APPEAL NO. 941048

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on June 16 and 24, 1994, with a hearing officer. She (hearing officer) determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____, that he timely reported the injury, and that he had disability during four specific periods of time. The appellant (carrier) appeals all of these determinations and also urges that the hearing officer erroneously admitted an exhibit that had not been exchanged. The claimant's untimely response will not be considered and his motion for late filing of response is denied.

DECISION

We affirm in part and reverse and remand in part.

The claimant testified that he worked for the employer as a cement truck driver and for the last 13 years had been exposed to concrete dust as a part of his duties in cleaning trucks and other areas. The work conditions and exposure to concrete dust and acid fumes were corroborated by a former coworker. The claimant testified that he did not have any problems with his lungs that required him to go to a doctor prior to 1992, although he had started having problems with coughing sometime in 1989. In any event, a medical report from his doctor, (Dr. S), states that when he was examined on January 4, 1992, one of the diagnoses was "Reactive Airway Disease made worse by exposure to atmospheric allergens IE dust, smoke and other allergens that would be encountered in his job." The claimant went to Dr. S in July 1992 because his breathing problems were getting worse and he was falling asleep frequently (Sleep Apnea Syndrome, a condition not related to the facts of this case). He stopped working in July and used up vacation time. At the time, he states he did not know his injury or medical condition was job related although on an application for short-term disability insurance payments dated August 8, 1993, he checked "yes" in a box following the question "did the sickness or injury arise out of your employment." He indicated "don't know" to a question why workers' compensation benefits are not payable. Records in evidence indicate the claimant received disability payments through December 27, 1992.

In any event, the claimant testified he first knew that his injury or medical condition was job related on _____, when he saw Dr. S and Dr. S gave him a statement which stated:

> [Claimant] has been under treatment for a severe lung problem. It seems to be made worse by exposure to concrete dust. We feel at this time this may be a work related injury. He has been seen by this office and by a lung specialist, and is currently under treatment.

The claimant testified that he immediately informed his supervisor, the general manager of the plant, and that he filed a claim for workers' compensation benefits with his employer. An Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), dated (day after alleged injury date), was admitted into evidence. Also in evidence was a Notice of Refused or Disputed Claim dated November 11, 1992, filed by the carrier. The claimant also testified that Dr. S took him off work in October 1992 and that he did not work from July 1992 to October 1992. He was apparently using vacation time during this period. The evidence was somewhat confusing and the claimant had memory lapses as to his work record from October 1992 on; however, during cross-examination he stated he returned to work on January 26, 1993 (Dr. S released him to go back to work), that there was a layoff starting on January 27, 1993, that he went back to work on March 25, 1993, and continued to work until January 14, 1994. He went back to work on February 8, 1994, and worked until February 26, 1994, when the employer sold out to another company and a number of employees were laid off. The claimant testified that he went to work for the new company for about four hours after which he was told that they had his medical records showing his disability and they did not have any other job for him and could not use him. He indicated he has a pending action under the Americans with Disabilities Act. The claimant also testified that during the times that he was not working for the employer he did not work elsewhere but that he had filed for unemployment benefits when he was laid off in January 1993. Although there was no indication that the claimant was not working as a result of any doctor having taken him off of work, the claimant stated he did not think he was capable of any kind of occupation "today."

The medical evidence in the case was certainly conflicting regarding the claimant's condition and any causal connection with his work. In addition to the opinion expressed by Dr. S above, a report of (Dr. W) of the R and I C A dated June 8, 1994, partially diagnosed "Industrial Inhalational Injury with Exposure to Silica Dust . . . Dusts . . . and Chemicals," and states:

> Prior to his work related industrial inhalational exposure, these symptoms (respiratory impairment, chest pain, shortness of breath) were not present according to (claimant). There is no other history to indicate a medical reason for them, along with the fact that he has never smoked, leads to the medical conclusion that there is a causal relationship.

The claimant either agreed with the carrier or was directed by the Commission to be examined by a (Dr. C) for an evaluation. In a report dated January 25, 1993, Dr. C stated that the examination on January 25th "reveals no evidence of work-related impairment" and the "pulmonary functions show no evidence of obstructive disease but they do suggest

a restrictive component, most likely related to the patient's obesity." He states "there is no obvious relationship between his prior dust exposure and his symptoms but avoidance of dust by this measure is prudent" and that "I find no reason to restrict him from usual and ordinary employment" without restriction. In Dr. C's opinion "each and every diagnosis [on claimant] is a disease of life, not of occupational origin." Dr. S, in a letter dated June 24, 1994, states his disagreement with Dr. C's report and points out that Dr. C only saw the claimant once and that the claimant used his "bronchodilator inhaler" just prior to the exam which would affect the accuracy of the results. The potential for inaccurate results was echoed by a cardiopulmonary technologist who testified telephonically at the hearing.

The hearing officer determined that the claimant sustained a compensable occupational disease. While we note that inferences could clearly be drawn from the evidence different from those found most reasonable by the hearing officer, we can not conclude from this record that her determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Although the precise lung condition or injury that the claimant suffered was variously stated to be reactive airway disease, industrial inhalation injury, and by Dr. C as intermittent episodes of bronchospastic dysfunction, the reports of Dr. S and Dr. W can provide a sufficient basis of the causal relationship to the claimant's employment. There was nothing to show that his lung disease or injury preceded his employment and the earliest potential manifestations in the record appear to have occurred in 1989, with coughing and shortness of breath, long after the inception of employment.

In urging reversal as a matter of law, the carrier cites several authorities for the abstract proposition that an aggravation of an ordinary disease of life, which it feels is what is involved in this case, can never be a compensable injury or disease. The cases cited, Texas Workers' Compensation Commission Appeal No. 93160, decided April 12, 1993 (unpublished), and Texas Workers' Compensation Commission Appeal No. 93416, decided July 8, 1993, do not support its position. In Appeal No. 93160, the hearing officer determined that the claimant had not proven there was a causal connection between a fall and the aggravation of her prior liver condition. Noting that a causal connection between an injury and the employment must be established, we state that "there was sufficient probative evidence from which the hearing officer could find that the claimant's asserted injury, generally resulting in her being tired, fatigued, suffering malaise, and having a lack of energy, was caused by her hepatitis." The medical evidence did not indicate any connection between the fall and the hepatitis. In Appeal No. 93416, we faced an issue of

whether the claimant's myasthenia gravis (MG) (disorder in which the muscles become weak and tire easily) was aggravated by his employment. The claimant contended that working long hours, stress, forced cancellation of doctor's appointments, demotion, and required attendance at certain events, aggravated and accelerated his MG. Our decision stated:

> We have on a number of occasions held that, under case law, an injury includes an aggravation of a preexisting condition, whether or not that condition was job related [citations omitted]. In order for aggravation to be found, there is an active incident which is alleged to have resulted in the enhancement, acceleration, or worsening of the condition. Even assuming that the employer's practices regarding sick leave [apparently very restrictive] could be injury producing, there is no evidence that the progression of the MG was accelerated or made worse beyond the course it would naturally have followed.

In the instant case, to begin with, there is no evidence of any preexisting condition, that is, preexisting the current employment. And here, there is some medical evidence that the work condition, namely concrete dust, caused or, or at least, aggravated the claimant lung disease or injury. In Home Insurance Co v. Davis, 642 S.W.2d 268 (Tex. App-Texarkana 1982, no writ), cited by carrier, the court was dealing with a case of chronic bronchitis. In reversing and remanding a decision for the claimant, the court pointed out that the claimant's expert stated he could not say that in reasonable medical probability the disease arose out of or was caused by the work conditions (exposure to extremes of temperature) but that the work conditions aggravated the disease and that it was just as likely that the claimant's bronchitis was caused by his history of smoking. The Davis court cites Schaefer (Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980)) for the proposition that aggravation, acceleration, or excitement of a non-occupational disease does not constitute a compensable injury under workers' compensation. In Schaefer, in upholding the lower court's denial of recover in a case involving a rare disease (Group III mycobacterium intracellularis (MI), referred to as atypical tuberculosis), the court noted that the fact that a disease is rare does not exclude it from being a disease to which the general public is exposed outside employment and that MI has not been found to be an occupational disease; that is, it has not been shown to be indigenous to the claimant's work or present in an increased degree in the claimant's work. Here, there was evidence from which the inference could be made that lung disease or injury related to concrete dust was indigenous to the claimant's work and was present in an increased degree in that work. We do not find merit to the argument that, as a matter of law, the injury or disease was not compensable under the circumstances presented in this case.

We conclude there is sufficient evidence to support the hearing officer's findings that the claimant first knew or should have known that the disease or injury may be related to the employment on _____, which was, therefore, the date of injury. Section 408.007. He also testified that he then immediately notified his supervisor. The hearing officer could believe the claimant that _____ was when he first knew, based on his doctor telling him. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Dr. S's statement of _____, linking his lung condition to the employment provides some corroboration that this is when he first was made aware of and knew of the connection.

Regarding the issue of disability, we are unable to tell from the hearing officer's decision her basis for finding disability for the periods following January 27, 1993, the first time the claimant, according to his testimony, was laid off after having been released to return to work. The claimant returned to work on March 25, 1993, when work at the employer became available, and continued working until January 14, 1994. He apparently worked from February 8, 1994, until February 26th, when the employer was taken over by another company. While the hearing officer asked questions of the claimant verifying the periods of being off work, the evidence as to the reason was not clear nor were the findings relating to disability or the application of the law to the findings. Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." (Emphasis ours.) *See generally* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991; Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The basis for the determination of disability from January 27, 1993, needs to be further considered.

The carrier asserts error based on lack of exchange in the admission of Claimant's Exhibit No. 3, a warning statement appearing on the back side of an employer's delivery ticket concerning hardened concrete warning and advising about concrete dust and that it should not be inhaled. Apparently the hearing officer was satisfied that it was an exhibit at a benefit review conference held earlier which was not attended by the attorney representing the carrier. While the continuance she granted would not necessarily cure a failure to exchange, we do not find a basis to conclude that it was not effectively exchanged earlier in the dispute resolution process. Exhibits exchanged at a benefit review conference do not have to be reexchanged. *See generally* Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. Our review of the evidence leads us to conclude that even if the exhibit had been erroneously admitted, it would not be prejudicial error in this situation. *See* Texas Workers' Compensation Commission Appeal No. 92077, decided April 13, 1992.

For the foregoing reasons, the case is reversed and remanded for further consideration and development of evidence, as deemed appropriate by the hearing officer, on the disability issue only. We affirm the decision on the remaining findings and conclusions of the hearing officer. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers'' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Tommy W. Lueders
Appeals Judge