APPEAL NO. 990089

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 18, 1998. The issues before the hearing officer involved whether the appellant, who is the claimant, sustained an occupational disease in the course and scope of employment; whether he had disability from this injury; the date of the injury; and whether the respondent (carrier) was relieved of liability because the claimant failed to timely notify the employer of his occupational disease. The hearing officer found (from conflicting evidence on the point) that the claimant first reported his injury to his employer on _____.

The hearing officer held that the claimant did not sustain an injury in the course and scope of employment. He found that the claimant first knew or should have known that he had a disease that may be related to his employment on _____. He further found that the claimant had not timely reported the injury and that he did not have good cause for the failure to report. He found that any inability to obtain and retain employment equivalent to the preinjury wage was not the result of the claimed asthma injury.

The claimant appeals all adverse determinations, arguing that the great weight and preponderance of the evidence support a decision in claimant's favor. The carrier asks that the decision be affirmed.

DECISION

Affirmed as to finding that there was no compensable asthma injury or disability therefrom. Reversed and rendered as to good cause and timely notice to employer.

The hearing officer has summarized the evidence at some length and we will repeat only that evidence most pertinent to our decision. The claimant was employed in the manufacture of lenses by (employer). He said he worked through a temporary services company beginning in August 1996 and then was hired by the company in January 1997. Claimant, who was 41 years old, agreed that he had asthma since he was 14 or 15 years old. He treated this with over-the-counter inhaler medication. Claimant also said he had a back injury on the job in 1997. He also testified to being an on-and-off smoker, although he said he had quit when he was 38 and was not a smoker at the time of his injury.

Claimant was employed in a job which entailed sprinkling acrylic crystals over the surface of the lens. Claimant testified that the consistency of such crystals was like sugar or sand. He wore a mask over his mouth, gloves and a lab coat. According to the claimant, beginning sometime in January 1998, he experienced a slightly more increased incident of nighttime breathing problems, but specifically stated that he did not associate this with his work. However, in _____ he began to experience chest and back pain, which was somewhat frightening, as well as a need to use his inhaler more. When it was pointed out that he may have had chest and back pain in January, according to other records in evidence, claimant said that he did but assumed that this was related to his

earlier back injury. A transcribed statement from one of the claimant's supervisors, Mr. L, was to the effect that claimant told him he had asthma and breathing problems for years. Mr. L stated that claimant called him on _____ to indicate he would be seeing a doctor about back pain and never mentioned asthma.

In any case, the claimant made an appointment to be examined by Dr. B on_____. The next day, he took Dr. B's report, on a Texas Workers' Compensation Commission form, to supervisor Mr. R. Claimant said that he had felt much better since not returning to work, that he had responded well to medication, but that his doctor had not released him back to work. However, he said he essentially felt "fine" since leaving the employer. His last day of work was March 27, 1998, and he had not since looked for any other employment. He asserted that a printing business he had operating from his home had discontinued in October 1997, and that any advertising signs that may have been observed in May 1998 were left standing for a business essentially defunct.

Mr. R testified that when claimant brought him the Initial Medical Report (TWCC-61) from Dr. B on _____, he questioned claimant closely about if he was hurt at work or his asthma related to what he did, and was told no. He said claimant disclaimed any knowledge as to why Dr. B used a TWCC-61. He stated that he told claimant he would not (for this reason) file a workers' compensation claim. He said that he offered, because of the Americans With Disabilities Act, to make accommodations to claimant by transferring him to another part of the plant, but claimant said he would obtain a release to work where he had been working. Claimant, on rebuttal, agreed generally with Mr. R's testimony although he could not recall being asked to work in another part of the plant. He said he intended to get a release from Dr. B but after Dr. B counseled him about how he could jeopardize his health, he declined.

Mr. R testified that lab coats and gloves were worn primarily to avoid contamination to the lens. He said that no changes were made in the workplace after claimant's injury other than to post signs advising workers to wear their face masks. Mr. R testified that any acrylic "dust" would not remain airborne but would fall to the ground. He said that after each shift, the work area was cleaned. Mr. R stated that the primary safety concern with acrylic on the ground would be that a buildup in the area might cause a worker to slip.

Claimant also was referred to Dr. O, who performed pulmonary function testing. Claimant agreed that he did not tell claimant about a family history of asthma in his siblings because Dr. O did not ask. Claimant said he was advised by Dr. B and Dr. O that his asthma was aggravated by his workplace. Dr. K, who had a specialty in toxicology, testified at the CCH for the carrier and said he had reviewed claimant's medical records, noted that no blood testing was done to determine if claimant's asthma was allergy based (as opposed to toxic), and concluded that the pulmonary function tests were for the most part within a normal range. He stated that one component not within normal range was inconsistent with normals in related categories and indicated some artificial limitation. Dr. K stated that if claimant's continuing asthma condition flared up because of work around acrylics, that it would represent a return to "baseline" allergic reaction rather than a

worsening of his condition. Dr. K reviewed May 1998 particulate testing that had been performed by the employer of the workplace and found that the ambient acrylic in the environment was much less than OSHA minimums.

Dr. O's April 16, 1998, report stated that claimant had chronic asthma exacerbated by workplace exposure. Dr. O found no wheezing on his examination of claimant. It was Dr. O's opinion that pulmonary testing yielded results consistent with a mild obstructive mechanism. Dr. B wrote in his TWCC-61 and in an April 20, 1998, letter that claimant reported working in a "dusty environment" and that he reported an exaggeration in his symptoms over the last few "weeks or months." He found wheezing upon his examination (this may be a reference to his first _____, examination, because the April letter is recounting the history of his treatment and that of Dr. O). Dr. B stated his conclusion that claimant had a work-related condition and could not return to work in that environment.

A Material Data Safety Sheet for the acrylic substance indicated that "gross" overexposure could cause irritation to the respiratory tract.

First of all, we reverse the hearing officer's determination that the claimant's date of injury was _____. It appears from the hearing officer's discussion that he simply picked the last day of the month of _____ and that there is no evidence in the record to support this date. We have repeatedly cautioned against finding that a lay person should know that he has a work-related injury around the time that the symptoms appear. Texas Workers' Compensation Commission Appeal No. 960488, decided April 25, 1996; Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994. Under the 1989 Act, if the injury is an occupational disease, including a repetitive trauma injury, the employee or person acting on the employee's behalf must notify the employer of the 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. Section 409.001(a)(2). In interpreting the occupational disease notice provision under the prior workers' compensation law, the court in Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.), stated that the statutory time period for notice begins to run in an occupational disease case when the claimant, as a reasonable man or woman, recognizes the nature, seriousness, and the work-related nature of the disease, which was not necessarily the date of the first symptom. In the context of an election of remedies, the court in Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, 853 (Tex. 1980), stated:

> Many diseases, do not fit neatly within an either/or distribution, and the dispute whether such a condition is compensable or not is an ongoing one. Uncertainty in many complex areas of medicine and law is more the rule than 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 purpose of notice to the employer is to allow the insurer an opportunity to investigate the facts and to fulfill that purpose the employer need know only the general nature of the injury and the fact that it is work related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980).

In this case, claimant believed not only that he was experiencing his recurring asthma condition but that his chest and back pain were related to his back injury. We find nothing in the record to support the _____, date of injury found by the hearing officer. In light of our affirmance on the lack of a compensable injury, little would be served by returning the case to the hearing officer for an advisory finding on the date of injury. We therefore render a decision that the date that the claimant first knew or should have known that he had asthma that may be related to his employment was _____ and that he timely gave notice of injury to his employer (based upon the hearing officer's fact finding that notice to the employer was given on _____). Even if we agreed with the date of injury in this case being supported by the evidence, there would appear to be good cause for not earlier reporting the injury to the employer.

The decision that the claimant did not prove a work-related aggravation of his asthma condition is hereby affirmed. Aside from the assertions of Dr. B and Dr. O (based in part upon claimant's contention that his workplace was "dusty") that there was an exacerbation of the asthma, there was little to show that the condition was actually made worse rather than re-experienced. Moreover, evidence indicating a workplace exacerbation was somewhat lacking. The hearing officer could choose to believe Dr. K's testimony that claimant's pulmonary function testing was essentially normal and that if claimant had a work-related episode of asthma, it represented a return to "baseline" rather than a worsening or aggravation. On the matter of inability to obtain and retain employment, the presence or lack of a "release" is not dispositive, and the lack of a release would be explained by Dr. B's comment that claimant could not return to his previous workplace. The inability to return to a specific workplace, under the 1989 Act, does not establish disability, as that term is defined in Section 401.011(16), and given the claimant's testimony that he felt "fine" with medication and removal from his previous workplace, the

hearing officer could choose to believe that claimant's chronic asthma did not prevent obtaining and retaining gainful employment. Therefore, we affirm the hearing officer's determination that claimant did not sustain a compensable injury in the form of an occupational disease or have the inability to work as a result of the asthmatic condition, and the order denying benefits is, for this reason, affirmed, notwithstanding our reversal and rendering on the date of injury and notice to employer issues.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge