APPEAL NO. 941659

This case arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 2, 1994, (hearing officer) presiding as hearing officer, to take evidence on the following disputed issues: 1. what is the date of injury; 2. did Claimant report the injury to Employer on or before the 30th day after the injury, and if not, did Employer have actual knowledge of the injury; 3. did Claimant file a claim for compensation within one year of the date of the injury, and if not, did good cause exist until Claimant filed her claim; 4. did Claimant sustain a compensable occupational disease injury; and 5. for what period(s), if any, has Claimant had disability since October 13, 1993. Finding that the respondent and cross-appellant (claimant) was exposed to secondhand smoke in her work area while working on (alleged date of injury), and that this exposure injured her due to her asthmatic and allergic conditions, the hearing officer concluded that claimant sustained an occupational disease injury on (alleged date of injury). Further finding that claimant reported her injury on (alleged date of injury), to one of her supervisors and filed her claim on or about February 16, 1994, the hearing officer concluded that claimant both timely reported her injury and timely filed her claim. The hearing officer also found that claimant's work-related injury of (alleged date of injury), has not caused her to be unable to obtain and retain employment at her preinjury wage equivalent and concluded that she has not had disability. The appellant and cross-respondent (carrier) has appealed challenging the sufficiency of the evidence to support the aforesaid conclusions except that of disability. The respondent and cross-appellant's (claimant) timely response also contained an untimely appeal of the disability issue.

DECISION

Reversed and a new decision rendered that claimant's date of injury was _____, and that claimant did not timely file her claim.

Before considering the merits of the carrier's appeal, we address the timeliness of claimant's cross-appeal. The Texas Workers' Compensation Commission (Commission) records show that the decision of the hearing officer was distributed to the parties on November 22, 1994. Since claimant does not state the date she received the decision, we apply Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) which provides that the Commission's written communications shall be deemed received five days from the date mailed. Accordingly, claimant is deemed to have received her copy of the decision on November 27, 1994. Section 410.202(a) requires appeals to be filed not later than the 15th day after the date the hearing officer's decision was received. Thus claimant's appeal deadline was December 12, 1994. Her cross-appeal, contained in the same document as her response to the

carrier's appeal, was mailed to the Commission on December 21, 1994, and received the following day. *See* Rule 143.3(c). Accordingly, claimant's cross-appeal has not properly invoked the jurisdiction of the Appeals Panel over the disability issue.

For the sake of clarification we observe that while the hearing officer's decision states that one hearing officer exhibit was admitted, the record shows there were three; and that while the decision also states that a carrier exhibit (release and settlement agreement) was admitted, the record shows it was not offered into evidence.

Claimant testified that she is 55 years of age, that she smoked cigarettes for 10 years from ages 21 to 31 and that her parents smoked, that she originally commenced employment as a secretary with (employer) in 1957, that she quit her job to have a family in 1963, that her allergies began in 1978, that she has known since that time that smoke and dust irritate her allergies, that she returned to her employment in 1980, was exposed to secondary cigarette smoke at work and began to cough and experience nasal drainage, and that she commenced treatment with the (Clinic A) in the early 1980s and was told to avoid smoke and other irritants. She said that as early as 1987 she told doctors she was having trouble with smoke at work, that her absences from work from 1987 to 1993 became more frequent as her condition worsened, and that in 1993 she missed work seven times. She said she talked to the employer's nurse and to her supervisor who asked the one smoker in the correspondence center where she worked not to smoke there. She said this action helped but she continued to have problems because of other smoke in the building and that she was later transferred downstairs which she described as "very smoky." She said she again began to cough and experience nasal drainage and sinus and allergy problems, and that she went to the company nurse for antihistamines and to Clinic A for steroids. In 1987 she was transferred upstairs to purchasing where there were also heavy smokers and she said she continued to see the company nurse and go to Clinic A. She said she coughed and complained in that department for nine years but the employer did not accommodate her. Claimant testified that in 1993 she was transferred to the (Building A). She agreed that the employer had designated Building A as a smoke-free building as of May 1992 but contended there were other tenants on various floors in the building who did not maintain smoke-free floors, and that she could smell smoke in the building which smelled strong to her and affected her. She said she told her supervisor, Mr. U, of the problem immediately and a machine was put on her desk (apparently a ventilating machine) and an air quality survey was conducted in her presence. The report of the testing of claimant's floor on July 27 and 28, 1993, stated that no evidence (including odors) of tobacco use on that floor had been identified, that the ventilation system was adequate, and that the air quality was acceptable. Claimant said she felt the testing was invalid because "my body told me so."

A Clinic A letter dated May 7, 1988, stated claimant had perennial allergic rhinitis and allergic cough syndrome, and recommended she avoid perfume at work; a Clinic A letter dated September 23, 1988, advised that air pollen causes claimant great discomfort, and recommended she have an air purifier at work; a Clinic A letter dated March 1, 1990, advised that claimant was on a hyposensitivity program for offending airborne allergens and recommended she avoid tobacco fumes at work "as far as is practicable;" a Clinic A letter dated July 3, 1990, said claimant was, "by history," exquisitely sensitive to tobacco smoke and recommended a smoke-free work environment. A Clinic A report of May 5, 1991, stated that claimant's treatment began in May 1978, that her symptoms were year-long and aggravated by weather and temperature changes, cigarette smoke, housecleaning, and emotional stress, and that her allergy survey was positive for dust, pollens, tobacco, mold spores, dander, weeds, grasses, etc.

On (recommended date of injury from benefit review officer), Dr. AR with (Clinic B) wrote Dr. CR, described by claimant as the employer's doctor, advising that claimant had been under care for rhinitis since August 1991 and more recently for asthma, that she must avoid environmental factors of cigarette smoke, perfumes and dust, which are "definite triggers if not specific allergens," that exposure to workplace smoke has presented claimant with a problem, and requesting arrangements so claimant will not have such exposures. Dr. AR wrote claimant on September 2, 1993, to reconfirm his previous recommendation made in his (recommended date of injury from benefit review officer), letter to Dr. CR, that claimant should not be in a workplace where there is any smoking. Dr. AR stated the following: "As you know, many of your pulmonary problems have been precipitated following exposure to tobacco smoke, some perfumes, and dust, all of which have made it necessary for you to increase medication or have medications added because of your pulmonary problems."

On March 21, 1994, Dr. LS, apparently then in Clinic B with Dr. AR and claimant's current treating doctor, wrote claimant stating that she had been under care since January 1993 for asthma and allergic rhinosinusitis caused by Helminthosporum, a type of mold spore common in the Gulf Coast region, which causes year-long respiratory inflammation. Dr. LS further wrote that while exposure to airborne irritants such as cigarette smoke triggers acute exacerbations of the underlying asthma, claimant's "fundamental problem is her mold sensitivity, which is not an occupational disease unless she were exposed to large doses of Helminthosporum in the course of work-related activities."

A June 30, 1994, report of Dr. D stated that he had reviewed records of Clinic A, the employer, and of Dr. LS, and he confirmed the impression of allergies and rhinitis back to 1978 and a diagnosis of asthma in 1991 by Dr. Z. Dr. D also reported that while

he could not say that the cigarette smoking was "the original cause of her asthma," there was "no doubt that exposure to cigarette smoke has acted as a trigger and aggravating factor of her symptoms and that avoidance to [sic] cigarette smoke, as well as other irritants, is certainly indicated."

Claimant also testified that the employer implemented a reduction in force, that she was advised she would be terminated on (alleged date of injury), that she was given the option of retiring with a benefits package or being involuntarily terminated, and that she accepted employer's settlement offer and last worked on (alleged date of injury). She contended that (alleged date of injury), was her last exposure to secondary tobacco smoke in her workplace, that the odor was "ongoing," and that she was "more ill than ever before from the smoke." She conceded she had known for years that smoke was an irritant and said she once had a reaction to a coworker's perfume. She acknowledged that smoke had been identified as an irritant from 1988 through 1993 and that she never consulted her employer about a workers' compensation claim before the day she was terminated, (alleged date of injury). She said she consulted with employer's human resources analyst, Ms. C, on that date about filing for either "non-occupational disability" or "occupational disability" and did so because "I knew I was damaged. . . ." She went on to state that she "did not want to sue" her employer but that the employer had "forced" her to retire and she was ill, did not know if she could work again, and needed help because her pension was small.

Claimant signed her Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on February 16, 1994, and stated on that form that "(recommended date of injury from benefit review officer)" was the date she first knew her occupational disease was work related, that "_____" was the date her lost time began, and that "(alleged date of injury)" was the date she was last exposed to the cause of the disease. She testified that the date of "(recommended date of injury from benefit review officer)" was the date she knew her asthma was related to secondary smoke, having known for years that she was allergic to smoke.

Ms. C testified that claimant came to her on (alleged date of injury) with a nonoccupational disability form and said she felt she had been "damaged" by smoke years ago while working for employer. Ms. C said she advised claimant it sounded as though she was talking about an occupational disability claim whereupon she gave claimant the forms (apparently workers' compensation claim forms) and told her to see the nurse and her supervisor about completing them. Ms. C also testified that employer's information center has been completely smoke free since May 1992 and that smoking was restricted there between June 1991 and May 1992. She also stated that claimant transferred to Building A in July 1993 and that employer's floors in that building

had been smoke free since May 1992. She further testified that each floor in Building A had its own ventilation system to the outside.

The benefit review conference (BRC) report indicates that the benefit review officer recommended that the date of injury was (recommended date of injury from benefit review officer), because that was the date claimant stated in her TWCC-41 that she first knew her disease was work related. Claimant responded to the BRC report before the hearing stating that with regard to the date of injury it was her position that her date of injury was "the date she was last exposed to the cigarette smoke at work. This is (alleged date of injury)." The statute requiring notice of injury to the employer provides in Section 409.001(c) that if the injury is an occupational disease, "the employer is the person who employed the employee on the date of last injurious exposure to the hazards of the disease." There was no issue in this case concerning the identity of the liable employer. As noted, the hearing officer reached the conclusion that claimant's date of injury was (alleged date of injury). The hearing officer perceived claimant's rationale for asserting the (alleged date of injury), date of injury as two-fold: first, that every day of exposure caused a new injury, and second, that each additional day of exposure caused an additional injury with a cumulative effect. The hearing officer characterized claimant's rationale as "sound" under either theory.

We find the hearing officer's (alleged date of injury), date of injury determination to be against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951), Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We reverse and render a new decision that claimant's date of injury was (recommended date of injury from benefit review officer). Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Claimant not only stated the date of injury as "(recommended date of injury from benefit review officer)" on her claim but explained that date as being the date her doctor wrote the employer's doctor advising that her workplace exposure to smoke was a problem for her asthma and allergies. The record is replete with evidence that claimant well knew even before (recommended date of injury from benefit review officer), that workplace smoke was aggravating her allergies and later diagnosed asthma.

Since we find that claimant's date of injury was (recommended date of injury from benefit review officer), we must also find that her claim was not timely filed. Section 409.003 required claimant's claim to be filed not later than one year after the date claimant knew or should have known that her disease was related to her employment. As noted, claimant did not sign her claim until February 16, 1994.

Since claimant's claim was untimely, we need not resolve the appealed issues concerning whether she gave timely notice of her injury to her employer and whether she sustained an occupational disease injury. However, with regard to the conclusion that claimant reported the injury to the employer on or before the 30th day after the date of injury, we note that this conclusion rests upon factual findings that on (alleged date of injury), claimant was exposed to smoke in her work area, was injured by such exposure, and on that date reported her injury to Ms. C. Since claimant's date of injury was (recommended date of injury from benefit review officer), she was required to report her occupational disease injury to her employer not later than 30 days after that date. *See* Section 409.001.

Occupational disease is defined as "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 that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). With respect to the determination that claimant sustained an occupational disease injury, the hearing officer cited Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993, a case involving secondhand smoke in the work place and lung cancer, for the proposition that "the test of an occupational disease is whether there was a causal connection between the work and the disease or injury," and seemed to disregard the further discussion in that decision of causation of occupational disease in the context of whether the disease is indigenous to the work or present in an increased degree as compared with employment generally. In Texas Workers' Compensation Commission Appeal No. 941413, decided December 7, 1994, a case involving a secretary exposed to secondhand smoke at work and her reactive airway disease, the hearing officer concluded that she did not sustain a compensable injury notwithstanding having found she was repeatedly exposed at work to environmental tobacco smoke which exacerbated a preexisting pulmonary condition. That hearing officer, stating her reliance on Appeal No. 93774, also found that environmental tobacco smoke, and the health conditions it can cause or aggravate, are conditions to which the general public is exposed outside the workplace. In affirming, the Appeals Panel approved the hearing officer's reliance on Appeal No. 93744, *supra*, and stated:

> . . . we believe that the hearing officer properly required the claimant, as part of her burden of proof on the question of causation, to establish by a preponderance of the evidence not only that the circumstances of her work resulted in the claimed occupational disease, but also that the second hand smoke encountered in her employment was indigenous to

her workplace or present in an increased degree than in employment generally. In Texas Workers' Compensation Commission Appeal No. 93094, decided March 19, 1993, also a second hand smoke case, the Appeals Panel pointed out that "[w]hat the general public is exposed to becomes relevant in determining what constitutes `an ordinary disease of life.'"

* * * *

The hearing officer was satisfied that the second hand smoke endured by the claimant at work aggravated her preexisting restrictive airway disease. However, for this condition to be compensable, the claimant had also to show that the second hand smoke was indigenous to or present in an enhanced degree in her employment. The claimant offered no evidence on how the conditions at work were significantly different from those she encountered in ordinary life. . . . there was evidence that dust and perfume also played an aggravating role in her restrictive airway disease.

The decision and order of the hearing officer are reversed and a new decision is rendered that claimant's date of injury is (recommended date of injury from benefit review officer), that claimant failed to timely file her claim, and that the carrier is not liable to claimant for benefits under the 1989 Act.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge