APPEAL NO. 94894

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 May 26, 1994. He (hearing officer) determined that the respondent (claimant) sustained a compensable injury on (date of injury), in the form of an occupational disease (silicosis); that (date of injury), was the date of injury for notice purposes; that the claimant timely reported the injury; and that the claimant had disability from October 18, 1993, through the date of the hearing. The appellant (carrier) appeals arguing that the medical evidence failed to establish that the claimant has silicosis or a causal connection between the alleged disease and the employment; that the evidence established an earlier date of injury in June 1993 which would render the claimant's report of this injury untimely with no good cause for the untimely reporting; and that the evidence does not establish that the silicosis caused or contributed to disability. The respondent replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The claimant testified that he worked as a sandblaster since 1979 for five different employers. He has worked in this capacity for (employer), since 1990, until October 18, 1993, his last date of employment when he contends that his disability began. He described his duties as involving sandblasting both the inside and outside of metal tanks. He said that his employer in the mid-1980s provided masks, but since there was no fresh air supply into the masks, they were of little value. His last two employers provided air fed masks, but according to his testimony, these never worked properly because they were ill-fitting and had leaks and tears. He also stated that until three months ago when he quit, he had been smoking a half pack of cigarettes a day for 25 to 35 years.

The claimant testified through an interpreter and had much difficulty in independently remembering the sequence of events that led to his belief that he had silicosis. He did agree, however, that the medical documentation in evidence accurately reflected what happened. It was his testimony that in June 1993 he and a number of other sandblasters who worked for the employer were experiencing shortness of breath. Another employee suggested that he seek medical treatment for his problem. Apparently at this point, he went to his attorney (who represented him at the contested case hearing) and arrangements were made for x-rays and an evaluation by Dr. G. The claimant said that Dr. G never discussed the results of the x-rays with him. Apparently, his attorney sent the x-rays to Dr. F in (city) for review and consultation. By letter of (date of injury), to a consulting attorney for the claimant, Dr. F reported the results of his review of the radiographs. He concluded the radiographs were abnormal and, though of poor quality, "are certainly compatible with complicated silicosis although one cannot exclude a tumor or active tuberculosis in the upper lung zones." It was the claimant's contention that this

letter was the first time he was aware he might have silicosis. Though unclear whether the claimant ever saw this letter, his attorney used it as the basis for written notification to the employer by letter of October 22, 1993, of his claimed work related occupational disease, specifically silicosis. The Employer's First Report of Injury or Illness (TWCC-1) indicates that a sandblasting injury was reported on October 25, 1993.

The pertinent Findings of Fact and Conclusions of Law of the hearing officer are:

FINDINGS OF FACT

4. Claimant has suffered an occupational disease in the form of silicosis with last injurious exposure occurring on (date).

5. Claimant first had knowledge that his breathing problems may be related to his employment when his x-rays taken in June 1993, were reviewed by Dr. F . . . [who] issued a report on (date of injury), stating claimant's x-rays were compatible with complicated silicosis.

6. Claimant gave notice of his occupational disease to employer on October 22, 1993, within thirty days of (date of injury).

7. Claimant is unable to obtain or retain employment at wages equivalent to his preinjury wage due to his current level of lung function.

8. Claimant's occupational disease, silicosis, is a producing cause of Claimant's inability to obtain or retain employment at wages commensurate to his preinjury wage.

CONCLUSIONS OF LAW

2. Claimant has suffered an occupational disease, in the form of silicosis, which constitutes a compensable injury for which medical and income benefits are payable.

3. Claimant's date of injury for purposes of giving notice under the Texas Workers' Compensation Act was (date of injury).

4. Claimant's notice to employer of his occupational disease was timely.

5. Claimant's disability started October 18, 1993, and had not ended as of the date of the Benefit Contested Case Hearing.

The carrier requests review of these Findings of Fact and Conclusions of Law on all the issues presented.

The carrier contends on appeal that the claimant failed to establish that he had silicosis, and that the medical records only indicate the possibility of silicosis along with several other possible non-compensable conditions. It submits that further testing was required to establish a diagnosis of what his lung condition was; that the biopsy did not note the development of "silicotic nodules," but noted the presence of asbestos fibers; and that such nodules must be present to confirm the disease. It also contends that even if silicosis is somehow confirmable "merely from the presence of silica in the lungs," the silica in his lungs "has not been traced to the sandblasting operation for this employer."

As a prelude to our review of the medical evidence in this case, we observe first that the claimant in a worker's 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). This burden is in no way lessened by the complexities inherent in such proof. Second, we note that the only medical evidence introduced in this case was that furnished by the claimant and the carrier's contentions about the testing required to establish the presence of silicosis are not supported in any medical evidence submitted to the hearing officer. The medical evidence in this case discloses that Dr. G found only what appeared to him to be a chronic obstructive pulmonary disease, with numerous possible causes. As a result, the claimant through his attorney referred himself to Dr. F for a review of the x-rays, as noted above, and for a personal examination on November 1,1993. Dr. F, a university medical school professor, in his report of November 1, 1993, recounts the claimant's symptoms and history and finds compatibility with silicosis. He notes a "significant impairment of lung function," and concludes that claimant "clearly has complicated silicosis." A lung biopsy was performed by Dr. A, a professor of pathology at a university hospital, in April 1994. He found "remarkably abnormal lung tissue," and the presence of asbestos in some of the sections analyzed. He clearly noted: "[n]o silicotic nodules were observed." He thought the claimant's condition is "better termed . . . a mixed dust pneumoconiosis . . . . "[1] Dr. A finds from his review that the claimant has documented pneumoconiosis and the "silica burden [in the lungs] is in the range seen in cases of silicosis and one would expect that the fibrosis would progress eventually forming silicotic nodules, not yet evident at the stage

[1]Pneumoconiosis is defined in Dorland's Illustrated Medical Dictionary, 27th edition, 1988, as "a condition characterized by permanent deposition of substantial amounts of particulate matter in the lungs, usually of occupational or environmental origin, and by the tissue reaction to its presence. It may range from relatively harmless forms of anthracosis or siderosis to the destructive fibrosis of silicosis."

of his disease at the time of biopsy." Dr. W, a referral doctor from Dr. F, also examined the claimant. In a report of January 13, 1994, done prior to Dr. A's report, Dr. W concluded based primarily on the x-rays that claimant had accelerated, complicated silicosis with mild airway obstruction, but "no restriction yet seen on pulmonary function tests." A high resolution CT scan and gallium scan were noted as pending.[2] He mentioned possible other diagnoses, including tuberculosis, tuberculosilicosis, coccidiomycosis, histoplasmosis, collagen vascular disease and cancer. It was his opinion that a determination of the silica burden and the presence or absence of other heavy metals "may be of importance in determining the patient's ultimate prognosis." (Emphasis added.) After Dr. W reviewed Dr. A's conclusions about the silica loading in claimant's lungs, he was of the opinion that there was "an extremely high concentration of silica particles" in the claimant's lungs together with other metals that would be consistent with the patient's occupation of sandblasting tanks, pipes as well as manifolds."

The carrier urges that in the absence of evidence of nodule formation and testing that affirmatively excludes all other potential alternative diagnoses mentioned in the medical records, silicosis has not been established. It offers no authority for this proposition. In any case, a fair reading of the medical evidence is that silicosis is a progressive disease that ultimately could result in nodule formation. None of this evidence expressly withheld a diagnosis pending evidence of lung nodules. Whether the claimant has silicosis is a question of fact for the hearing officer to decide. As the finder of fact, the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We conclude that the reports of Drs. F, W, and A reflect their opinions that the claimant has silicosis and that this diagnosis is not provisional or dependent on further testing or exclusions of other possibilities. These reports provided a sufficient evidentiary basis for the hearing officer's determination that the claimant suffered from the occupational disease of silicosis. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, a standard not met in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The carrier also contends that, even were one to assume that the claimant has silicosis, he still did not establish the necessary causal connection between that condition and his particular employment with (employer) In support of its position it cites Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980). In Texas Workers'

[2]The results of these tests were not introduced into evidence.

Compensation Commission Appeal No. 92604, decided December 30, 1992, the appeals panel discussed extensively "the principles concerning proof of causation of occupational diseases" which need not be repeated here. In that case, we noted that what is required is evidence of probative force of the causal connection between the employment and the claimed occupational disease, and that such proof does not always require expert scientific testimony. The claimant's testimony can be probative evidence of causation in some cases based on common sense or the general experience of mankind. In the instant case, as in Appeal No. 92604, the claimant testified about the nature of his employment as a sandblaster, the presence of particulate and silica (sand) and the availability but general ineffectiveness of protective masks. He recounted that though he had been in this occupation for almost 15 years, the last four were with the employer. The carrier did not introduce evidence to contradict the claimant's account about the conditions of his employment and his exposure to silica particles and other airborne abrasives released in the sandblasting process while working for (employer). Given the length of time the claimant worked for this employer before symptoms developed and the nature of the sandblasting activities as described by the claimant, we believe that his testimony supported by expert evidence of significant amounts of silica in his lungs, provided sufficient evidence to support the hearing officer's determination that the claimant's current employment was the cause of his silicosis. We distinguish Schaefer, *supra*, in this case as we did in Appeal No. 92604, on the basis that in Schaefer there was no evidence at all that the claimed cause of the occupational disease (certain bacteria) was present at the workplace. Based on our standard of review as set out above, we find no basis for disturbing this determination of the hearing officer that claimant's silicosis was an occupational disease.

The carrier next contends in its appeal that the hearing officer erred in finding the date of injury was (date of injury), because "[t]he evidence in this case makes it quite clear that the employee either knew or should have known that his disease may be related to the employment prior to June, 1993." It suggests that the claimant knew or should have known he had an occupational disease when he experienced severe shortness of breath on the job and discussed with a co-employee about being examined by a doctor.

Section 409.001(a) provides that, in the case of an occupational disease, including a repetitive trauma injury, an employee must notify the employer no later that 30 days after the employee "knew or should have known that the injury may be related to the employment." Absent a finding of good cause for failure to timely notify the employer, lack of timely notice relieves the carrier of liability. Section 409.002. The Appeals Panel has pointed out that the 30 days for giving notice of an injury begins to run from that point when a reasonable person would recognize the nature and seriousness of the injury and that it may be work related. Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992. Waiting for "hard evidence" of an injury and its work-

relatedness may cause the notice to be untimely. *See* Texas Workers' Compensation Commission Appeal No. 94521, decided June 13, 1994. In this case, the evidence is uncontested that the claimant realized in June 1993 he was experiencing breathing problems and that this was not uncommon among his fellow employees. In this same month, he engaged a lawyer who forthwith sent the claimant to Dr. G for evaluation. The carrier makes much of the fact that the claimant in June went first to a lawyer and not a doctor as compelling evidence that the claimant was in fact then seeking workers' compensation benefits and therefore must have known he had a compensable injury. While this argument is not without appeal, it is ultimately premised on the contention that any speculation about the nature and cause of a possibly compensable occupational disease triggers the notice requirement. It also ignores the fact that Dr. G himself was unwilling to assign the cause of claimant's condition to silicosis even after he read the x-rays. More importantly, we observed in Texas Workers' Compensation Commission Appeal No. 94200, decided April 4, 1994, that the manifestation of an occupational disease "could occur over a period of time" and for this reason there must be some flexibility in determining that date. We also quoted approvingly from Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848 (Tex. 1980), on this subject:

> Uncertainty in many complex areas of medicine and law is more the rule that the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them.

The date the statutory notice period begins to run is a factual determination. Appeal No. 94200, *supra*. The hearing officer determined this to be (date of injury), after the claimant's x-rays were interpreted by Dr. F. Whether a reasonable person would be expected to have made the connection between the injury and the employment earlier was for the hearing officer to decide. We conclude that the decision of the hearing officer on this issue is supported by sufficient evidence and, under these circumstances, we will not substitute our judgment for that of the hearing officer. Because notice of the injury was given within 30 days of (date of injury), it was timely.

Finally, the carrier contends that the hearing officer erred in finding disability from October 18, 1993, through the date of the hearing. It contends that "all the purportedly disabling conditions the claimant has, have been related to other conditions not related to the employment" and that there is "no medical evidence that silicosis has caused even one percent of the alleged disabling conditions." Though not articulated as such at the hearing or now on appeal, the argument of the carrier appears to be that the sole cause of claimant's disability was something other that his job-related silicosis. If so the carrier had the burden of proof on this issue. *See* Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993. Regardless, the claimant testified that his

breathing difficulties prevented him from working after October 18, 1993. Dr. W in his report of April 28, 1994, notes that a functional capacity evaluation found the claimant "severely impaired" with "marked decreased strength and endurance." He considers the claimant "completely impaired" as a result of his "severe pneumoconiosis." Disability is defined in the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether disability exists is a question of fact for the hearing officer to decide, and the Appeals Panel has held that a finding of disability may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In light of Dr. W's conclusions about the claimant's work limitations, even though stated in terms of impairment rather that disability, we must consider the carrier's argument that there is no medical evidence that shows the claimant's silicosis has any role in the claimant's disability somewhat unsupported. In any event, the carrier refers only generally to the "purportedly disabling conditions" of the claimant as not directly related to his employment without identifying what conditions it is referring to. To find disability, a compensable injury need only be a producing cause of the disability, not necessarily the exclusive cause. *See* Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993. We find that the testimony of the claimant that he was unable to work because of his silicosis, supported at least in part by the opinion of Dr. W, provided sufficient evidence to support the decision of the hearing officer that the claimant had disability and we will not disturb that decision.

There being sufficient evidence to support the decision and order of the hearing officer and no legal error, we affirm.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Gary L. Kilgore
Appeals Judge