which stated that claimant would be seeing him on July 16th, and described him as "one of the recent silicosis cases." The letter further stated, in pertinent part, a brief description of claimant's occupation and:

He has experienced similar symptoms as my other clients who suffer from silicosis or mixed-dust pneumoconiosis . . . . I have not filed a notice of occupational disease with the Texas Compensation Commission [sic]. I believe that prudence dictates that we have field-related experts' opinion of [claimant]'s condition, prior to filing this notice. In the event you diagnose [claimant]'s condition as being job related, please provide me with a narrative report. This will enable us to help [claimant] file a notice of occupational disease . . . .

The letter concludes that if Dr. W finds no evidence of occupational disease, that he should send the attorney his charges for the consultation.

Claimant said that Dr. W told him at this first visit to avoid working in a dusty environment. He acknowledged that Dr. W told him he would be running various tests. It was claimant's testimony, however, that Dr. W never, in 1992, discussed with him the reason for such tests (although he stated he understood there was some test about the lungs) or that he could have a lung problem. He said that he took an interpreter with him to Dr. W's office, but that the interpreter didn't do very well. Claimant returned to Dr. W's office on July 30, 1992, but essentially did not recall what he and Dr. W talked about.

Claimant said he returned eleven months later, in June 1993, to Dr. W. At that time, he was not having any symptoms, including shortness of breath. Claimant said he had returned to work for a pipe inspecting company, which did not involve sandblasting. On June 14, 1993, claimant had a "gallium scan," which he was told was normal. When asked if at that visit Dr. W told him that he wanted claimant to have another pulmonary function test (a test he had previously been given) for the reason that he thought there might be something at claimant's work that was related to some problems he might be having with his lungs, claimant responded "I believe so." However, claimant stated that he was definitely told by Dr. W that he had a lung disease on (date of injury), which was confirmed September 8, 1993, when he went to the office of his attorney and was shown a letter to this effect from Dr. W. On that date, claimant completed a notice to his employer and a claim for compensation. There was no dispute at the hearing that notice was received by the employer, and a claim for compensation also filed, on September 8, 1993. As of the date of the hearing, claimant was working and experiencing no symptoms.

Mr. M testified that he had been diagnosed with silicosis and had a lung biopsy. Prior to leaving the employer in March 1992, he had begun to experience fatigue and shortness of breath, which he still had the day of the hearing, in addition to back pain and weakness in his legs.

Dr. W testified at the hearing. On January 14, 1993, he had also answered a deposition on written questions. Although Dr. W said he was not a specialist in pulmonary disease (but was a specialist in internal medicine and allergy), he had studied and presented a paper on silicosis in West Texas. He treated several clients of claimant's attorney relating to lung diseases. Dr. W testified he knew a little Spanish, and that he had trouble communicating with claimant through his interpreter during the appointments in July 1992.

Asked whether he discussed his suspicions with claimant at any time prior to (month year), Dr. W testified that he did not, and he recanted his deposition testimony in which he twice said he told claimant on his first visit that he had silicosis. Dr. W stated he had not thoroughly reviewed the file in his earlier testimony and that he was fatigued and under some stress. Dr. W stated he only counselled claimant to avoid the dusty occupations, and told him he would write his attorney. Dr. W testified that his professional obligations did "not necessarily" involve communication with his patient.

Silicosis was described as the effects of respirable silica particles on the lungs and its immune system, a progressive condition that did not depend upon constant exposure in order to develop but could occur in persons who had been exposed to respirable silica at an earlier point in time. Dr. W agreed that not everyone who was exposed would develop silicosis. Dr. W described one test that he believed as indicative of lung function due to silicosis would be the pulmonary function test, which measured the extent of exchange of oxygen between the lungs and blood (diffusion capacity); an abnormal score would result from a thickening of the exchange membrane due to scarring resulting from the course of silicosis. Dr. W noted that three tests administered to claimant during the period of slightly over a year showed a decline from borderline normal into the abnormal range. Dr. W acknowledged that other conditions and diseases could cause abnormal readings (including tuberculosis). Dr. W said that claimant's primary symptom, shortness of breath (dyspnea) could be caused by tuberculosis. He had not ordered a tuberculosis skin test for claimant. Dr. W testified that x-rays would likely detect only advanced silicosis. Claimant had normal x-rays until January 13, 1994, when he had an x-ray that Dr. W felt showed abnormalities although the radiologist did not.

Dr. W stated that the definitive diagnostic test for silicosis was an open lung biopsy, which he had recommended several times for claimant. This had been denied by the carrier. A letter from Dr. W to claimant's attorney dated October 27, 1992, stated that Dr. W understood claimant to be a sandblaster who "would only occasionally" wear a mask. This letter stated that claimant's history and mild decrease in diffusion capacity with mild bronchospasm were "not inconsistent with a diagnosis of pneumoconiosis with occupational asthma." The lung biopsy was urged in order to make a definitive diagnosis.

The highlights of other letters from Dr. W are:

- April 28, 1993, to claimant: Informs claimant he can no longer be his doctor; tells him he has a "serious medical problem" requiring follow-up.

- (date of injury), to attorney: Normal gallium scan, differential diagnosis includes inflammatory or infectious disease, pneumoconiosis, and neoplasm.

- October 8, 1993, to adjuster. Notes that diagnosis was dyspnea (shortness of breath) of unclear etiology. Negative gallium scan makes silicosis less probable. Urges lung biopsy.

Dr. W stated his opinion that according to reasonable medical probability claimant had silicosis, based upon his experience treating over 90 patients with various forms of the disease, claimant's declining diffusion capacity, and an abnormal chest x-ray of January 13, 1994.

Finally, the carrier submitted an exhibit indicating that it made a request for a medical examination order November 16, 1993, to include a lung biopsy among several tests. There is ancillary correspondence from a nurse (apparently acting on behalf of the adjuster) to claimant's attorney confirming her understanding that they refused to release claimant's x-rays to the carrier. A notation on the order indicated that it was refused by the commission.

CLAIMANT'S APPEAL/WHETHER THE HEARING OFFICER ERRED BY FINDING NO INJURY/AND NO RELATIONSHIP TO WORK

Clearly, there are conflicts in the medical and lay evidence presented on the injury issue. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Exposure to silica through inhalation, and the resultant effect on the body, are matters beyond common experience, and medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1990); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 93774, decided October 19, 1993.

In this case, the hearing officer may have believed that the possibility of other conditions was equal to or greater than claimant's contention of silicosis. He may have felt that Dr. W assumed that claimant only occasionally wore a mask, while claimant and Mr. M both testified he always wore it. The hearing officer's determination that no compensable injury was proven is sufficiently supported by the evidence.

CARRIER #1's APPEAL/WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT IT WAS THE PROPER CARRIER

We believe it was error for the hearing officer, having determined that no injury occurred, to identify a "last injurious exposure." Apparently, the hearing officer sought to apply Section 406.031(b) which would make the employer on the date of the "last injurious exposure" the employer for purposes of workers' compensation, and its carrier the liable carrier. Assuming for purposes of argument that the claimant might develop an occupational lung disease in the future, the "last injurious exposure" would have to be determined according to his employment and medical condition as determined then, not now. The hearing officer's order with respect to Carrier #1 is phrased contingently, and is in essence an advisory opinion on a possible future claim when all the facts are not yet known. We accordingly reverse the determination and order of the hearing officer insofar as it holds Carrier #1 accountable for benefits in the event claimant develops silicosis and render a decision that neither carrier is liable for benefits on the current claim.

CARRIER #1's APPEAL/WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT A DATE OF INJURY COULD NOT BE ESTABLISHED, AND THAT NOTICE AND CLAIM WERE MADE TIMELY

For purposes of the 1989 Act, the date of injury for an occupational disease is the "date on which the employee knew or should have known that the disease may be related to the employment." Section 408.007. Notice to an employer must be given not later than the 30th day "after" the date the employee "knew or should have known that the injury may be related to the employment" (emphasis added) in accordance with Section 409.001(a)(2); a claim must be filed not later than a year after the same date. Section 409.003(2).

The hearing officer's determination that a date of injury could not be found in light of his determination that there was no injury proven is understandable; however, for purposes of analyzing the issues relating to timeliness of notice and claim, we believe it was error for the hearing officer to determine that claimant did not, even as of the date of the hearing, have the requisite standard of "knowledge" of an occupational disease, but nevertheless gave timely notice. The time for notice begins to run when a reasonably prudent person would have recognized the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Forth Worth 1980, writ ref'd n.r.e.) The evidence is replete with numerous dates that a trier of fact could determine that claimant "knew or should have known" that he had a disease that "may" be related to his employment, not the least of which would be (date of injury), the date urged by the claimant.

There is much evidence suggesting dates prior to (date of injury), when the claimant "should have known," including the date his attorney appears to have appreciated the seriousness, the nature, and the work-relatedness of the asserted occupational disease, as reflected in his letter; the date claimant was advised to stay away from dusty occupations; or the April 1993 letter from Dr. W advising him that he had a serious medical condition. If the hearing officer had determined that notice or claim was not made timely, he would have had to consider some of the same facts to determine if there was "good cause."

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact; National Union Fire Insurance Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). For this reason we decline to sift through the evidence to determine a date when the claimant knew, or should have known, that he had a disease that "may" be related to employment. While the hearing officer erred, his findings and conclusions are not reversible in light of our affirmance of his decision and order that claimant did not sustain an occupational disease. We reverse the part of the decision that found that Carrier #1 would be the proper carrier to pay benefits, and render a decision that neither carrier is liable for benefits on the current claim.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge