APPEAL NO. 060798
FILED JUNE 19, 2006

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 March 22, 2006. With regard to the five issues before him, the hearing officer determined that: (1) respondent (claimant) sustained a compensable injury in the form of the occupational disease of Rocky Mountain Spotted Fever (RMSF); (2) the date of injury (DOI) is _____; (3) the claimant timely reported the injury; (4) the claimant had disability from June 14, 2005, through March 22, 2006; and (5) the appellant (self-insured) "is not relieved from liability due to Claimant's failure to follow the requirements of Texas Health and Safety Code § 81.050(j) and 28 TEX. ADMIN. CODE § 122.3 [Rule 122.3]."

The self-insured appeals all of the hearing officer's determinations asserting that the claimant has failed to prove by a reasonable medical probability how she contracted the RMSF, that the DOI was (alleged date of injury), that the injury was not timely reported to the employer, that because the claimant did not have a compensable injury she did not have disability, and the claimant had failed to file the report required by Texas Health and Safety Code § 81.050(j) and Rule 122.3. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

BACKGROUND INFORMATION

The claimant testified that she is employed by the self-insured as an "animal services officer" whose duties are to investigate "a variety of animal/human interactions" and to work at a shelter caring for and tending to animals. The claimant testified that during the end of May 2005 she "started feeling sick" but believed, at that time, it was "a sinus problem." The claimant's condition continued to worsen and on June 10, 2005, she went to her "normal" doctor and saw one of his associates. The claimant said the doctor told her that she had "a virus that became bacterial" and prescribed antibiotics and a sinus spray. A hospital record of June 10, 2005, has an assessment of allergic rhinitis due to pollen and sinusitis. The claimant went to (City 1) to get married on June 14, 2005, became "really sick" and went to a hospital emergency room (ER). The claimant testified, and ER records indicate, that the claimant was diagnosed as having "pelvic inflammatory disease" and was prescribed doxycycline and vicodin. The claimant continued to get worse and returned to her regular doctor on June 17, 2005. Additional testing was performed and a hospital record dated June 20, 2005, assessed pneumonia and prescribed other medication. A CT scan performed on June 22, 2005, indicated an abnormal inflammatory process. The claimant was referred to a pulmonologist. The claimant testified that she thought she might have cancer at this point. The pulmonologist, in a report dated July 7, 2005, recited the claimant's medical

history and had an impression of "Right sided pnemonia." The claimant testified that she had told all the doctors about her work as an animal services officer. The claimant was referred for a "PET scan" and said that she was now convinced she had cancer. Additional tests were performed and the claimant's preexisting Multiple Sclerosis was considered. The claimant's condition continued to deteriorate and the claimant was admitted to a hospital on September 1, 2005. A doctor's note of September 1, 2005, assessed dysphia ("difficulty and pain with swallowing"). Additional testing was done to rule out certain conditions (the claimant at one time was diagnosed as having histoplamosis). The claimant testified that her husband brought an article on zoonotics (diseases communicated from animals to humans) to the hospital and the doctors eventually diagnosed RMSF on _____ or (day after date of injury), and that the claimant's husband reported the claimed injury to the self-insured on September 9, 2005. The claimant was terminated from her position on October 19, 2005, for reason of "Business Necessity."

DATE OF INJURY AND TIMELY NOTICE TO THE SELF-INSURED

Section 409.001(a)(2) provides, in relevant part, that an employee or a person acting on the employee's behalf shall notify the employer of an injury no later than the 30th day after the date on which (in cases of an occupational disease) the employee knew or should have known that the injury may be related to the employment. Failure to notify an employer as required by Section 409.001(a) relieves the employer and the carrier of liability, unless the employer or carrier has actual knowledge of the injury, good cause exists, or the claim is not contested. (Section 409.002). The self-insured contends that the claimant had reason to believe that she had contracted a zoonotic disease as early as May or (alleged date of injury). The self-insured points out that the claimant advised her health care providers that she worked with animal control and handled sick and injured animals. Although the claimant testified that she thought she had something that she might have contracted from an animal at work, the doctors told her at various times that she had pneumonia, other conditions and histoplasmosis and then she "was convinced" she had cancer. (Transcript pg 44). The date when the claimant knew or should have known that the injury may be related to the employment is a question of fact for the hearing officer to resolve. Here there was conflicting evidence and while a concrete diagnosis is not required in order to find a DOI as defined in Section 409.001(a)(2), in this case, the doctors gave conflicting diagnoses. The claimant clearly did not know, and in view of the health care provider's opinions had no reason to believe her injury was related to her employment. The hearing officer's determination that the claimant knew or should have known she may have a work-related injury in the form of RMSF on _____, and reported the occupational disease the same day (there was some conflicting evidence whether the injury was reported on _____ or (day after date of injury)) is supported by the evidence and is affirmed.

INJURY IN THE FORM OF AN OCCUPATIONAL DISEASE

Section 401.011(34) states the definition of an occupational disease as being:

(34)"Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless the disease is an incident to a compensable injury or occupational disease.

In this case we believe that expert medical testimony is necessary to establish the cause of the claimant's disease. *See generally* (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). The question in this case is whether there is a causal connection between the RMSF and the claimant's employment as established by medical evidence. The claimant offers medical articles that RMSF is a rickettsial disease that is transmitted by several different species of ticks and the disease may be contracted either by a tick bite "or by crushing infected ticks between their fingers." In this case there is no evidence that the ticks at the shelter were infected and the claimant denies any tick bite or crushing a tick between her fingers. Other articles discuss the incidence of RMSF, how RMSF can be transmitted, the signs and symptoms of RMSF and how one can protect themselves from RMSF.

The treating doctor, in a letter dated September 23, 2005, states that the claimant "was diagnosed with a rare tick-born disease acquired presumably thru contact with animals." In another brief note the treating doctor states that RMSF "is a rare condition transmitted via ticks. It most certainly was a result of her work as an animal control officer." In another report dated October 31, 2005, the doctor discusses the claimant's clinical history and states that "an infectious disease specialist . . . sent lab tests for [RMSF] due to her work exposure to animals."

In evidence is a report dated February 20, 2006, from Dr. B, who also testified and who identified himself as the claimant's "patient advocate." Dr. B described the claimant's clinical history and concluded that the claimant's history and "medical literature would suggest, contraction of this disease was highly likely to be job related, and I personally can't think of any other reasonable scenario." Dr. B testified that the chances of finding and catching RMSF in some other way are "very, very small."

The self-insured cites a number of Appeals Panel Decisions (APD) including APD 961898, decided November 6, 1996, a case where a city worker contracted Ehrlichiosis, a disease transmitted by ticks, presumably while out cutting brush. The Appeals Panel affirmed the hearing officer's determination that the claimant had not sustained a compensable injury noting that no tick was found on the employee, or at the worksite and no tick was ever tested to see if it could spread Ehrlichiosis. That case, and the self-insured in the instant case also cites APD 93885, decided November 15, 1993. In APD 93885, an air conditioning/refrigeration maintenance worker alleged he

contracted Lyme disease as a result of being bitten by ticks at work while working on an air conditioning unit on a hospital roof. In that case there was testimony that the employee had to pull ticks off of himself following work. There was testimony and reports in evidence regarding Lyme disease and the various types of ticks which transmit the disease. The Appeals Panel, in 93885 commented:

> The medical evidence demonstrates that not all ticks carry the bacteria that causes Lyme disease and that the bacteria has been detected in fleas, mosquitoes, and biting flies. The claimant admitted that ticks from the hospital roof were not tested and there is no evidence that [Dr. SG] tested ticks from the hospital roof to determine if they in fact carried the bacteria that causes Lyme disease. There is also no evidence of the type of tick specie that was on the hospital roof. In essence, Dr. SG assumes that the claimant contracted Lyme disease at work based on the fact that he was bitten by ticks at work in numerous occasions. However, she admits that in Texas there is a low frequency of ticks carrying Lyme bacteria and "assumed" that in the location where the claimant lived and worked the frequency of ticks carrying Lyme disease is about one percent. The claimant acknowledged that he had pulled ticks off of himself from occurrences other than work. The absence of evidence in this case that the ticks at the claimant's work carried the bacteria that causes Lyme disease is directly analogous to the Schaefer, [*supra*], case where there was an absence of evidence that the bacteria was present in the soil where Schaefer worked. Thus, we conclude, as did the court in Schaefer under similar circumstances, that Dr. SG's opinion, although couched in terms of probability, did no more than suggest a possibility as to how or when the claimant was exposed to or contracted Lyme disease.

The Appeals Panel, in that case, reversed the hearing officer's decision because there was no medical evidence based on reasonable medical probability which established that the employee had contracted Lyme disease in his employment.

Like APD 93885, *supra*, in this case, the claimant's literature indicates that RMSF "is transmitted by several different species of ticks." The type of ticks at the animal shelter, or in which the claimant came in contact was not established and tested and there is no evidence that the ticks in the vicinity (claimant testified she had not been bitten and took precautions in animal handling) in fact carried the bacteria that causes RMSF. As in APD 93885, the treating doctor and Dr. B, simply assumed that because the claimant worked around animals that had ticks those ticks transmitted the RMSF. Those opinions did no more than suggest a bare possibility of how the claimant was exposed to the RMSF. Consequently we apply the principles in Schaefer as set out in APD 93885 and reverse the hearing officer's decision that the claimant sustained a compensable injury in the form of the occupational disease of RMSF as being insufficiently supported by expert medical evidence. We render a new decision that the claimant did not sustain a compensable occupational disease injury.

FAILURE TO FOLLOW THE REQUIREMENTS OF TEXAS HEALTH AND SAFETY CODE § 81.050(j).

The self-insured, both at the CCH and on appeal asserts that the claimant is barred from workers' compensation benefits due to failure to comply with the statutory requirements of TEX. HEALTH & SAFETY CODE ANN § 81.050(j), which provides:

> For the purpose of qualifying for workers' compensation or any other similar benefits of compensation, an employee who claims a possible work-related exposure to a reportable disease, including HIV infection, must provide the employer with a sworn affidavit of the date and circumstances of the exposure and document that, no later that then 10th day after the date of the exposure, the employee had a test result that indicated an absence of the reportable disease, including HIV infection.

We note that we have addressed this argument in APD 011247-s, decided August 29, 2001. We also note (as pointed out in APD 011247-s) that Section 81.050 is entitled "Mandatory Testing of Persons Suspected of Exposing Certain other Persons to Reportable Diseases, Including HIV Infection." By its terms the statute applies to four categories of employees who may request a health authority to order testing of another person who may have exposed the employee to a reportable disease. The four categories are: a law enforcement officer; a fire fighter; an emergency service employee or paramedic; or a correctional officer. In APD 011247-s the injured employee was a phlebotomist while in this case the claimant is an animal services officer. There was no discussion, much less evidence, that the claimant, as an animal service officer, qualifies as a law enforcement officer. In that the self-insured is asserting the proposition that Texas Health and Safety Code § 81.050 is applicable, the self-insured had the burden of proof and has failed to meet that burden.

APD 011247-s, *supra*, also observes that Section 81.050 goes on to provide in Subsection (k) that the person who may have been exposed to a reportable disease may not be required to be tested. Subsection (j), quoted above, deals with workers' compensation benefits for the four types of employees listed in Subsection (b). Two rules relate to this topic; Rule 122.3, which deals with Reporting and Testing Requirements for Emergency Responders listed in Texas Health and Safety Code § 81.050 and Rule 122.4 which applies to state employees. We see nothing in the statute or the rules which impose a requirement on this claimant to comply with § 81.050(j). We affirm the hearing officer determination on this issue.

DISABILITY

In that we have rendered a new decision that the claimant did not sustain a compensable injury the claimant cannot, by definition in Section 401.011(16) have disability. We reverse the hearing officer's determination that the claimant had disability from June 14, 2005, through March 22, 2006, and render a new decision that the claimant does not have disability. We would also note that the hearing officer found,

and we are affirming, that the DOI was _____, and therefore the hearing officer had found disability almost three months prior to the DOI.

In summary, we affirm the hearing officer's determinations on the DOI, timely reporting of the injury to the self-insured and that the self-insured is not relieved of liability due to failure to follow the requirements of Texas Health and Safety Code Section 81.050(j) and Rule 122.3. We reverse the hearing officer's determinations on the compensable injury and disability issues rendering a new decision that the claimant did not sustain a compensable occupational disease injury and that the claimant did not have disability.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

CE
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge