

APPEAL NO. 972321

On October 3, 1997, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease on _____; (2) the date of injury under Section 408.007; and (3) whether the claimant gave timely notice of injury to her employer. The claimant requests review of the hearing officer's decision that: (1) she did not sustain a compensable injury in the form of an occupational disease; (2) the date of injury under Section 408.007 was _____; and (3) she failed to timely notify her employer of her injury and thus the respondent (carrier) is relieved of liability. The carrier's response requests affirmance.

DECISION

Affirmed.

The claimant claims an occupational disease from exposure to ethylene oxide (EtO). From November 1976 to September 13, 1992, the claimant used EtO sterilizers to sterilize medical instruments at the employer's hospital. On September 14, 1992, the claimant went to work for another hospital doing the same EtO sterilizing work she had done at the employer's hospital. The claimant said that she was not given protective clothing or gloves to wear at the employer's hospital but that at her new job she wears gloves and a face shield. The claimant said that to sterilize medical instruments at the employer's hospital, she placed the instruments in the EtO sterilizer, locked the door of the sterilizer, and then pushed a button to turn the sterilizer on. The sterilizer was connected to an EtO gas cylinder. The instruments are removed from the sterilizer after they are sterilized.

Occupational Safety and Health Administration (OSHA) regulations provide for permissible exposure limits to EtO. These regulations state in the "effects of overexposure" section that EtO in liquid form can cause eye injury, frostbite, and irritation to the skin; that ingestion of EtO can cause gastric irritation and liver injury; and that acute effects from inhalation of EtO vapors include respiratory irritation, lung injury, headache, nausea, vomiting, diarrhea, shortness of breath, and cyanosis. In addition, the regulations state that exposure to EtO has been associated with the occurrence of cancer, reproductive effects, mutagenic changes, neurotoxicity, and sensitization. A federal safety guideline recommends that EtO be handled as a potential human carcinogen and that, among other things, chronic exposure to EtO has caused anemia. According to a federal bulletin, most worker exposures to EtO result from the use of EtO in sterilizers in health care facilities. A 1991 federal report on carcinogens states that OSHA had estimated that as many as 100,000 health care technicians may be exposed to EtO in the workplace. A safety guide recommends a closed system with ventilation and the use of protective gloves and eye protection when working with EtO.

The claimant testified that from 1976 to 1985 she used a portable EtO sterilizer that did not have ventilation and that was not separated from her work area; that in 1985 the employer's hospital had two EtO sterilizers installed in a separate room from where she worked; that she never wore protective gloves or a face shield while working at the employer's hospital; that since beginning work at the employer's hospital she has had a history of nosebleeds, headaches, blurred vision, breathing problems, and dizziness; and that her current problems include numbness in her hands, problems walking, funny smells in her nose, stomach problems, chest pains, pain in both arms, and nervousness. She also testified that she does not know when she was exposed to EtO. The claimant presented medical records documenting her complaints. The claimant said that BE was her supervisor at the employer's hospital and that BE stopped working for the employer before September 13, 1992. BE stated in an affidavit that from 1976 to 1985 protective equipment was not worn in the sterilization area. The claimant stated in an answer to a written interrogatory that her claimed injuries include, but are not limited to, her stomach, lower abdomen, ears, hands, vision, smell, feet, taste, a knot on her back, anemia, right side of her tongue, memory, nervous system, and skin discoloration.

According to reports in evidence, EtO monitoring studies were done in the sterilization area of the employer's hospital on June 25, 1990, December 3, 1990, March 5, 1992, June 8, 1992, and September 17, 1992, and the EtO levels found were below the OSHA permissible levels. According to the June 25, 1990, report, the employees used rubber gloves to transfer loads, and according to the March 5, 1992, report, employees were provided with protective clothing and eye protection was in use. Reports in evidence also reflect that the claimant's personal area at work was monitored for EtO exposure on October 3, 1991, February 6, 1992, and July 7, 1992, and only the latter report showed any exposure by the claimant to EtO, and that exposure was well below the OSHA permissible levels. In a letter dated April 19, 1991, the manager of an air survey company wrote that on March 21, 1991, EtO was found to be present in the employer's sterilization room in a sufficient concentration to cause concern regarding employee safety, and that it was found that EtO was leaking into the room's false ceiling from the exhaust ducts from the sterilizers. The claimant said that she did not know if she was working on March 21, 1991.

Dr. C, a medical toxicologist, wrote that he examined the claimant in March 1994 for symptoms the claimant related to workplace exposures; that the claimant complained of shortness of breath, recurrent nosebleeds, dizziness, lightheadedness, hand pain, ankle pain, roaring noise in her ears, headaches, difficulty with memory and concentration, and abdominal pain; and that the claimant stated that her symptoms have occurred since 1985 or 1986. Dr. C noted that, with regard to the nosebleeds, the claimant had had nasal polyps and pyogenic granuloma resected. He also noted that blood tests he had done on the claimant demonstrated severe anemia. Dr. C wrote that he believed that some of the claimant's medical problems may have been caused or contributed to by repeated EtO exposures. Dr. G, a diplomate of the Board, examined the claimant at the request of the Texas Workers' Compensation Commission in February 1996 and Dr. G wrote that the claimant is suffering from a mal-adaptive stress syndrome that was precipitated by exposure to EtO while working at the employer's hospital and that that exposure caused her nasal irritation, polyps, and bleeding.

Dr. CO, a medical toxicologist, reviewed the claimant's medical records, including Dr. C's report, in July 1995 at the carrier's request and he wrote that the "[EtO] exposure sustained by this patient is an improbable cause of her recurrent illness. . . ." In February 1996 Dr. CO reviewed additional medical records of the claimant's, visited the EtO sterilization area of the employer's hospital, reviewed the employer's EtO monitoring reports done by an outside consultant, reviewed the federal regulations on EtO, and wrote that the working area of the EtO sterilizing equipment is safe and is an improbable source of EtO injury to the operators. In September 1997 Dr. CO reviewed the report of Dr. G and the notes of Dr. C's examination of the claimant and wrote that there was no evidence of a causative relationship between the hemangioma of the mucus membrane of the claimant's nose and occupational exposure to EtO in the claimant's workplace, and that the claimant's shortness of breath, dyspnea on exertion, weakness, and fainting between 1986 and 1994 are adequately explained by the claimant's "severe anemia which was discovered by [Dr. C] and occurred secondary to severe and prolonged epistaxis.

The claimant had the burden to prove that she was injured in the course and scope of her employment. There is conflicting medical evidence regarding the cause or causes of the claimant's medical conditions. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence. The hearing officer found that the claimant's anemia, nosebleeds, stomach problems, shortness of breath, chest pains, and nervousness were not caused by an exposure to EtO in the course and scope of her employment, and she concluded that the claimant did not sustain a compensable injury in the form of an occupational disease. We conclude that the hearing officer's finding and conclusion on the injury issue are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Under Section 408.007 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. The claimant testified that on _____, she received a copy of the April 19, 1991, letter regarding an EtO leak at work on March 21, 1991, and that that letter raised her concern that her medical problems might be related to EtO. On _____, the claimant wrote a statement, which she gave to her attorney, that stated that she understood that EtO is harmful to her health. In her Notice of Injury or Occupational Disease and Claim for Compensation (old IAB-2 form) the claimant wrote "_____" in the space for stating "Date of First Knowledge Disease Was Work Related." We conclude that the hearing officer's decision that the date of injury under Section 408.007 was _____, is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

Section 409.001(a) provides that, if an injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The claimant had the burden to prove that she gave timely notice of injury to her employer. The

claimant testified that her attorney notified her employer of her injury in a letter to the employer's hospital dated September 28, 1993. In the letter dated September 28, 1993, which is addressed to the vice president of the employer's hospital, the claimant's attorney wrote that he had been retained by the claimant to pursue a claim for damages against the employer's hospital for injuries the claimant sustained as a result of her exposure to EtO during the time she worked for the hospital. There was no evidence as to the date the attorney's letter of September 28, 1993, was mailed to the employer's hospital, and the letter does not have a date received stamp on it. It appears that the letter may have reached the employer's hospital by October 7, 1993, because that is the date of the employer's first report of injury or illness, which report does not contain a date that the claimed injury was reported. A letter from the carrier's adjusting company dated October 19, 1993, states that the adjusting company had received the attorney's letter of September 28th. Without evidence as to the date the attorney's letter of September 28, 1993, was mailed to the employer, and with the earliest employer document regarding the claimed injury being dated October 7, 1993, we cannot conclude that the overwhelming weight of the evidence is contrary to the hearing officer's finding that the claimant failed to report her injury within 30 days of the date she knew or should have known her injury was work related. At the CCH, the claimant did not assert good cause for late notice of injury to the employer. We conclude that the hearing officer did not err in finding that the claimant failed to establish good cause for failing to timely report her injury. We note that even if it were to be found that the claimant gave timely notice of injury to the employer, the claimant would not be entitled to workers' compensation benefits because of our affirmance of the hearing officer's decision on the injury issue.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Christopher L. Rhodes
Appeals Judge