APPEAL NO. 991501

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 June 16, 1999. The issues at the CCH as agreed to by the parties were: "(1) did the claimant sustain an occupational disease in the form of asthma, bronchitis, pulmonary, and respiratory problems due to his work at (employer); (2) what is the date of accident (sic) for the occupation (sic) disease; (3) did the claimant report his claimed injury with 30 days of the date of accident (sic), or does good cause exist for his failure to report his claim of injury; (4) did the carrier dispute compensability of the claimed occupational disease within 60 days of the having (sic) received written notice; (5) what periods of disability, if any, are the result of his occupation (sic) disease." The hearing officer determined that the appellant (claimant) did not sustain a compensable occupational disease; that the date of injury of the asserted occupational disease was _____; that the claimant did not report the injury within 30 days of _____, but that he had good cause for not reporting the injury and thus the carrier was not otherwise relieved of liability for claimant's failure to timely report an injury; that the respondent (carrier) did not waive the right to contest compensability because it filed a dispute within 60 days of receiving written notice of the claimed occupational disease on December 22, 1997; and that the claimant did not have disability from the claimed occupational disease since the occupational disease here was not compensable. The hearing officer also found, pursuant to stipulation of the parties, that the claimant had disability from an Compensable injury, injury to his back and ribs from August 19, 1997, to September 1, 1997. The claimant appeals several findings of fact and conclusions of law, urging that they are against the great weight and preponderance of the evidence and urging that the evidence supports a finding that the claimant sustained a compensable occupational disease; that he had disability from such injury; that the date of injury was Compensable injury; that the claimant gave timely notice; and that the carrier did not timely dispute, thus waiving its right to dispute. The carrier responds that the findings and conclusions of the hearing officer are supported by the evidence and urges that the decision and order be affirmed.

DECISION

Affirmed.

The claimant, who had been in the construction business for years, testified that he started working for the employer in August 1995 and that, in November 1995, he started being exposed to paint and solvent fumes in his painting duties. He states that the working area was not well ventilated and that he spent about 80% of his time around the paint and solvents. He stated that one tractor he painted was outside but then he had painting duties in a barn or shed. He also had duties as a welder where he encountered welding fumes. He stated that he started noticing some shortness of breath (denied any prior such problems) but did not think too much about it, although he claims he told his supervisors about having problems with fumes. In any event, he applied for and started working as an electrician assistant in January or February 1997. His duties included replacing light

fixtures and putting cable in ceilings. This latter part was done by lifting ceiling tiles out and throwing a tennis ball with a string attached from one area to another and then pulling the cable through. He claims that it was very dusty doing this work, that no masks were used, and that they would have to clean up after doing this type work. He stated that he had some breathing difficulty and shortness of breath but did not think it a "big deal" and that when he went to work in the electrical position he was getting better and "improved some." He stated that on Compensable injury, he went out to a truck, felt weak, passed out, and fell, sustaining an undisputed injury to his back and ribs. He stated that at this time he knew he needed to do something about his breathing problem.

He saw Dr. M on August 12, 1997, and his report of that day indicates complaints of low back, flank, and rib pain (chest) and states that he "slipped on Trailor hitch and fell on _____." An August 26, 1997, report from Dr. M indicates "persistent low back and chest wall pain, increased shortness of breath." In a letter to "T.A.S.B." dated September 18, 1997, Dr. M reports a contusion to the claimant's right chest and a low back strain and states "he has recently experienced an episode of acute bronchitis and exacerbation of chronic obstruction pulmonary disease on August 28, 1997," which has further compromised his chest wall injury. The claimant testified that he faxed a letter to the employer on September 17, 1997, in which he states his pulmonary condition is a result of the chemicals he has been exposed to at work. (This letter, in evidence, is not signed, bears no indication of any fax markings, is denied as having been received by the employer, and is stamped as received by the Texas Workers' Compensation Commission on September 17, 1998.) The claimant was referred to Dr. H, who, in a report dated October 10, 1997, notes that the claimant stated he had no respiratory problems in the past until August of this year when he fell at work and hurt his right side and that the claimant indicated that he had been working for the last two years cutting grass, painting outdoor equipment (using a paper mask), and welding in a shop that was not ventilated. Dr. H reports that x-rays taken on August 13, 1997, showed no active pulmonary disease. Under "impressions," Dr. H states possible occupational induced asthma and, in a later report, chronic obstructive pulmonary disease. In an _____, report, Dr. H notes that the claimant indicates that he is concerned that his breathing problems were caused by his work environment prior to Compensable injury. In a March 9, 1998, report, Dr. H stated, "I cannot tell him that his asthmatic bronchitis is related to his past occupation or not," and that "the only thing I can say is that it could possibly be, but I have no way of telling him that possibility at this time."

At a subsequent benefit review conference, the claimant was referred for an independent medical examination by Dr. D, who, in a report dated December 1, 1998, sets out the history given by the claimant. According to the report, the claimant told Dr. D that 80% of his time was spent working in the painting shed, that he developed wheezing, coughing, and headaches, which later improved in his position of electrician assistant until he did cabling in a dusty environment, and that triggers of the symptoms included cigarette smoke, cold air, exertion after walking one quarter of a mile, and perfume exposure. The report states that the claimant specifically denies any history of prior allergies, asthma, or hay fever. (It was brought out that the claimant has been treated for allergies (no further

specifics and no medical records in evidence) in 1996 and that, subsequently, he takes injections for allergies.) Dr. D states that he reviewed other medical records on the claimant and goes on to list his impression and summary, based on the history provided by the claimant and available medical records, that the claimant "has asthma and that the course of evolution of his asthma is most compatible with occupational asthma." He goes on to note that, although the claimant did not seek medical attention until after Compensable injury, "his description of the onset of symptoms and the nature of the various chemical compounds that he worked with, under conditions of poor ventilation and lack of air conditioning, are entirely supportive of a diagnosis of occupational asthma."

The adjuster handling the case testified that she had never seen the alleged September 17, 1997, fax the claimant states he sent and that when she got the report from Dr. M in September requesting medical treatment for breathing problems (as a part of the falling accident resulting in the back and rib injury) she filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) denying those conditions as part of the injury. She stated that the first she ever got notice of the claimant asserting a separate occupational disease for his breathing problems was when she got an impairment rating report from Dr. S on December 22, 1997, and that she filed another TWCC-21 in January 1998, disputing liability. She stated that she had written to provide information and ask for clarification of some points in Dr. C's report but that he would not respond.

The senior director of special services over maintenance testified that the claimant did some painting on several tractors at one time but that it was a "rainy day" project and done on a part-time basis. He stated that he investigated the claimant's assertion that he spent 80% of the time painting and determined that the claimant only painted several tractors and trailers and that the time spent painting was some 37 and a half hours over a period of time. He stated that the claimant's duties involved mowing, trimming, repairing things, clean up, etc. and that the first he was aware that the claimant was asserting an occupational disease was in January 1998.

Another supervisor, JF, was called as a witness and testified that the claimant painted several tractors on rainy days, that there was never any discussion with him about any physical condition as a reason to transfer to another area, and that the job demands in the areas where the claimant worked prior to the electrician position were similar. He stated that as an electrician assistant, the job requirements were to retrofit light fixtures, remove old lamps and replace them, and work with ceiling tiles. He stated that one did not go into the ceiling but removed ceiling tiles to work and that there was no blown insulation above the tiles.

The hearing officer determined that the claimant did not sustain his burden of proving a compensable occupational disease and thus did not have disability from an occupational disease. Clearly, there was conflict and inconsistency in the evidence before the hearing officer and it was his responsibility to resolve those conflicts and inconsistencies. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Section 410.165(a). Only were we to

conclude from our review of the evidence of record that his findings and conclusions were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb his decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We do not find that to be the case here even though different inferences may find some support in the evidence. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994.

Although it appears from the medical evidence that the claimant has an asthmatic or chronic obstructive pulmonary disease condition, what is not clear is its origin, that is, whether it was causally related to his employment. An occupational disease is compensable if the disease arises out of and in the course of employment and causes damage or harm to the physical structure of the body, but it does not include an ordinary disease of life to which the general public is exposed outside of employment. Section 401.011(34). The claimant has the burden of proving the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 951184, decided September 5, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 962277, decided December 23, 1996. Where an occupational disease such as asthma is asserted, expert medical testimony is necessary to show the causal relation to the work as opposed to other unrelated conditions. Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ); Texas Workers' Compensation Commission Appeal No. 980781, decided June 3, 1998. Such expert medical opinion must be to a reasonable medical probability, although magic words are not necessary; rather, it is the basis and substance of the opinion expressed. Texas Workers' Compensation Commission Appeal No. 970504, decided May 2, 1997. And, of course, the underpinning of the opinion, including the history relied on, can have a great impact on the relevance and weight of the opinion. If the history is inaccurate and is relied upon in forming the opinion, then the opinion is of little probative value. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497 (Tex. 1995); Texas Workers' Compensation Commission Appeal No. 990591, decided April 30, 1999. Aside from the fact that the medical opinions were not expressed in terms of reasonable medical probability regarding causation, but rather "possible" and "consistent with" and "most compatible with," there was considerable factual dispute or disagreement about the claimant's work conditions, his time, and the circumstances of his exposure to paint, solvents, dust, and fumes and of other trigger mechanisms and allergies. The hearing officer could consider all these factors in concluding that a compensable occupational disease had not been proven and in assessing the weight to be accorded the various expert opinions expressed. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We conclude there is a sufficient evidentiary basis to support the findings and conclusions reached.

It is apparent that the hearing officer did not believe that the claimant gave notice of a work-related occupational disease until December 22, 1997, when the report from Dr. S was received by the carrier alleging an occupational disease arising out of exposure at work. This is in accord with the testimony of the adjuster and the supervisor witnesses.

The hearing officer was not required to accept the claimant's testimony that he gave notice on an earlier date or that he sent a fax on September 17, 1997. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). We cannot conclude his determinations on notice to the employer and carrier and the carrier's timely dispute in January 1998 are not supported by sufficient evidence. Accordingly, we affirm these findings and conclusions. The hearing officer also found the date of injury (date the claimant knew or should have known that the disease may be related to the employment, Section 408.007) to be _____, the date this belief appears in Dr. H's records. While the claimant urges that he believed his breathing problems might be related to his work on Compensable injury, when he fell, and that is the date of injury, other evidence, particularly in the medical records, indicates no connection was made to the work at that time other than the falling incident. There is sufficient evidence to support the hearing officer on this point. In any event, the hearing officer concluded that the claimant had good cause for any untimely notice and thus the carrier was not absolved of liability because of any untimely reporting.

For the foregoing reasons, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Judy L. Stephens
Appeals Judge