

APPEAL NO. 950116
FILED MARCH 9, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). On November 16, 1994, and December 8, 1994, a hearing was held. The hearing officer determined that appellant (claimant) does not have an occupational disease, but that respondent (carrier) did not contest whether claimant was injured in the course and scope of employment within 60 days; the carrier nevertheless had no liability because the carrier's controversion within 60 days did dispute timely notice and claimant was found to have failed to give timely notice with no good cause shown for delay. With claimant not having met the notice requirements, no disability followed. Claimant asserts that he was injured in the course and scope of employment, met the notice requirements, and does have disability. Carrier replies that claimant's appeal is not clear and concise and asks that the decision be affirmed; carrier did not appeal the determination that it did not timely controvert that claimant was injured in the course and scope of employment.

DECISION

We affirm.

Claimant worked for (employer) as an air operated valve technician. Claimant testified that he was exposed to solvent, dust, welding, grinding, and chemicals in pipes. He described other employees painting while he had to work in several rooms over a four day period from_____, to_____. He further testified that he did not wear a respirator. He was laid off at the end of April 1992 and has not worked since. He acknowledged that he had stated before that he had worn a respirator for a short time. Claimant also stated that he reported his injury to his supervisor, (Mr. M) on April 28, 1992.

Claimant first went to a doctor about his exposure on June 4, 1992. He filled out a questionnaire for (Dr. S) of (Wala), in which he wrote, "_____, _____ paint fumes inhaled" and "chemical exposure_____, _____, _____, mineral fiber danger tag. On_____, _____ coughed up blood sinus drain." He also wrote in answer to a question as to possible exposure at work, "chemical exposure, dust, fumes, _____ to _____. Dr. S then noted that claimant reported exposure to "mineral/paint fumes." He noted a report of "one episode of coughing up blood & coming out of nose."

Claimant had given a deposition on September 24, 1992, in an action against his employer, in which he said that he had complained to Mr. M and possibly (JR) and (SW) about working in an area where he wasn't qualified to be "as far as having a respirator" and having to carry heavy valve actuators. He added in that deposition that he felt Mr. M was threatening him when he made this report. When asked if he had made any other complaint other than about respirators or carrying too much weight, he replied that he

thought he referred to "short cutting some of the procedures." Nothing appears about injury from exposure. (Mr. M's statement says that no injury was reported to him.) Claimant also stated in this deposition that his exposure was to paint fumes. He said that he had to work with valves in several rooms where workers were painting with brushes; he saw no spray guns. In the deposition, claimant described his use of a respirator as follows:

Q: . . . When you began going into the room on _____ where you say the painting was being done, how long before you wore the partial respirator?

A: Fifteen to thirty minutes.

Q: Why did you wait fifteen to thirty minutes?

A: That's--they weren't doing anything at the time and about the time that [Mr. M] came in, I don't know if somebody gave him the respirator at the door or what, but he came in with a respirator and he--I believe he made some indication that there was some more outside the door and to get one.

Q: Did you?

A: Yes.

Q: When you say they weren't doing anything, they hadn't started painting yet?

A: Correct.

Q: So the whole time they were painting, you had one on?

A: The first two nights I did.

Claimant later said that on the third night he did not have anything; he felt dizzy and disoriented about 15 minutes after being exposed to the fumes, but kept on working. He did not say anything to anyone on _____, or _____, about any problem with dizziness or complain about exposure.

In addition to Dr. S, claimant saw (Dr. Sp) who on August 5, 1992, reported to claimant that his "recent chemistry profile was normal with the exception of cholesterol which was 251." The complete blood count was also normal. Dr. Sp referred claimant to (Dr. J) to check his symptoms relative to chemical exposure. Dr. J only reported what claimant related about exposure to fumes, while rooms were being painted, with nose bleeding, dizziness, and disorientation. He found hive-like spots, nose and throat irritated,

and an irregular heart. He called for certain tests to be performed. (The record does not show evidence of results of such tests.)

(Dr. F) then reported claimant's complaints as exposure to paint fumes. To the other reported symptoms, he added gum bleeding, itching, ringing in ears, sleep problems, and blackened areas around the eyes. He notes claimant reported three days of exposure to paint. Dr. F states, in December 1992, "[w]hether or not he has any actual physical damage is yet to be determined." He later in the same narrative says, "[a]t the present time I am unable to give a definitive diagnosis but I can say the patient has chronic anxiety reaction and he has had exposure to toxic chemicals in unknown quantities and unknown concentrations, with unknown physiological effects."

Claimant saw (Dr. W) in January and July 1994. Dr. W described claimant as having had "prolonged industrial inhalational injury with exposure." He adds to the paint fumes, dust, and solvent previously mentioned, that claimant was also exposed to "asbestos, fiberglass, and chemicals." Some symptoms were also added, but generally the symptoms included those previously reported. His physical examination found vital signs normal, but he found:

head tenderness over sinus areas; injection of the eyes; injection and congestion of the nose; injection of the throat; increased post nasal drip; neck tenderness with muscle tension; and chest wall tenderness. . .

Dr. W added that "appropriate laboratory" studies were performed which were consistent with the findings quoted above. He added that pulmonary function and arterial blood gases were performed and "we are awaiting the results." Nevertheless, Dr. W then states that claimant's diagnoses are:

Industrial inhalational injury with exposure to silica dust, asbestos, fiberglass, paints, solvents, metals, dusts, vapors, and chemicals.

He added that claimant "continues to have medical problems and symptoms" and is unable to work at present.

The carrier provided a report of (Dr. L), a "diplomate American board of forensic toxicology" which reviewed the specifications of the epoxy paint, noting that xylene, trimethylbenzene and naphtha were the ingredients to question for toxicity. Of these, xylene had been shown to have some central nervous system effects after daily exposure for at least one month or longer. Dr. L said that a skin rash could result from the epoxy, but when exposure stopped, the rash would decrease and disappear; a rash months later would not be due to the exposure from_____. He found no evidence of injury and no evidence of paint exposure causing long term symptoms.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The hearing officer could choose to give no weight to a medical opinion that found injury and exposure to "chemicals" after having done "appropriate laboratory" tests, based on a history of "prolonged" exposure. The medical evidence sufficiently supports the finding of the hearing officer that claimant did not sustain an occupational disease injury.

Although claimant appealed the determination that he suffered no injury, the determination of the hearing officer that carrier did not contest the compensability of the claim as to whether it occurred in the course and scope of employment, would have resulted in liability in the carrier if claimant had met notice requirements. The carrier did controvert compensability within 60 days on the basis of failure of the claimant to meet notice requirements.

The evidence of claimant's answers to the questionnaire for Dr. S on June 4, 1992, as previously described, sufficiently supports the hearing officer's finding that claimant knew that the injury may be work related on June 4, 1992. The finding that claimant did not report injury until August 28, 1992, is sufficiently supported by the evidence including claimant's own deposition which shows that he did not tell Mr. M in April anything about an injury. There was no evidence of notice given between the April 28th discussion with Mr. M and the August notification. The finding that claimant did not have good cause for delay is shown by claimant's testimony of many reported symptoms occurring from the time the exposure was said to have happened, coupled with claimant's statement that he could not work after April 28, 1992. A determination of whether good cause exists or not is reviewed on the basis of whether the hearing officer abused his discretion. See Texas Workers' Compensation Commission Appeal No. 931012, decided December 20, 1993, and Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995. We find no abuse of discretion in finding no good cause for delay, until August 28, 1992, in notifying the employer in this case. Without having met notice requirements in some manner, the carrier is not liable for benefits. See Sections 409.001 and 409.002.

The hearing officer could give more weight to the medical evidence of Dr. F, Dr. Sp, and Dr. L in considering disability than he did to the evidence of Dr. W and find that claimant had no disability. In addition, he could determine that there was no disability because disability is defined in terms of a compensable injury. See Section 401.011(16). The determination of no disability is sufficiently supported by the evidence.

Contrary to the reply by carrier, claimant's appeal that took issue with certain findings of fact and conclusions of law adequately placed the issues underlying those findings of fact before the Appeals Panel. In addition, claimant states in his appeal that he has trouble concentrating. The record reflects that the hearing of November 16, 1994, was continued on the motion of the hearing officer to determine whether any medication claimant was taking was affecting claimant's ability to take part in the hearing. While the evidence obtained from claimant's treating doctor was equivocal on the point (he said the

medication could "possibly" affect claimant), the hearing officer questioned claimant at the beginning of the December 8, 1992, hearing and concluded that claimant could take part in the hearing. This point was not appealed, other than the reference made by claimant concerning his concentration. The record shows that claimant did take part in the hearing and provided evidence in his behalf with some inability to recall some events.

Finding that the decision and order, that carrier is not liable for income and medical benefits, are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge