APPEAL NO. 023106
FILED JANUARY 22, 2003

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 7, 2002. The hearing officer determined that the appellant (claimant) did not prove that he had an injury that arose out of the course and scope of his employment (an alleged toxic exposure) and that he did not have disability. The hearing officer held that because there was no injury, the respondent (carrier) did not waive the right to dispute compensability because it filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) more than 7 days, although within 60 days, of written notice of an asbestos injury. The claimant has appealed and argues that the hearing officer misapplied the decision of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no writ), and appeals by reference findings of fact and conclusions of law that the claimant does not have a work-related injury or disability. The carrier responds that the decision is correct and that any medical opinion that the claimant has an asbestos-related injury was based upon a history of exposure that did not occur.

DECISION

Affirmed in part, reversed and rendered in part.

FACTS

The claimant worked for 35 years for a foundry. He said that some of his duties involved replacing liner in some furnaces that the employer had. Although not entirely clear, it was his theory of recovery that asbestos in the lining material, or in his heat resistant gloves, caused him to have asbestosis or a chronic pulmonary condition as a result of asbestos inhalation. Evidence was offered from the manufacturer of the furnaces (that were installed in 1979 at the employer's plant) that the "Transite" substance on the outside furnace panels was "Transite 2," a nonasbestos-containing substance. The manufacturer's president wrote that one reference in the furnace instruction manual that referred to asbestos in "Transite" was an inadvertent holdover from the prior manual. In any case, the process described by the claimant and his coworkers for replacing the furnace lining material did not involve removal of the Transite on the outside panels. There was testimony that on rare occasion a bolt may have been replaced on the panels and that they were scratched.

The linings were replaced as needed, generally 2 and perhaps 3 times a year. The claimant was not the sole employee responsible for this.

Prior to 1979, the employer used one and then two furnaces that it built itself. A witness for the employer checked purchase records to ascertain what materials were used in those furnaces, and Material Data Safety Sheets for the lining material was

produced. While it shows some silica-based components, and a cancer risk is noted for prolonged exposure to some of the listed components, no asbestos is noted.

The claimant produced as witnesses two coworkers who said that they assumed, or that it was "common knowledge," that asbestos was a component of the furnaces. When asked for actual knowledge, the witnesses agreed they had no knowledge of what materials were actually used in the furnaces nor could the sources of the rumors be recalled or identified. The claimant said that he recalled one supervisor who told him to "be careful" when replacing the furnace linings. The claimant said he wore a paper mask.

The claimant said he could not work since April 1999 due to his breathing problems. His family doctor agreed.

Medical Records. Medical records in evidence show that the claimant was in his early 60s, that he was "morbidly" obese (over 300 pounds), that he has diabetes, sleep apnea, congestive heart failure, and occasional high blood pressure. The claimant did not testify as to when he started being bothered by breathing problems. Rather, he noted that he was asked (by whom is not clear from the record) to have a chest x-ray in December 1998. Dr. F, a radiologist, wrote a report of that x-ray as showing "irregular interstitial opacities" and cardiac enlargement. The opinion portion stated that the pleural changes observed were "pathognomonic of asbestos related disease" consistent with a patient "who has had adequate exposure history and latent period." An attachment consisted of a checklist, where the evaluator was specifically asked questions as to whether there were any findings consistent with pneumoconiosis. An October 1999 letter from Dr. F's office to an unidentified person said that Dr. F had no records of the claimant being a patient and noted that Dr. F had done chest x-ray interpretations for a law firm in North Texas.

The claimant's family doctor, Dr. H, testified that the thickening in the claimant's lungs was chronic obstructive pulmonary disease (COPD). He said that prolonged exposure to any irritant, including asbestos, could contribute to this condition. He also agreed that congestive heart failure, obesity, history of smoking, diabetes, and hypertension could cause the disease. He said that there was no definitive diagnosis of asbestosis from the claimant's objective testing. He referred the claimant to Dr. W, a pulmonologist, in March 1999. Dr. W's first report said that the claimant "clearly has an asbestos exposure." However, his later reports make no reference to this and instead noted that the claimant had reflux disease, sleep apnea, pulmonary hypertension, and morbid obesity. Dr. W opined that the claimant did not have evidence of restrictive lung disease and noted that decreased forced vital capacity of the lungs was entirely consistent with obesity.

Dr. H agreed with the determination that the claimant had changes relating to an asbestos exposure although he stopped short of concluding that the claimant had asbestosis. He said that the history provided by the claimant was of primary importance in identifying asbestos as a causative agent, and agreed that if there had been no

asbestos in the workplace, then it could not be a factor in the claimant's COPD. Dr. H said that asbestos would not cause the claimant's heart condition.

Another specialist, Dr. P, noted on August 22, 2000, that by history the claimant has 12 years of exposure to asbestos while maintaining the furnaces, but noted it was "unclear" whether the lining material he packed contained asbestos. Dr. P noted that he had been hospitalized for congestive heart failure in the past. He also noted that Dr. F had found conditions consistent with asbestosis, and noted that an x-ray performed on that day confirmed bilateral pleural changes consistent with asbestosis.

The difficulty of assessing the claimant's physical problems is illustrated by a report of Dr. GF, from an independent medical examination performed on January 28, 2000. Dr. GF assumed the accuracy of an asbestos exposure but goes on to assess the numerous other factors that more likely caused the interstitial thickening in the lungs and breathing problems encountered by the claimant. He noted that it was claimant's morbid obesity that caused insufficient inspiration and compression of the lower lobes of the claimant's lungs. Dr. GF noted that the interstitial thickening was slight and that Dr. F had not taken into effect the claimant's obesity as opposed to asbestosis.

Reporting of the Asbestos Exposure Injury. The employer's safety manager, Mr. Fr, testified that the claimant had begun pursuing retirement in early 1999. Mr. F said that in April 1999, the claimant and his wife brought Dr. F's x-ray report to him and urged this as a reason he could no longer work. Mr. FR said that the claimant told him he was not interested in pursuing a claim against the company but against a third party. He declined to fill out an employee's accident report. Mr. FR said, however, that he called the carrier and on their advice reported over the telephone that the claimant contended an asbestos exposure. The carrier responded by sending back a copy of an Employer's First Report of injury or Illness (TWCC-1) dated May 17, 1999.

On June 14, 1999, the carrier filed a TWCC-21 with the Texas Workers Compensation Commission (Commission), asserting that there was no compensable injury or disease arising out of employment. There the matter stayed until the claimant filed a Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on February 22, 2000, asserting "repeated exposure to toxic particles" causing injury to the lungs, heart, throat, and body in general, and that the extent of the injury was unknown. However, at the CCH, the claimant contended that he did not assert that congestive heart failure or diabetes were injuries arising from the course and scope of his employment.

WAIVER

The carrier is required by Section 409.021 to pay benefits or dispute a claim within 7 days. At the time the carrier filed its TWCC-21, the Commission had held that the full 60 days were available to carriers to investigate and dispute claims and noncompliance with the 7-day provision was punishable by administrative penalty but not by waiver. In early 2000, a San Antonio Appeals Court held otherwise; the decision

was affirmed in a 5-4 opinion of the Texas Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). The Appeals Panel has held that it is the first written report of injury that triggers the carrier's duty to react and that the TWCC-1 is by definition a written report of injury. The claimant urges that Downs applies in this case to render his lung condition compensable regardless of the cause (although he further argued at the CCH that evidence that there was no asbestos in the employer's furnaces to which the claimant would have been exposed is "not credible").

We note, in light of the claimant's expanded contention in his TWCC-41 and at the CCH that exposure to toxic substances in general could have led to his lung disease and that the Commission has promulgated an administrative rule making clear that Section 409.021 does not apply to subsequent assertions that an injury has extended beyond that originally contended. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §124.3(c) (Rule 124.3(c)).

The hearing officer noted, however, that the applicable case under these facts was Williamson, *supra*. This case held that a nonexistent injury cannot be converted into a "compensable injury" because of the failure to comply with Section 409.021. In Williamson the claimant had a right knee condition already in existence by virtue of a work-related injury when he contended he had a second fall at work. However, there was evidence presented that the fall appeared to be staged plus a doctor's report that no injury had been caused thereby. The Court of Appeals concluded the decision by stating "We hold, therefore, that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law."

Mindful that a broad reading of Williamson could undermine the requirements of Section 409.021, the Appeals Panel noted that Williamson would not apply where there was evidence of an "underlying injury." Texas Workers' Compensation Commission Appeal No. 992907, decided February 10, 2000. However, the Appeals Panel has continued to apply Williamson where the claimant fails to prove the occurrence of the alleged damage or harm. Texas Workers' Compensation Commission Appeal No. 992907, decided February 10, 2000.

In considering whether the hearing officer was correct in this case that Williamson applied and Downs did not waive an injury into existence, reference must be made to the initial injury of which the carrier was informed. Although the carrier argued that the TWCC-1 was not written notice of injury because the claimant did not initiate it, we do not agree.

What the carrier was notified about in the TWCC-1, however, was an occupational disease related to "asbestos exposure." Existing medical evidence within the first 7 days of the TWCC-1 that the carrier could have obtained through investigation would have shown physical damage of bilateral pleural changes consistent with asbestosis and, in the words of Dr. F, "asbestos related disease." (The carrier was not required to dispute the subsequent TWCC-41 injuries, which broadened the claimed

extent of injury to other body parts and toxic exposures in general, by virtue of Rule 124.3 (c)). Although the carrier reacted within the time frames of Section 401.021 as interpreted at the time by the Commission (and prior to any reported decision in Downs), it is undisputed that it did not contest an asbestos-related injury within 7 days. There is evidence of physical damage or harm to the lungs. Therefore, we agree that the carrier waived the right to dispute an asbestos-related injury and we reverse the determination that the Williamson case precluded waiver.

INJURY

Given the strong evidence that asbestos was not in fact present in the workplace, and that the claimant and his coworkers merely "assumed" that it was, the hearing officer's determination that the claimant did not sustain an asbestos-related injury is affirmed. See Texas Workers' Compensation Commission Appeal No. 970641, decided May 27, 1997. Furthermore, no other substances were identified that could have led to the claimant's more generalized contention of injury. The treating doctor made clear that his opinion that asbestos was a causal factor in the claimant's interstitial thickening was based largely upon the history that the claimant gave of asbestos exposure. The Appeals Panel has held that a fact finder is not bound by the testimony of a medical witness when the credibility of the testimony is manifestly dependent on the credibility of the information imparted to the witness by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). Expert evidence based upon inaccurate underlying facts cannot support a verdict. *See* Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995); Texas Workers' Compensation Commission Appeal No. 990591, decided April 30, 1999.

Exposure to toxic chemicals through inhalation, and the resultant effect on the body, are matters beyond common experience, and medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. *See* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; and Texas Workers' Compensation Commission Appeal No. 93774, decided October 14, 1993. The evidence in this case amounted to no more than a speculation or guess. The hearing officer did not err in holding that any injury did not arise from the course and scope of employment.

DISABILITY

Leaving aside the waiver issue, the hearing officer found that the claimant was not unable to retain and obtain employment due to any alleged injury, including alleged exposure to asbestos, while at work. Waiving the right to dispute an injury does not waive the right to dispute that disability has resulted. There was evidence that the claimant was contemplating retirement at the time he left work in April 1999. Further,

there was evidence of several other chronic conditions beginning even before the date of the claimed occupational disease here. Although Dr. H stated that the claimant could not work due to his COPD, he agreed that the claimant's other health problems could result in this condition. We would further note that there were differential diagnoses of pulmonary hypertension and congestive heart failure not linked to the claimed asbestos exposure.

Finally, there is medical evidence from Dr. W and Dr. GF that even if there is asbestosis or an asbestos exposure that caused some interstitial thickening, it is not a factor in his diminished lung capacity as opposed to his weight.

For these reasons we reverse the determination that there was no waiver of the asbestos-related injury, but affirm the determination that the claimant did not have disability as the result of his alleged injury.

The true corporate name of the insurance carrier is **WAUSAU BUSINESS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Roy L. Warren
Appeals Judge