APPEAL NO. 94751

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 18, 1994, a contested case hearing (CCH) was begun. The CCH was concluded on April 29, 1994. The issues presented for resolution were:

1. Did CLAIMANT suffer a compensable injury in the course and scope of his employment?

2. If so, did CLAIMANT give his employer timely notice?

The hearing officer determined that the claimant suffered a compensable injury in the form of "an anoxic event" caused by exposure to toxic chemicals which "aggravated his pre-existing conditions" in the course and scope of his employment on (date of injury), and that claimant's wife, acting on claimant's behalf, gave the employer timely notice of claimant's injury.

Appellant, carrier herein, basically contends that the hearing officer's decision is not supported by the evidence and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Finding the evidence to be sufficient, the decision and order of the hearing officer are affirmed.

First, we note that the record includes a 500-page transcript plus depositions of medical experts and other witnesses and voluminous medical evidence and testimony. We find the hearing officer's statement of the evidence to be a fair and accurate summary of the testimony presented at the CCH and we adopt it for purposes of this decision. Claimant, in (month year) (all dates will be 1991 unless otherwise noted), was a 60-year-old male, who had a history of being a heavy smoker (a "55-pack-year" man). Claimant's wife, Mrs. B, is a licensed vocational nurse (LVN) and testified that claimant quit smoking in 1988 and that she has assisted claimant in controlling his diabetes and hypertension with diet.

Claimant apparently was a maintenance person in a large food storage warehouse which over the years had been owned or operated by several concerns with claimant remaining with essentially the same duties. At the time of the incident in question, the warehouse operation had been taken over by the employer. Claimant's duties included floor scrubbing (using a power operated industrial floor scrubber), general housekeeping and insect control using "a high volume insect fogger . . . inside the warehouse, and . . . residual sprays with a hand sprayer on the outside . . . ." Claimant worked nights, usually from 4:00 p.m. until 4:00 a.m., and would use the fogger after 11:00 p.m. Although carrier

disputes the frequency of claimant's spraying, the testimony in a deposition of a coworker, JC, and documentary evidence support the determination that claimant sprayed three times a week in summers and twice a week in winters. Mrs. B's and JC's testimony indicate that claimant wore no protective clothing when he sprayed, wore a short-sleeved shirt or T-shirt in summers and a jacket in winter, with jeans and a cloth ball cap. On occasion, claimant may have worn a paper face mask or other type of mask. For approximately three months before (date of injury), claimant had complained of various ailments, such as headaches, popping or ringing in his ears, trouble with balance and dermatitis. Some six months before (date of injury) claimant had suffered a breathing problem after he came home from spraying, which was described as an "asthmatic or emphysemic episode."

On the evening of (date of injury), claimant went to work as usual but called Mrs. B to pick him up late that evening. JC testified that claimant had looked tired that evening and was limping. JC testified sometime after 11:00 p.m. "maybe 11:30" he found claimant "holding onto" a fence. According to JC, claimant said, "I don't feel good" and JC took claimant to the guardhouse where claimant's wife picked him up. The evidence is unclear whether claimant had begun fogging that evening. Mrs. B testified claimant had told her he had been fogging. Claimant's wife testified that claimant was "gasping for breath," and that she took him to (Medical Center) emergency room. Claimant was subsequently placed in intensive care. Claimant's wife, Mrs. B, testified that she called Mr. H, claimant's supervisor, from the hospital on (day after the date of injury), but that Mr. H was not in and she left a message with the secretary that claimant had had an accident at work. Mrs. B testified that approximately two days later, Mr. H came to the hospital to visit claimant and that Mrs. B asked about workers' compensation benefits. Mrs. B testified that Mr. H told her that workers' compensation benefits were not available because the employer had just recently taken over the operation. Mr. H testified that he called claimant's home on (day after the date of injury) and had been told that claimant was in intensive care with a stroke. Mr. H stated he visited claimant at the hospital "the next day," spoke with Mrs. B who asked him about "sick pay." Mr. H said he replied that he". . . didn't know because [employer] had just recently taken over the company and I didn't know if he had any sick pay coming or not." Mr. H denied he had discussed workers' compensation coverage at any time but he had told Mrs. B to see "human resources" about sick pay. Mrs. B did see human resources "about two weeks" later. What occurred at that time is not clear. It is claimant's contention that through his wife, he gave notice to Mr. H on (day after the date of injury) or shortly thereafter.

On July 12th, claimant had a respiratory arrest, and his condition deteriorated. On September 26th claimant was transferred to a rehabilitation center. Apparently claimant was sent home in October where he is on a ventilator, in a semicoma, requiring 24-hour nursing care.

A "medical statement" from Medical Center dated August 24th gave a medical diagnosis of "1. Brainstem infarction with quadriparesis. 2. Hypertension. 3. Diabetes Mellitus II." The prognosis for the stroke was "1. Guarded, significant; Disabling neurologic

sequelae anticipated." A subsequent medical statement dated January 28, 1993, indicates "Brainstem Infarction and subsequent cerebral anoxic injury--Jun 91 to Jan 92." Prognosis was: "Terminal, total nursing care dependent." As previously indicated there is voluminous medical evidence in the record.

Claimant submitted a letter dated August 9, 1993, from Dr. JH, Chief of Toxicology at (Sciences Center), which stated:

> After reviewing the information you sent, my preliminary opinion is that the cerebrovascular event suffered by [claimant] could very well have been a direct result of his exposure, in a relatively closed space, to the substances he was using at work.

A doctor from (Country), Dr. S, also opined that claimant's brainstem infarction was due to "exercabation [sic] of his hypertension and diabetes" by the chemicals he used at work. Dr. ED opined claimant's "infarction of the brain was a direct result of his work situation" and gave reasons. Mr. JR, Director, Hazardous Material Program at the University of (City 2), testified as a chemist that the chemicals claimant was working with could cause constriction in blood flow and that claimant's reactions are textbook systemic poisoning reaction. Mr. JR, not being a physician, did not give an opinion on causation other than to state claimant's brain damage could be due to lack of oxygen in the brain. Dr. BJ, a neurologist from (City 3), testified that he had performed nerve conduction studies on claimant, that claimant's health had been good before the incident and that in his opinion claimant's overexposure to toxic chemicals caused respiratory problems so that lack of oxygen to the brain caused a stroke. Dr. BJ testified that he had eliminated diabetes and hypertension as causes of claimant's stroke. Dr. DV, a staff physician at Medical Center, examined claimant and in a deposition taken on February 7, 1994, testified that claimant had suffered a particular type of cardiovascular accident (CVA) called Wallenburg's Syndrome which is not common in patients with diabetes or high blood pressure. Dr. DV was of the opinion that claimant's stroke was caused by toxic exposure rather than diabetes or hypertension.

Carrier's position is that claimant's condition is the result of uncontrolled diabetes and hypertension plus years of tobacco abuse. Mr. J, a certified industrial hygienist, who is, and has been since graduate school, a full-time employee of carrier with the title of senior occupational health specialist, testified about the "four ways of assessing whether or not a disease is work related." Although Mr. J agreed with some of Mr. JR's testimony regarding the chemistry of the chemicals used, Mr. J was of the opinion that claimant's condition was not work related because the "agent response relationship" was not present. It was Mr. J's opinion that the agents used had not been proven to cause strokes and in claimant's case the "nonoccupational risk factors (i.e., diabetes, hypertension and tobacco use) . . . are virtually overwhelming (as the cause of claimant's stroke)." Mr. J testified that it did not matter that claimant was not wearing protective clothing as recommended by the material safety data sheet (MSDS) because he was not exposed to enough chemicals. Carrier also called Dr. LV, a board certified neurosurgeon in private practice in (City 1). Dr.

LV agreed that claimant had Wallenburg's Syndrome "which is an obstruction of blood flow to an area of the brain stem" but testified that claimant had suffered a series of transient ischemic attacks (TIAs) prior to the (date of injury) incident and that claimant had an "evolving stroke" caused by high risk factors of diabetes and hypertension compounded by tobacco abuse. Dr. LV characterized Dr. JB's testimony as a "medical fallacy" and the nerve conduction studies were "not indicative of anything." Dr. LV disagreed with Dr. BJ's testimony about "vasoconstriction of blood vessels." Dr. LV testified he believed claimant's diabetes and hypertension were poorly controlled and that claimant's stroke was a result of the high risk factors. Dr. LV admitted, however, that he has had very little experience with toxic exposure cases and that he had never seen a stroke caused by exposure to toxic chemicals.

The hearing officer determined in pertinent part:

FINDINGS OF FACT

5. Part of CLAIMANT'S duties included spraying and fogging the warehouse with pesticides and insecticides two to three times each week that he worked.

7. CLAIMANT suffered from hypertension and diabetes.

8. On (date of injury), CLAIMANT suffered an anoxic event which was caused by over exposure [sic] to toxic chemicals contained in the pesticides and insecticides he was using at work and which aggravated his pre-existing conditions.

9. An aggravation of a pre-existing condition is an injury.

10. EMPLOYER was notified of CLAIMANT'S work related injury on (day after the date of injury), when CLAIMANT'S wife [Mrs. B], asked his supervisor, [Mr. H], about workers' compensation coverage during a visit [Mr. H] made to CLAIMANT in the hospital.

Carrier filed a 40-page appeal, principally attacking the credibility of claimant's expert witnesses and stressing expert evidence supporting its position. We would note, and emphasize, that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Carrier argues that Dr. BJ, claimant's (City 3) expert, failed to state his postdoctoral training and failed to specify the practice he specialized in; however, we suggest that these are items which should have been brought out in the extensive cross-examination at the CCH, for the hearing officer's consideration rather than request the Appeals Panel to speculate on the significance of what that testimony might have been.

Carrier first argues that "there was no evidence . . . that [claimant] had been

spraying and fogging that warehouse with pesticides two or three times a week each week that he worked." Carrier then concedes that Mrs. B testified that claimant had been using the chemicals for a number of years. Whether that number of years was 18, 16, or a few less does not appear to be significant. Further, Mr. JC (who had worked with claimant "eight months, nine months, somewhere around that time" not the "2-3 years" carrier stated) testified of his own knowledge that claimant "fogged three days a week." Further the checklist of duties, provided by the employer and admitted into evidence shows insect control to be one of claimant's duties with the fogging schedule for the warehouse to be twice a week in winter. The schedule for summer is checked for once a week (contrary to the testimony) but the blocks for "Mon Tues Wed" appears to have been "whited out." In any event there is ample evidence that claimant sprayed/fogged each week he worked and sufficient evidence to support the hearing officer's Finding of Fact No. 5, quoted above. Carrier's contention that "there is no evidence" that claimant fogged each week that he worked is without merit.

Carrier next argues that the "hearing officer fails to state what 'conditions' were aggravated [in Finding of Fact No. 8] and her finding is vague and ambiguous so as not to give the carrier adequate notice of her findings." We disagree. Quoted above is the hearing officer's Finding of Fact No. 7, which finds that claimant had hypertension and diabetes. In the next finding, and next sentence, the hearing officer refers to "conditions" which we believe a fair reading of the decision would mean that the hearing officer was referring to the hypertension and diabetes in the previous sentence. The hearing officer's theory is clear to us that she found (and it is uncontroverted) that claimant had hypertension and diabetes; that those two conditions were aggravated by exposure to toxic chemicals in the pesticides and insecticides claimant was using, and that this aggravation of hypertension and diabetes resulted in the anoxic event on (date of injury). The hearing officer appears to have borrowed a little from both the claimant's and the carrier's theories and determined that claimant suffered a compensable injury based on aggravation of pre-existing conditions. We find the hearing officer's determinations on this point supported by the evidence. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. Further, the hearing officer has the authority to judge the weight and the credibility of conflicting medical evidence, and the hearing officer has the authority to resolve any conflicts in the evidence. Texas Workers' Compensation Commission Appeal No. 93010, decided February 16, 1993; Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Carrier further contends that claimant must establish a causal connection between "a disease" and his employment based on "reasonable probability" by the testimony of experts citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199, 202 (Tex. 1980). We agree that the general proposition of law applies to the 1989 Act; however, we disagree that "none of the witnesses brought by the claimant as 'experts' meet the above requirements [of knowledge, skill, experience, training or education], as a

matter of law." Dr. JH, toxicologist and medical doctor from (Health Center), Dr. ED, a medical doctor, Dr. BJ, another medical doctor, and Dr. DV, a medical doctor and staff physician at Medical Center, all qualify as medical experts by title and licensure alone. Carrier might argue its experts are more qualified and entitled to greater credibility, but carrier's statement that those witnesses are not experts "as a matter of law" has no merit. If carrier believed those individuals, in fact, were not medical doctors and/or, in fact, were not licensed to practice medicine, it should have so challenged that testimony at the CCH. As stated previously, the weight and credibility to be given to the witnesses is for the hearing officer and we will reverse a finding only if we determine it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Carrier cites a number of Appeals Panel decisions which, in one way or another, involve inhalation of substances alleged to have caused a variety of ailments. Most of those cases turn on and can be distinguished on a factual basis. Carrier states: "In fact, in an almost identical case, involving a stroke victim who had diabetes, hypertension and obesity, was claiming to have had her [sic--his] stroke as a result of the inhalation of chlorine gas, the Appeals Panel held . . . claimant's theory of recovery should fail." Carrier alleges the theory in that case "is similar to the one at hand. . . ." Although carrier fails to give a citation to that particular case, we believe it to be Texas Workers' Compensation Commission Appeal No. 93874, decided November 5, 1993. Contrary to carrier's contention, Appeal No. 93874 involved a pool maintenance man, who, while changing chlorine gas cylinders, inhaled "a couple or three breaths of gas," left the area, began coughing, alleged he lost consciousness, went home, rested and eventually suffered a stroke. The employee in that case was overweight and suffered from untreated diabetes and hypertension. In that case, although the medical experts agreed chlorine gas exposure, per se, did not cause a stroke, the employee claimed that the exposure caused "respiratory difficulty" (i.e., coughing), temporary hypoxia which was claimed to be the precipitating event for the stroke. The hearing officer, in that case, believed differently and determined the employee had not sustained a compensable injury. The Appeals Panel affirmed the hearing officer's decision as not being against the great weight and preponderance of the evidence. In that case, as in this case, there was conflicting expert medical evidence supporting both sides and the hearing officer resolved that case against the employee. Consequently, that case has several distinguishing features including the fact that it involved a one-time occurrence while the instant case involved exposure over a period of years. The hearing officer in Appeal No. 93874 found against the employee, while in the instant case the hearing officer made a determination that the toxic exposure aggravated the pre-existing hypertension and diabetes which resulted in claimant's stroke. We find that determination supported by sufficient evidence.

That another trier of fact may have reached a different conclusion, or may have given greater weight to carrier's evidence or may have believed that some of claimant's expert medical testimony was "a medical fallacy" not worthy of belief and "not indicative of anything," alone is not a sufficient reason to reverse a decision of a hearing officer. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary

to the overwhelming weight of the evidence as to be clearly wrong and unjust, a standard not met in this case. Cain and Pool, *supra*.

Carrier also argues that the overwhelming weight of the evidence was that neither claimant "nor anyone on his behalf timely reported his alleged on-the-job injury. . . ." Carrier argues that because the notice did not include "the name, address, and telephone number of the injured employee; the date, time and place the accident occurred; the description of the circumstances and the nature of the injury; the names of any witnesses (if any); the name and location of the health care provider . . . [in accordance with] TWCC Rule 122.1(a)(1)-(6)," carrier should be relieved of liability. We reject the concept that notice must specifically meet each and every aspect of the listed items. The Appeals Panel has early held that the purpose of the notice provision is to give the insurer an opportunity to immediately investigate the facts surrounding an injury. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). To fulfill the purpose of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related. The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Section 409.001(b)(2). Where the claimant offers evidence (through Mrs. B's testimony) that the supervisor was notified of the injury, but the supervisor testifies he was not notified, a question of fact exists for determination by the trier of facts. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991. Mrs. B's testimony that she called Mr. H's office on (day after the date of injury) and that she spoke with Mr. H a day or two later, is uncontroverted. The hearing officer, in her Finding of Fact No. 10 seems to indicate that Mrs. B gave notice to Mr. H, claimant's supervisor "during a visit [Mr. H] made to CLAIMANT in the hospital." If so, that visit was "a day or so" after (day after the date of injury) and we reform that finding to read that "on or about (date)," rather than (day after the date of injury), clearly the day Mrs. B said she called Mr. H's office. The hearing officer resolved what was said between Mrs. B and Mr. H in the hospital a day or two after the incident in claimant's favor finding that notice was given at that time. There is sufficient evidence to support that determination.

Mrs. B testified, and the hearing officer found, that Mrs. B had asked Mr. H about workers' compensation coverage when Mr. H visited claimant in the hospital on (day after the date of injury), Mr. H's denial and inferences drawn by the carrier notwithstanding. This was a factual determination to be resolved by the trier of fact. Carrier argues that Mrs. B filed an application for Social Security Benefits on behalf of her husband on August 3rd, less than one month after the incident and that the application states that the cause of claimant's condition to be a stroke, with no mention of the pesticides. We find nothing improper or unusual about that fact, particularly in light of the hearing officer's comment in her statement of evidence that "[Mr. H] said there was no workers' compensation because of the recent change in ownership of the company. For this reason [Mrs. B] filed for social security benefits on August 3, 1991." The hearing officer clearly believed that Mrs. B asked about workers' compensation benefits, was told there were none and filed for social security benefits. We know of no requirement, and carrier cites none, which would require

a claimant for social security benefits to detail the cause of his condition.

Carrier makes some reference that prior to the CCH, Mrs. B had admitted or stated "that she had an excuse for not timely reporting the claimant's injury." We did not find that in Mrs. B's testimony nor in her statement dated August 12, 1993, offered into evidence by the carrier. This point is not covered in the benefit review conference report before us, nor in any of the evidence submitted. We will consider only evidence in the record developed at the CCH and cannot accept as fact argument made by the parties in the request for review or response.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge