APPEAL NO. 91002

On May 16, 1991, a contested case hearing was held. The hearing officer determined that the employee, respondent herein, was within the scope of employment at the time he contracted a compensable occupational disease from exposure to heavy metal. He concluded that (company 1), appellant herein, was liable for the payment of temporary income benefits under Tex. Rev. Civ. Stat. Ann. art. 8308-4.23 (Vernon Supp. 1991). Appellant now urges that there is "no evidence" and "insufficient evidence" that the respondent sustained a compensable occupational disease. In addition, appellant states the hearing officer erred in awarding temporary income benefits in that the respondent failed to raise and prove that a disability had occurred and the hearing officer failed to make a finding of disability, average weekly wage, and accrual date of temporary income benefits.

DECISION

We do not find merit in the contentions of the appellant that: (1) the hearing officer erred in concluding that respondent contracted a compensable "occupational disease, and (2) the hearing officer erred in awarding temporary income benefits and ordering that they be paid. Accordingly, we affirm the decision of the hearing officer.

Appellant asserts both that there is "no" evidence to support the issue regarding occupational disease and that the "great weight and preponderance of the evidence" establishes that the disease was not work-related (sufficiency of evidence). In considering the "no evidence" challenge, only evidence favorable to respondent will be considered to determine if some evidence supports the decision that respondent contracted a compensable "occupational disease." If "some" evidence is found, all the evidence will then be considered and weighed to see if it is sufficient to uphold the decision or if it is so deficient as to make the decision against the great weight and preponderance of the evidence. Mueller v. Charter Oak Medical Center, 533 S.W.2d 123 (Tex. App.-Tyler 1976, writ ref'd n.r.e.), Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980), and Julien v. Baker, 758 S.W.2d 873 (Tex. App.-Houston [14th Dist.] 1988, writ denied).

The Texas Workers' Compensation Act of 1989 (1989 Act) in defining "occupational disease" and "repetitive trauma injury," in identifying the "employer", and in setting the date of injury, Tex. Rev. Civ. Stat. Ann. arts. 8308-1.03(36), 1.03(39), 3.01(b), 4.14 (Vernon Supp. 1991), is substantially the same as the prior article found in Tex. Rev. Civ. Stat. Ann. art. 8306, ' 20 (repealed 1989), insofar as the facts of this case are concerned. As a result, the 1989 Act will be viewed in this area as conveying the same meaning as the prior Act. Walker v. Money, 120 S.W.2d 428 (Tex. 1938).

Evidence offered by respondent and considered by the hearing officer included testimony by Dr. DD and Mr. JL, the respondent, plus eight exhibits, including medical records. Appellant offered one exhibit, which also included medical records, for the hearing

officer's consideration.

Respondent testified that he had worked for (company 1) at least 11 years, grinding brass, bronze, and nickel. He was exposed to mist, fumes, dust, and particulates. The materials he worked with contained cadmium, chromium, zinc, and lead. He did not work with a respirator but with "regular" masks first given him three to four years ago. He first complained of chest pain, fatigue, headaches, breathing difficulties, and bumps on his hands to his physician, Dr. DD, in late 1990. The heavy metal disease was confirmed on _____ as recorded in letters by Dr. DD dated February 1, 1991. After returning to work, on April 10, 1991, his job was changed but he became sick while painting and his job was again changed. He again got sick, this time from a liquid coolant that created a mist. He went to the emergency room on April 18 with chest pain. He continued working, with pain, because he needs the money.

The existence of certain heavy metals in mist, dust, or particulates in the workplace was established by the respondent in the testimony related above. Texas Employers Insurance Association v. Etheredge, 272 S.W.2d 869 (Tex. 1954) (silicosis), and Aetna Insurance Company v. Luker, 511 S.W.2d 587 (Tex. App.-Houston [14th Dist.] 1974, writ ref'd n.r.e.) (asbestosis) allow lay testimony of a claimant's working condition to be considered with medical testimony connecting the condition to the injury. The court in Morgan v. Compugraphic Corp., 675 S.W.2d 729 (Tex. 1984) found "some" evidence solely on the lay testimony of a worker to the effect that her machine's fumes caused her injuries - headaches, blurred vision, skin rashes, etc. Other evidence of heavy metal mist, dust or particulates in the workplace included:

(1) Respondent's photos, Exhibits 2 and 5, showed significant dust along with metal products which respondent described as accurately reflecting his workplace.

(2) Appellant's expert's report, Exhibit 1, page 2, stated that ". . . JL was exposed to a variety of toxic substances; and, that in some of the employer air measurements, the air lead levels slightly exceeded the hazard guidelines for OSHA." (No evidence indicates whether such readings occurred at respondent's work station.)

(3) Respondent's expert, Dr. DD, testified as to medical testing conducted. He stated that various medical studies, dated December 22, 1990, showed above normal levels of certain metals in respondent. Many of these levels generally decreased in respondent when he was tested again in March 1991 after being away from the workplace for one to two months. Finally, after respondent was back at work under restrictions, another chest x-ray and cat scan on April 22, 1991, showed more damage to a lung lesion.

(4) Appellant's Exhibit 1, page 84, (letter of CK) showed airborne lead level for another employee to be .135 mg/m3 (milligrams per cubic meter), and says,

"The maximum allowable concentration is .040 mg/m3."

The above constitutes "some evidence" of exposure to heavy metal in the workplace. Under the circumstance, Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980), which appellant asserts is controlling in this case, is not applicable. Schaefer's foundation was the absence of any evidence that any bacteria were present at the work site. In regard to amount of exposure in the workplace, Etheridge, supra, and INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ) found expert testimony sufficient to show causation even where measurements of exposure were found to be below established norms for causing damage (issues of silicosis and hearing loss, respectively). In Adams, the court said an occupational disease must be shown by probative evidence of causal connection between the employment and the disease, "i.e., the disease is indigenous thereto or present in an increased degree." This definition does not require exposure of a "toxic" degree. In TEIA v. Turner, 634 S.W. 364 (Tex. App.-Waco 1982, no writ), a decision that contact dermatitis was an occupational disease was affirmed just on the basis that the worker became allergic to chromate in cement and "cement dermatitis is not the especially common type contact dermatitis that we see."

Both respondent and his physician, Dr. DD, reported respondent's symptoms to be indicative of heavy metal poisoning - malaise, muscular aches, chronic indigestion, chronic chest pain, chronic cough with sputum, and intermittent headaches. In addition, Dr. DD reported signs of cadmium, chromium and zinc, to be above normal as established in laboratory tests of blood samples from respondent. He found lead at 20 mg/m3 and opined that this was detrimental chronically even though not "above normal" as that is currently defined. Dr. DD also discussed a lesion on the left lung that varied in appearance on x-rays but which was shown to indicate permanent damage on a cat scan; he characterized it as the type damage that heavy metal will cause and as the basis for respondent's chest pain. Finally he described two liver function studies, alkaline phosphatase and GTT, (each above normal) as showing a chronic damaged liver. Dr. DD states that within "reasonable medical probability" respondent's exposure to heavy metal in the workplace was the cause of his disease. This is some evidence that respondent contracted a compensable occupational disease.

In considering whether sufficient evidence exists to uphold the decision as to appellant's first issue, all the evidence was considered. Appellant dismisses Dr. DD as not being board certified, which is true. Dr. DD is a medical doctor who states he is "board eligible" in internal medicine. It is not necessary that he have a particular level of specialty or even be a specialist to give expert testimony. Hardware Mutual Casualty Company v. Westbrooks, 511 S.W.2d 406 (Tex. App.-Amarillo 1974, no writ). Appellant asserts that "reasonable medical probability" must be built on substance; he attacks Dr. DD's causal conclusion as based on presumption and as not substantiated as required by Schaefer, supra. He also takes issue with Dr. DD's inability to differentiate whether respondent inhaled fumes or particles. Dr. DD was not required to differentiate whether metal fumes or metal particles caused the damage. As stated in Western Casualty Surety Co. v.

Gonzales, 518 S.W.2d 524 (Tex. 1975), "This court has never required that the medical expert explain or even understand the precise biochemistry or mechanism by which the initial trauma affects the health or organs of the injured party." See also Charter Oak Fire Insurance v. Hollis, 511 S.W.2d 583 (Tex. App.-Houston [14th Dist.] 1974, writ ref'd n.r.e.) which quoted testimony from appellant's doctor that either fumes or particles could cause heavy metal poisoning when inhaled.

In Schaefer, supra, the expert for claimant presumed certain bacteria to be present in the work environment, but there was no evidence of such bacteria. Here respondent's expert testified, in effect, that his initial diagnosis included a presumption based on the history and symptoms described by respondent. His opinion as to cause, however, took into account tests and studies showing exposure to heavy metal in the workplace. Appellant also argues Dr. DD was biased because his testimony regarding appellant's expert was argumentative and based on a conversation with a secretary. The question of bias in this case was a matter for the trier of fact to consider in weighing the evidence. Davis v. Alaska, 415 US 308, 39 L. Ed2 347, 94 S. Ct. 1105 (1974). This assertion of bias when considered with the record as a whole shows no abuse of discretion in the Hearing Officer's consideration of Dr. DD's testimony.

Appellant's Exhibit No. 1 contains the opinion of an expert, Dr. TK, whose curriculum vitae is clearly impressive. Dr. TK states that taken together, all tests in the workplace and on respondent do not show evidence of acute or chronic toxicity in respondent. He characterizes some tests showing abnormalities as "borderline" and states at least one test shows ". . . above the normal background population levels given by the general laboratory, but well within healthy worker levels." He also says ". . . cadmium is not associated with liver dysfunction . . .". However, page 2 of Respondent's Exhibit 7 (supplemental), a 1978 Department of Labor publication, says "Cadmium may cause liver damage." Dr. TK writes that he has extensive experience in reviewing records involving issues of occupational disease but he did not examine respondent. In addition, appellant also provided reports of Dr. JL of the (health center) in (city) which stated respondent's complaints were probably not related to heavy metal exposure. Dr. JL did examine respondent but did not review some tests conducted on him. Appellant stresses that Dr. DD's limited experience and manner of practice do not compare favorably to his two experts. Tex. Rev. Civ. Stat. art. 8308-6.34(e) (Vernon Supp. 1991) gives the hearing officer the power to judge weight and credibility of evidence. His choice to give more weight to Dr. DD's evaluation and conclusions as opposed to appellant's expert's written reports was within his discretion. Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. App.-San Antonio 1950, writ ref'd n.r.e.)

Appellant also argues that Parker v. Mutual Liability Insurance Company, 440 S.W.2d 43 (Tex. 1969) compels that a causal connection between occupational disease and employment be articulated by scientific experts. Dr. DD provided expert medical testimony as previously discussed and Parker only calls for "some scientific testimony that can be interpreted as an inference of hypothetical probability . . ." Evidence provided about the workplace coupled with Dr. DD's reports of tests and symptoms result in much more

than an "inference" of hypothetical probability.

According to Adams, supra, to support an occupational disease, evidence must show a causal connection between the claimant's employment and the disease - either that the disease is indigenous to the employment or that it is present in an increased degree. Other cases choose to look at occupational disease as a result of "repetitious physical trauma", Leal v. Employees Mutual Life Insurance Co., 605 S.W.2d 328 (Tex. App.-Houston [14th Dist.] 1980, no writ) (worker who developed lung problems from fumes emitted in making plastic bags) and U.S. Fidelity & Guaranty Co. v. Bearden, 700 S.W.2d 247 (Tex. App.-Tyler 1985, no writ) (worker repeatedly breathed chicken feed dust which aggravated pre-existing emphysema).

Although the evidence of record emphasized the level of metallic dust and particles in the workplace, an "occupational disease," under Adams, may be found when indigenous to the workplace or present in an increased degree, and under Leal, may result from "repetitious physical trauma." Each theory is reasonable, is supported by the evidence, and may be used to uphold the judgment in this case. Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

Appellant asserts that "findings four, five, six, seven, and eight are "contrary to the evidence"." Whether these findings are against the great weight and preponderance of the evidence is the correct standard. Finding four, "JL contracted an "occupational disease" on _____, and _____ is the date of injury," and eight, "repeated chronic low level exposure to toxic "heavy metals" in the workplace caused the requestor's "occupational disease"," are supported by sufficient evidence. Findings of fact five through seven stated that there was "toxic exposure" to heavy metals in an amount greater than that to which the public was exposed; that "toxic exposure" caused damage to the lungs and liver; and that when respondent was removed from "toxic exposure" his signs of disease improved. Since no criteria for occupational disease require "toxic" exposure, these findings are not necessary. Each of the remaining five findings of fact is supported by sufficient evidence and together provide an adequate basis for the decision. Texas Indemnity Insurance Company v. Skaggs, 134 S.W.2d 1026 (Comm. of Appeals, 1940). The Hearing Officer's decision that respondent has a compensable occupational disease is supported by sufficient evidence.

Appellant states as its issue number two that the Hearing Officer erroneously awarded temporary benefits and ordered their payment. It is undisputed that no findings of fact were specifically made in regard to disability, accrual date of temporary income benefits, and average weekly wage (AWW). The 1989 Act did make changes from the prior law relative to disability and average weekly wage. The prior law, Tex. Rev. Civ. Stat. Ann. art. 8306 ' 6, 10, 11 (repealed 1989), spoke of "incapacity", "total incapacity" and "partial incapacity" respectively, while the 1989 Act at articles 8308-4.23 and 8308-1.02(16) refers to and defines "disability" respectively. Also, weekly benefits were set forth at article 8306 ' 29 of the prior act while the 1989 Act at article 8308-4.10 not only defines average weekly wage but provides methods of determining it. Just as important to consideration of

appellant's second issue are the procedural changes in the 1989 Act that now provide for resolution of disputes at articles 8308-6.11 and 8308-6.31. Article 8308-6.31 states ". . . issues not raised at the benefit review conference may not be considered except by consent of the parties . . ." The Benefit Review Conference Report was admitted into evidence and shows that the only issue raised by either party was compensability. This exhibit also shows that average weekly wage and compensation rate were calculated. (Note -other evidence shows respondent worked for Employer for over 11 years). While Rule 128.2 requires the appellant to presume that claimant's last pay reflects his wage in order to promptly begin payment, the Benefit Review Conference Report states that the appellant did not dispute the amount of the AWW. Further, appellant did not object to this exhibit at the time admitted into evidence. As a result there is evidence of AWW in the record. In addition, the record of this hearing on at least three occasions reflects that the only unresolved issue from the benefit review conference was compensability. Again, no party took exception to these assertions by questioning AWW or any other possible issue that could have accrued at this time.

Disability in article 8308-4.23 of the 1989 Act is viewed as a condition to entitlement to temporary income benefits. Contrary to appellant's assertion, article 8308-4.23 does not, however, require a "finding" prior to an award. No statutory requirements, including "Notice of Injury" under article 8308-5.01, must have a "finding" unless there is a dispute as to that point. The record neither shows a dispute as to disability raised at the Benefit Review Conference nor that the parties consented to consider it as a dispute at the contested case hearing. The record of the hearing shows that respondent testified of his symptoms that caused him to see a medical doctor. His physician advised him in writing to stop work as of _____, to avoid further exposure to toxic heavy metals that caused liver and pulmonary damage. He further advised him to seek additional medical care while not at work. The physician returned him to work, under restrictions, on April 10, 1991. His employer at that time moved him to a different area of work consistent with his doctor's instructions. He got sick and was moved once more. Appellant asserts that neither respondent nor his expert witness was qualified to testify as to disability. The 1989 Act at articles 8308-6.32 and 8308-6.34(e) along with its rule, Tex. W.C. Comm'n, 28 Tex. Admin. Code ' 142.1 do not require conformity to legal rules of evidence. Even when these rules apply, cases including Houston General Insurance Company v. Peques, 514 S.W.2d 492 (Tex. App.-Texarkana 1974, writ ref'd n.r.e.), International Insurance Co. v. Torres, 576 S.W.2d 862 (Tex. App.-Amarillo 1978, writ ref'd n.r.e.), and Director, State Employees Workers Corp. v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied), all allowed claimant or lay witness testimony alone to establish disability even if contradicted by medical experts. The testimony of respondent and his doctor along with documents admitted in the record constitute evidence of disability.

Accrual date of temporary income benefits is not specified in the record of the hearing or from evidence admitted.

The 1989 Act at article 8308-6.34(q) requires the hearing officer to make findings of fact and conclusions of law. Since article 8308-6.31 directed that issues resolved and

those not raised at the benefit review conference may not be considered at the contested case hearing, it is understandable that findings and conclusions would only be directed to disputed issues. The hearing officer is told also in article 8308-6.34(q) to determine and award benefits due. Since administrative proceedings under the 1989 Act are issue driven and Chapter D of Article 6 is not subject to Administrative Procedure and Texas Register Act (APTRA) rules regarding findings of fact and conclusions of law, a hearing officer is not required to make findings of fact and conclusions of law on matters not in dispute. Similarly, Commercial Insurance Company of Newark v. Smith, 596 S.W.2d 661 (Tex. App.-Fort Worth 1980, writ ref'd n.r.e.), Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562 (Tex. App.-Houston [14th Dist.] 1983, modified, 704 S.W.2d 742), Martin v. U.S. Trust Co. of NY, 690 S.W.2d 300 (Tex. App.-Dallas 1985, writ ref'd n.r.e.), and Transit Enterprises v. Addicks Tire, 725 S.W.2d 459 (Tex. App.-Houston [1st Dist.] 1987, no writ) required no issue be submitted to the jury when there was no controversy or dispute as to the matter. In addition, the Hollis case, supra, allows implied findings, or presumed findings, based on the judgment award by a court without a jury. (Also see Motyka, supra, and Julien v. Baker, supra, on this point.) While implied findings to support a court's judgment are usually discussed when no request for findings had been made at the time of trial, the situation here is not significantly different. No dispute was identified by either party on these issues at time of hearing. An implied finding of AWW and disability can be made from the evidence of record.

Accrual date was not disputed. The date of injury under article 8308-4.14 of the 1989 Act was found to be _____ by the hearing officer. From this date, with an implied finding of disability, the parties should be able to arrive at date of accrual and determine the amount of temporary income benefits consistent with article 8308-4.23(c). If they cannot, that issue may be directed to a new Benefit Review Conference. Under article 8308-4.23, there is no requirement for the hearing officer to determine the duration of temporary income benefits. They run until maximum medical improvement as defined at article 8308-1.03(32) of the 1989 Act.

The decision that temporary benefits are awarded is supported by sufficient evidence. The order of the Hearing Officer is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge