APPEAL NO. 950037
FILED FEBRUARY 17, 1995

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 October 27, 1994. The hearing officer determined that the appellant (carrier herein) timely controverted this claim; that the employer had actual knowledge of the claimed injury; that the respondent (claimant herein) sustained a compensable occupational disease in the form of respiratory problems on or about _____; and that the claimant had disability from January 2, 1994, through the date of the hearing. The carrier appeals only the findings of a compensable occupational disease and disability arguing that the claimant established only that he had asthma, which it characterizes as an ordinary disease of life, and failed to meet his burden of proving by expert medical evidence that this condition was aggravated by his employment. The claimant replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We reverse and remand the appealed issues.

The claimant testified that he began working in June 1979 in the employer's foundry. His duties included grit blasting (not sandblasting as described by the hearing officer) and, more recently, he was a "chipper/grinder." This latter occupation involved removing excess metal and other defects from raw castings. This takes place in a "cleaning room" with high levels of dust and particulates and requires the use of a full helmet with a breathing apparatus. He stated that his breathing problems began after he started working at the foundry.

Introduced into evidence were statements signed by the claimant which attributed the claimant's absence from work from December 1 to December 3, 1980, to pneumonia and an absence on December 28 and 29, 1982, to asthma and bronchitis. The claimant also referred to an incident in 1987 or 1988 in which he said he breathed an oil spray through his mask. There was uncontradicted evidence that the employer provided annual physical examinations. For the years 1989 through 1992, the claimant's chest x-ray was reported to him as indicating a "need for personal review with your personal physician."

The claimant's treating physician was (Dr. S), a general practitioner, who said he first saw the claimant on January 4, 1994, "for shortness of breath." The claimant, who stopped working on January 2, 1994, reported at about this time to an emergency room complaining of chest pain and breathing difficulties. A cardiovascular evaluation was done and he was tentatively diagnosed with "subendocardial myocardial infarction" with no history of hypertension, diabetes mellitus, bronchial asthma, tuberculosis or peptic ulcer disease reported. On February 11, 1994, Dr. S diagnosed a subendocardial injury and

possible infarction. In a letter of May 16, 1994, Dr. S states that the claimant was injured on the job "while running a machine." No date of injury is given. He diagnosed a left shoulder injury and carpal tunnel syndrome and said the claimant "also suffers with shortness of breath when working around fumes, gases and dust while on the job." In another letter of August 1, 1994, Dr. S writes "I have been treating [claimant] for shortness of breath since January 04, 1994. This seems to have begun while he was on the job around dust and particles in the air." Finally, in a letter of October 25, 1994, Dr. S writes "[p]ertaining to letters written August 01, and May 16, 1994, [claimant's] medical conditon [sic] concerning his shortness of breath is from a medical history given by the patient. No further testing has been done by myself concerning this conditon [sic]."

Other medical evidence consists of two letters from (Dr. D) who examined the claimant on June 4, 1992, as a result of his prior chest x-rays. Dr. D, on May 24, 1994, wrote that a chest x-ray taken that day in his office "failed to show any evidence of the previously mentioned abnormalities." He concluded from this that the prior results were either non-pathologic or the condition had resolved. In a letter of October 24, 1994, Dr. D wrote that the claimant had a diagnosis of asthma since 1989 by Dr. S and that he had no clinical evidence of silicosis. He continued:

> [Claimant's] pulmonary function studies are compatible with an obstructive airway defect of the type seen in asthma. Whereas exposure to welding fumes and conceivably even to an oil mist-contaminated air fed hood could result in transient aggravation of his underlying pre-existing asthma, review of his pulmonary function studies over time do not show any worsening of lung function following the 1991 incident.

The "1991 incident," according to Dr. D, is the spray incident.

The only other doctor's evaluation of the claimant introduced into evidence was a June 30, 1994, report of (Dr. F) who conducted an independent medical examination of the claimant on June 27, 1994. Because of language problems and extensive conversations between the claimant and a translator who accompanied the claimant, Dr. F cautioned that he "could not attest to the accuracy of the entire history." Dr. F interpreted chest x-rays, taken that day, as normal. He was of the opinion that the claimant has reactive airway disease with "significant reversible component to bronchodilators" and significant impairment of lung function with a "credible history of some episodes of bronchospasms triggered by irritant fumes or gases." He continues:

> However, establishing causation is a less clear cut issue. The patient alleges date of injury being _____[1] yet does not report loss time until 1994. . . . In summary, the patient has objective evidence of an asthmatic type condition

[1] This was amended by the claimant to _____.

which apparently dates back to 1989. It does not appear to have been caused initially by an occupational exposure or injury. Subsequent exposure to fumes including those being listed as present at [the foundry] are certainly capable within reasonable probability of aggravating the patient's condition. However, there is not sufficient objective evidence to quantify what degree the occupational exposures have aggravated the underlying asthmatic condition. At this time there is no evidence of silicosis.

In her discussion of the evidence, the hearing officer commented that the claimant was required to wear protective covering at work and that he worked "in an atmosphere of dust clouds and fumes." From this she concluded that "[c]ertainly there is the potential for respiratory problems under such conditions in the workplace. Claimant presented medical evidence to support his respiratory problems." On the issue of whether the claimant sustained a compensable injury, the hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

4. Claimant worked some 11 years as a chipper/grinder and later as a sandblaster [sic] which exposed him to constant dust clouds and fumes.

6. Claimant's chest x-rays results recommended detailed consultation with a personal physician for some 3 years.

7. Claimant presented medical evidence from [Dr. S] and [Dr. F] that he had respiratory problems which could likely be caused by his employment, if only as an aggravating factor.

8. Claimant was diagnosed with asthma sometimes after being employed with Employer.

CONCLUSIONS OF LAW

4. Claimant sustained an injury in the form of an occupational disease on or about _____.

6. Claimant sustained disability from January 2, 1994, to present and continuing.

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 employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936

(Tex. Civ. App.-Texarkana 1961, no writ). Injury includes an occupational disease which is a disease arising out of and in the course of employment. It excludes an ordinary disease of life to which the public is exposed outside of employment unless incident to a compensable injury or occupational disease. Sections 40l.011(26) and (34). The aggravation of a preexisting condition, including the aggravation of a preexisting ordinary disease of life, can be a compensable injury in its own right, provided the claimant establishes a causal connection between the employment and the aggravation. Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994. Whether a condition is a compensable aggravation or a non-compensable natural flare up or the continuing manifestation of the preexisting condition is a question of fact. Texas Workers' Compensation Commission Appeal No. 941331, November 18, 1994; Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993. The Appeals Panel has also required that the necessary proof of causation be established to a reasonable medical probability by expert medical testimony in cases such as this "where the subject matter is so complex that a fact finder lacks the ability from common knowledge to find a causal connection." Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. *See also* Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex App.-Corpus Christi 1989, no writ) and Texas Workers' Compensation Commission Appeal No. 92421, decided October 1, 1992, for cases which apply this requirement to asthma claims.

Although we infer the claimant believes his asthma was originally caused by his employment, the claimant's position at the hearing was not that his asthma was a compensable injury, but that an aggravation of this condition at work was compensable. In his appeal, he refers to this aggravation as "more difficult breathing problems." Unfortunately, it is not clear from the record what the precipitating cause for this aggravation was or that there even was a medically confirmed aggravation. As Dr. F observed, there was a significant time lapse between the _____, claimed date of injury (which Dr. F believed was May 15, 1991), and January 2, 1994, the day the claimant stopped working. There was also evidence of a possible heart condition and other injuries to the shoulder and carpal tunnel syndrome that may have been factors in the decision of the claimant to stop working.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to that evidence. Section 410.165(a). We will reverse a factual determination of a hearing officer only when it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Our concern in this case is with the lack of fact finding to support the conclusions of law. Thus, for example, the hearing officer, in Finding of Fact No. 7, found only that the claimant "presented medical evidence of respiratory problems that "could likely" cause the aggravation. There is no finding of fact that the claimant's employment actually aggravated his condition. *See* Texas Workers' Compensation Commission

Appeal No. 92258, decided August 7, 1992. Similarly, in her discussion of the evidence, as noted above, the hearing officer refers to claimant's work environment as creating a "potential" for respiratory problems and that claimant has produced evidence to support his respiratory problems, but no mention is made of evidence supporting causation. From this, we conclude that the hearing officer's findings of fact do not support her conclusion of law that the claimant sustained an occupational disease. For this reason, we remand the case back to the hearing officer to make appropriate findings of fact to support her conclusions of law as to both the existence of a compensable aggravation injury and disability. *See* Appeal No. 92655, *supra*, and Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. For the claimant to prevail, the evidence of causation must be based on reasonable medical probability, not a mere possibility of a causal connection between the aggravation and the employment. The fact that such evidence may be difficult to obtain in no way lessens the claimant's burden in this regard.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party 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.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

With all respect to my colleagues, I do not feel that it is necessary to reverse and remand the present case. I would simply affirm the hearing officer.

I appreciate the point that the hearing officer's findings may be somewhat inartfully worded. However, her underlying meaning is quite clear to me. She concludes that the claimant had a compensable injury and in her findings of fact points to the medical evidence on which she based that conclusion. In the past, the Appeals Panel has often implied findings on the part of the hearing officer when the hearing officer's intent is clear. A very recent example of this can be found in Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, where we affirmed an implicit finding by a hearing officer that the claimant's shoulder problems were part of his injury. I agreed with majority that we could imply this finding (although dissenting on other grounds). It seems to me that implying a finding by the hearing officer in the present case that the claimant's respiratory problems were aggravated by his work requires fewer logical gyrations than our implied finding in Appeal No. 941728. I admit this is a close point in that in the present case we would have to imply a finding that arguably comes closer to the heart of the decision and we have remanded in the past to have findings clarified. However, in a situation like this where the hearing officer's meaning is not obscured, I would not remand on factual issues.

I am actually more concerned that some statements in the majority opinion might be somewhat misleading as to the standard of proof to be applied in this case. One concern I have is that the majority, while recognizing that the aggravation of a preexisting disease can in itself constitute a compensable injury, nowhere mentions the legal standard to be used in regard to aggravation. We stated the standard definitions along with citation to its sources in Texas Workers' Compensation Commission Appeal No. 94517, decided June 14, 1994, as follows:

> Injury means damage or harm to the physical structure of the body and such diseases or infections as naturally resulting therefrom, or the incitement, acceleration, or aggravation of any disease infirmity or condition, previously or subsequently existing, by reason of such damage or harm. Gill v. Transamerica Ins. Co., 417 S.W.2d 720 (Tex. Civ. App.-Dallas 1967, no writ); *see also* McCartney v. Aetna Casualty & Surety Co., 362 S.W.2d 838, 839 (Tex. 1962); Matson v. Texas Employers' Insurance Ass'n, 331 S.W.2d 907, 908 (Tex. 1960).

Also while the majority states "evidence of causation must be based on reasonable medical probability," I point out that we had held that use of the term "reasonable medical probability" is not required. As we stated in Texas Workers' Compensation Commission

Appeal No. 94815, decided August 4, 1994, "[i]t is not required that experts use `magic words' in expressing opinions on causation."

Finally, in the present case the claimant contends that continuous exposure to fumes and dust in a foundry more likely than not aggravated his asthma. This is proposition which to me might arguably be so within basic human experience as not to require expert testimony. I think it certainly could be inferred by the fact finder from the medical evidence before her.

Gary L. Kilgore
Appeals Judge