

APPEAL NUMBER 94972  
FILED SEPTEMBER 8, 1994

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 June 23, 1994, in (City), Texas, with (hearing officer) presiding as hearing officer. The only issue at the hearing was whether the respondent (claimant) sustained a compensable injury in the form of an occupational disease (organic brain syndrome) on \_\_\_\_\_. The hearing officer determined that the claimant failed to meet his burden of proof on this issue and found that his "brain and head problems" were not the result of any injury in the course and scope of employment and that, for this reason, the claimant was not entitled to benefits under the 1989 Act. The claimant asserts on appeal that he did meet his burden of proof and that the hearing officer "ignored compelling medical evidence in favor of the claimant." He also contends that Dr. GR, the forensic psychiatrist relied on by the respondent (carrier) was racially biased against the claimant. The carrier replies that the decision of the hearing officer is supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The claimant had been employed by (employer) for approximately five years working primarily as a carpenter. He testified that in February 1993, he was assigned to assemble fiberglass pipes. He said the job included use of a glue and a solvent. According to his testimony, these chemicals smelled from the first day he worked on this job. He said he was not given any protective clothing or masks to wear, but he did buy his own mask and used it for two or three days. Although he displayed a very limited memory in his testimony, he said in early February he became dizzy and found it difficult to breathe.

He said his health became progressively worse over the next three months until he was no longer able to work and felt like he was living "in a dream." He admitted he worked in a large building with wide doors. He denied, or does not remember, previous health problems before he began working with the fiberglass or that he was told he was being assigned a different job his last day at work.

The claimant's wife testified that her husband came home "acting strange" the first day he was working with the "chemicals." She described him as disoriented and spitting up mucous. After the third day, she said he came home staggering and had a seizure that night. He became lethargic and non-communicative. The claimant nonetheless continued working for another three months. She said her husband first went to see Dr. C, a neurologist, on May 19, 1993. Since Dr. C could find no underlying disease that might explain the claimant's condition, she said he referred the claimant to Dr. J of the (health center). She reported Dr. J as saying the claimant had brain damage as a result of lack of blood flow to the right side of the brain and may never be able to function correctly again. Because trimethylbenzene was found in the claimant's blood, she attributes his problems to this chemical. She admitted that the claimant also took some herbal medicines which

he acquired in Mexico and are otherwise unidentified, but which seemed to help somewhat.

Dr. C admitted the claimant to a hospital on \_\_\_\_\_, for a "thorough imaging workup and electroencephalographic testing" to rule out toxic organic brain syndrome and any seizure disorder. Brain MRIs, an electroencephalogram and 24 hour electroencephalogram monitoring as well as blood testing and urinalysis were all normal. The claimant was discharged from the hospital on May 24, 1993, with the comment by Dr. C that the claimant was "markedly depressed" but neurologically normal except for his memory problems which Dr. C considered "more subjective than objective." He diagnosed "probable toxic organic brain syndrome" and advised the claimant not to return to work or to drive. His treatment plan was to refer the claimant to a toxicologist for further evaluation. Other blood tests on June 8, 1993, to determine the presence of volatile aromatic and chlorinated hydrocarbons and other chemicals were all normal, that is, no concentrations were found above background or detection levels with the exception of trimethylbenzenes which were detected at 1.8 ng/ml measured against the laboratory's "population average" of less than 1.0 ng/ml. A consulting neuropsychological report done by Dr. H, a clinical psychologist, on August 9, 1993, concluded that the claimant had "cerebral dysfunction, consistent with toxic exposure" and "organic personality syndrome with depression."

On June 7, 1993, Dr. J saw the claimant and completed his evaluation on August 31, 1993. He recorded the claimant's history and described Dr. C's "final impression" as toxic organic brain syndrome. He described the claimant as working with "solvents" which included acetone. The claimant underwent a SPECT scan<sup>1</sup> which Dr. J concluded showed:

temporally lobe abnormalities as well as neurotoxic-type pattern which is compatible with solvent-type exposure. Chemistry profile and CBC [complete blood count] were within normal limits as was the urinalysis. Chemical analysis of the blood revealed Trimethylbenzene present at 1.8 ppb, which is unusual except in an industrial type exposure. Pulmonary function study revealed moderate to severe large airway obstruction.

Dr. J's impression was that the claimant suffered from toxic encephalopathy secondary to chemical exposure including acetone, methyl ethyl-ketone and similar solvents. He described these chemicals as "very toxic and volatile," and, based on Dr. C's testing, ruled

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<sup>1</sup>Single Photon Emission Computed Tomography Analysis. Other published Appeal Panels decisions which reference the SPECT test include Texas Workers' Compensation Commission Appeal No. 94524, decided June 13, 1994; Texas Workers' Compensation Commission Appeal No. 931069, decided January 7, 1994, and Texas Workers' Compensation Commission Appeal No. 92342, decided September 4, 1992.

out other underlying disease processes. He considered the claimant totally disabled and recommended "deep heat sauna therapy to try to mobilize the chemicals from the fat stores . . . over a 6 to 8 week period of time on a daily basis."

The claimant also introduced into evidence a statement of Dr. S, his family physician, which advised that he never exhibited any symptoms of neurological deficit. On May 13, 1994, Dr. G, a psychologist, completed a neuropsychological evaluation of the claimant at Dr. J's request. Dr. G concluded that the claimant currently functions in the borderline range of intellectual abilities with significant evidence of cerebral impairment. He considers these findings "consistent with what would be expected of individuals who have been exposed to toxic chemicals . . . [and with] organic brain syndrome."

In a report of July 15, 1993, Dr. GO reviewed the medical records of the claimant at the carrier's request. Dr. GO commented that there was "no exposure concentration information available." He noted that the substances identified as those with which the claimant worked included dimethylaniline, acetone, polyester resin and methyl ethyl ketone peroxide and that "the alleged exposure period was quite short (approximately 3 months)."<sup>2</sup> No mention of trimethylbenzene is made. It was his opinion that had the claimant experienced any significant exposure to these chemicals, he would first have experienced burning and irritation of the eyes and the skin, something the claimant never reported. He does not consider the SPECT test reliable because, in his opinion, it has never been validated against a normal population or subjected to critical peer review. He does not consider it an acceptable technique for the diagnosis of neurotoxic disorders. Based on the medical examinations and diagnostic tests done on the claimant, it was not "apparent" to him that the claimant sustained any injury through a chemical exposure. He also finds "inconsistencies" in the claimant's claimed memory loss. He also believes that neurotoxicity occurs after years, not months, of exposure to solvents and that the claimant's depression itself could result in "psychomotor retardation."

At the request of the Commission, Dr. CH examined the claimant on November 17, 1993, and reviewed his medical records and the Material Data Safety Sheets for the four chemicals described above. He concluded that the claimant has "an organic brain syndrome, as well as marked depression" with "the onset of symptoms . . . temporally related to his work in confined space with toxic chemicals without any respiratory protection." He was, however, unable to find "any legitimate reports in the literature of chronic effects from these chemicals similar to what [the claimant] exhibits." He speculated that "another possible explanation" is that the dimethylaniline interfered with the oxygen carrying capacity of the claimant's blood which over time caused the seizure his wife reported. Thus, Dr. CH concluded that the claimant has organic brain syndrome secondary to anoxia which was secondary to exposure to the dimethylaniline at work. He

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<sup>2</sup>Material Safety Data Sheets on these chemicals were also introduced into evidence.

also diagnosed severe depression secondary to the organic brain syndrome and "possible schizophrenia, precipitated and/or exacerbated" by the organic brain syndrome and severe depression.

Dr. GR, a forensic psychiatrist, examined the claimant February 2, 1994, at the request of the carrier and testified at the hearing. His objective was to undertake "a mental status examination" of the claimant which he described as mostly a verbal examination. He also discussed the claimant's work conditions with a company safety engineer. According to the safety engineer as reported by Dr. GR, the claimant worked in a large building with five doors measuring 12 feet by 12 feet, which were kept open weather permitting. The safety engineer told Dr. GR that no dimethylaniline was used at the time the claimant worked there. The safety engineer also described the claimant as being paranoid and nervous. In his written report, Dr. GR stated that after he began his interview of the claimant, the claimant's wife insisted on being present. Up to this point, he felt the claimant was trying to be cooperative and answer his questions. Once the claimant's wife was admitted to the interview, Dr. GR observed she sat as close as possible to her husband and his mood became "even more neutral and subdued." He believed her presence "certainly hindered a proper evaluation."

Dr. GR also commented that no other employee working with the claimant exhibited any medical problems and that the claimant may have mistaken directions to report to another job with the employer the next day with termination. It was Dr. GR's conclusion, based on reasonable medical probability, that claimant's symptoms were inconsistent with overexposure to chemicals. He based this conclusion on the belief that claimant was not exposed to dimethylaniline, in accordance with the report he received from the safety manager; that no other employee had this problem; and that the claimant disclosed no skin irritation consistent with overexposure to chemicals. He believes the SPECT test has no validity in determining the presence of organic brain syndrome. In his opinion, the claimant's conduct at his interview suggested "long-standing schizophrenic illness and not a toxic exposure to chemicals as he is alleging." He believes that the claimant's conclusion that he suffers from toxic exposure is the "product of his delusional system and also the over-zealous actions of [his wife] who I believe is very involved in promoting his illness." Dr. GR stated in his testimony that he gave no significance to the abnormal level of trimethylbenzene reported in the claimant's blood and did not know what the significance of this concentration was, but believed it had nothing to do with the claimant's possible schizophrenia. He stated that medical science did not yet know all the causes of schizophrenia, but some of it may be drug induced, as for example, by LSD. He commented that the claimant was taking three unknown drugs he had acquired in Mexico. It was his opinion that any loss of blood flow to the brain did not result in the schizophrenia.

Based on this evidence, the hearing officer determined that the claimant's "brain and head problems are not the result of any injury which occurred in the course and scope of employment;" that he did not suffer a compensable injury; and was not entitled to

workers' compensation benefits. In his appeal, the claimant contends that he did meet his burden of establishing a compensable injury, but the hearing officer ignored "compelling evidence" in the claimant's favor. The claimant identified this evidence as the report of trimethylbenzene in his blood, "well in excess of the normal population." Claimant further contended that Dr. GR refused to acknowledge the "validity" of this report and conceded he did not know what it meant.

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). Injury means "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). An occupational disease is included in the definition of injury and means a "disease arising out of and in the course of employment," 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. Whether a compensable injury has occurred is a question of fact for the hearing officer to decide. We have held, most recently in Texas Workers' Compensation Commission Appeal No. 94824, decided August 10, 1994, that injury by exposure to toxic chemicals through inhalation, is generally a matter beyond common experience, and medical evidence must be submitted to establish the connection between the chemical inhalation and the injury as a matter of reasonable medical probability, as opposed to mere possibility or speculation. The fact that such proof is difficult does not relieve the claimant of the burden of proof. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. The hearing officer is the sole judge of the relevance and materiality of the evidence presented at the contested case hearing 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). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness, including an expert witness. 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The only objective medical evidence of abnormality in this case, and the only evidence seized on by the claimant in his appeal, that may explain the cause of the claimed organic brain syndrome is the presence of elevated levels of trimethylbenzene in the claimant's blood in June 1993 when the blood test was taken. The test was not replicated, nor was there any evidence beyond the contention of the claimant and his wife that this chemical was actually in use during the time the claimant worked with the fiberglass pipe assemblies. Even were one to assume that the claimant worked with this

chemical, the experts relied on by the claimant to establish causation speak only in terms of a possible connection and the compatibility of such exposure with organic brain syndrome, not in terms of reasonable medical probability. The expert evidence introduced by the carrier, particularly the evidence of Drs. GR and GO, challenges the scientific acceptability of the SPECT test so heavily relied on by Dr. J for his diagnosis. These doctors question how, in light of the claimant's relatively short term exposure and the absence of skin irritation, this chemical or any of the others mentioned could have caused the claimant's organic brain syndrome or neurological dysfunction. On the other hand, the claimant's theory of causation in this case was conclusory at best.<sup>3</sup> The suggestion in claimant's appeal, that the levels of trimethylbenzene in his blood was "well in excess of the normal population" has no evidentiary support in the record, nor was there any evidence about correlations between a certain level and organic brain syndrome. Neither Dr. GR, nor the hearing officer were compelled to accept Dr. J's report as establishing the cause of organic brain syndrome in this case. We conclude that the decision of the hearing officer that the claimant did not establish a compensable disease in the nature of organic brain syndrome was amply supported by the evidence. The hearing officer weighed this evidence and determined what facts were established. We will not disturb that opinion on appeal.

We briefly note two other objections raised by the claimant in his appeal. He accuses Dr. GR of "bias" because, he says, Dr. GR indicated that "since the claimant was from Mexico he was intellectually primitive." The claimant did not raise this argument at the hearing to impeach Dr. GR's credibility, and we will not consider it for the first time on appeal, see Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993, except to quote the actual report as follows:

I immediately observed that he [claimant] was a somewhat primitive, unsophisticated, and intellectually undeveloped person, which is not too unusual for his cultural background in the deep interior of Mexico.

We do not consider this to be evidence of bias such that on its face impeaches the credibility of the report. As a critical aspect of a diagnosis, we believe it is an attempt to explain the cultural conflicts experienced by the claimant in the course of his employment, and which, as Dr. GR notes, "could certainly cause some people to diagnose him as organic but not because of toxic exposure."

The claimant also contends that the hearing officer mischaracterized the evidence in stating that the claimant had long-standing psychiatric problems. In the decision and order, the hearing officer attributes the conclusion that the claimant had these longstanding

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<sup>3</sup> See Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993, for a discussion of the toxicity of trimethylbenzene.

problems to Dr. GR. In his report, Dr. GR as a result of his involvement with the claimant suggests that the claimant does have "a long-standing schizophrenic illness and not a toxic exposure to chemicals as he is alleging." We believe the hearing officer fairly characterized the evidence of Dr. GR in his decision and order.

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

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge