APPEAL NO. 950338

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On November 30, 1994, a contested case hearing was convened in (city), Texas, with (hearing officer) presiding. The issues were whether the appellant, (claimant), who is the claimant, sustained a compensable occupational disease, silicosis; whether he had disability resulting therefrom; and whether the carrier was relieved of liability because claimant failed to notify his employer in accordance with Section 409.001.

The hearing officer found that claimant did not "currently" have silicosis, concluded that he gave timely notice of alleged injury, and that he did not have disability because he did not have a compensable injury.

The claimant has appealed all findings and conclusions that he did not have a compensable injury or disability. Claimant argues that the evidence, including product warnings from a few of the products that he used, established the presence of crystalline silica. Claimant asks for a review of exposure and medical evidence to determine if the hearing officer's decision is against the great weight of the evidence. Claimant argues that the opinion of carrier's expert doctor is not evidence that the claimant did not breathe "sufficient quantities" of respirable silica particulate. The carrier responds with reciting evidence in favor of the decision. The carrier files an appeal of the hearing officer's finding that claimant gave timely notice of his injury. The claimant responds to this appeal almost entirely by arguing that the employer had actual knowledge from the beginning that the claimant was having respiratory problems.

DECISION

We affirm the hearing officer's decision that claimant did not have a compensable injury, finding the evidence insufficient to establish either an exposure to respirable silica, or the presence of silicosis. We affirm the hearing officer's determination on timely notice.

Claimant, who was 31 years old at the time of the hearing, began his testimony by describing his employment history prior to beginning work for (employer) in 1988. Claimant had worked primarily doing insulation for a number of companies prior to 1988, but the nature or extent of such work was not developed in the record. Claimant stated that he did two types of work for the employer: insulation and refractory work. He stated generally that insulation work was performed on the outside of pipes or structures, and refractory work was done inside ovens or boilers. Claimant testified that the hours he worked varied depending upon the work he had. He stated that "a lot of times" he would work 12 and up to 15 hours a day when doing refractories. Refractory work could also involve working seven days a week. Aside from this, there was no testimony from the claimant about his working hours or amount of time spent doing specific activities that he contended exposed him to silica. All work performed by claimant was at work sites of customers of the employer.

When asked if he could tell the percentage of refractory work he performed versus insulation work, claimant stated only that he believed he did "more" refractory work.

Claimant, asked to describe the refractory work, indicated that it involved brick laying on the inside of ovens, to act as an insulator. Sometimes such work involved laying new bricks, and sometimes repair work was involved. Bricks and a kind of cement were used for this work. Claimant stated the only brick manufacturer he could remember was (company). He stated that some types of brick needed a mix for application, and some didn't. He stated that some mixes were dry, and some were wet, applied with a spray gun. Claimant stated that if brick were being replaced, the old brick liner was removed with an air hammer. Claimant testified that there was no ventilation but there were openings that allowed air to circulate. He said removal of old insulation created dust, as did cutting into bricks when it had to be done. The debris would be shovelled out. There was no testimony about the frequency of such tasks within claimant's work history, or the duration of such tasks when they did occur.

Insulation work, according to claimant, involved using fiberglass, foam glass, and a substance called SuperCaltemp. Claimant was asked how he applied foam glass, he stated that it was cut to fit the fixture he was insulating, with a handsaw. Wire was used to secure this to the structure. Claimant testified that SuperCaltemp was also fastened to fixtures with wire or a band. Claimant said that this material came cut to fit pipes, and that if a tank was insulated, it came in blocks. Claimant stated that SuperCaltemp was never applied inside.

Claimant testified that there were warning labels on the materials he used, and he identified some for the record. When claimant was asked about the frequency of his use of the various substances used in both refractory and insulation work, claimant stated that "the entire time I was working there, I used these products, but sometimes it was one product, and sometimes it was the other."

Although claimant's appeal notes that he used "paper" masks, claimant testified that he wore a paper mask that had a little metal piece on the nose and was attached with two bands. He did not remember any numbers on the masks, nor did he testify to the brand of mask. However, claimant's attorney began referring in his questioning to a "Three M Paper Mask." Claimant testified that he used it basically any time he was working, and he agreed that an ample supply was provided. Claimant stated that while working at one chrome company customer's location, for about a week, he wore a mask with two filters. Claimant said that the masks would not keep out everything, and he would have something inside the mask. The relationship of this occurrence to claimant's various work tasks, or the frequency of dust in his mask, was not developed.

Claimant said that in (month year), when he had been suffering from allergies, he heard a radio ad from the Mexican Consulate on the radio, warning of exposure to silica. Claimant testified:

And even though I wasn't working with sand . . . I overheard on the radio this. But I knew I was working with materials that contained sand, and that is when I talked to the Consul, and he recommended me to go see [claimant's attorney].

Claimant stated he was referred by his attorney to (Dr. W), whom he saw in December 1993. He stated that he told Dr. W he wanted his allergies examined. The second time he saw Dr. W was in February 1994, when Dr. W ordered testing. He stated that he requested time off from work in order to see the doctor. Claimant said that after the "second or third time" he saw Dr. W, Dr. W told him he thought he had tuberculosis. However, he also said that Dr. W referred him to the county health department in December 1993 for tuberculosis, and he was treated for this condition. Claimant said he discussed his tuberculosis with persons at the company.

Claimant said that after a December 8, 1993, appointment with Dr. W, he discussed x-rays that had been taken. The substance of the conversation was not brought out. Claimant stated he had a test in April 1994 in a hospital. Claimant said it was his understanding that he had silica in his lungs, and was prohibited from working in a dusty environment. He quit work in May 1994 when the employer could not provide dust-free work.

On cross-examination, claimant stated that he had never been a sandblaster, and he had been troubled with allergies for two years. Claimant stated that while he paid for prescription medications, no one was paying his medical bills, but that he was also not receiving bills. Claimant said he had not had a lung biopsy. He stated that he never told Dr. W that other persons who worked for the employer were sick, or that he did not use any mask. Claimant agreed he had some x-rays in (month year) prior to seeing Dr. W. Claimant stated that Dr. W never discussed with him the possibility that he might have silicosis. He said he was unaware that Dr. W listed a diagnosis as of December 8, 1993, of "probable silicosis" on a form completed for claimant. Claimant was informed he had silicosis, he said, by his attorney.

(Ms. S), the vice president of the employer, testified. From claimant's working records, she ascertained that 30-35% of his hours had been spent on refractory work, and 60-65% on insulation. Ms. S stated that 99% of the insulation work took place outdoors. Ms. S stated that while she did not expect that claimant normally would have applied refractory adhesive with a spray gun, she said it was likely that he probably did do some of that work. Ms. S estimated that 35%-40% of the company's business would involve removing old materials. She testified that she could not ascertain from the records what part of claimant's time was devoted to various activities within insulation or refractory projects to which he was assigned. Ms. S testified that at least one of the products for which claimant submitted an exhibit could not be verified as used by her company. Ms. S stated that no other employees had reported occupational lung diseases or silicosis, and that several refractory employees had been doing such work for employer for 20 to 30 years.

Ms. S stated that the first time the employer became aware that claimant was contending work-related illness was at the end of May 1994, when the company received a letter from Dr. W. She stated that the reasons given by claimant for previous times off were for treatment of allergies and tuberculosis.

Ms. S said that she understood that silica was an ingredient of Pabco Insulation, SuperCaltemp and (company) Kruzite 70, which was identified as "one" of the products used for refractory work. However, Ms. S stated that this brick was not considered to be insulating brick, but was a hard brick, and would be present inside an oven as about five percent of the brick. Because plants bought their own brick, she was not able to testify whether other brick inside the ovens would have silica without consulting material data sheets. She stated that while some of the spray gun mixes contained silica, not all of them did. Ms. S stated that she was not the person who ordered the masks and could not therefore identify the mask as a Three M 8710 dust particle mask. Ms. S testified that it was her understanding that some of their customers would be required by OSHA to conduct air sampling studies.

(Dr. H) testified as a witness for the carrier. He had conducted his residency in occupational pulmonary diseases. He went into private practice, and stated that he consulted with corporations on issues such as risk assessment, safe work environment and proper testing procedures. Dr. H testified that diagnostic criteria for silicosis included an exposure to begin with, and then pulmonary abnormalities reflected in objective testing. Dr. H pointed out that a history of exposure to respirable silica, and not just silica, had to be established. Dr. H identified silica as ubiquitous and a main component of beach sand. Dr. H stated that within reasonable medical probability he did not believe claimant had silicosis.

Dr. H had reviewed products sheets for the products that claimant alleged he had been exposed to. He stated that respirable silica would not be visible. He testified as to why he felt that claimant was likely not exposed to respirable silica.

Dr. H had not examined claimant and had not been to work sites. When asked to comment on wet sprayed "gun" materials, he stated that release of respirable silicates would be less than dry sand, and that silica would adhere because of the water. He stated that the fact that claimant may have coughed up dust on occasion did not equate to inhalation of respirable silica. When asked to review records of three spirometric tests taken by claimant, he noted that the first two were normal, and "reproducible." He found that for a test in April 1994, the "FVC" ratios were again in the normal range. He found some fault with "reproducibility" of results on the third page of that test, and indicated that a follow-up test was invalid. Dr. H stated that claimant's x-rays were normal. Dr. H stated that the testing performed indicated to him a slant to screen for silicosis rather than allergies in general. He stated that mild restrictive processes on a pulmonary function test were not abnormal per se.

Dr. H said he did not doubt that claimant was exposed to products containing crystalline silica. He stated, however, that it was the form, dosage, quality, and duration of exposure that were important to determine a harmful exposure. Dr. H had not reviewed any air sampling tests of work sites, and agreed that he assumed that exposure to silica particles would not have gone beyond permissible limits. In cross-examination, Dr. H stated that it was "possible" that the dust claimant stated he was exposed to contained some particles of respirable silica. However, he stated that at the "probable" level, the evidence of exposure was much less weighted. Dr. H stated that the paper masks produced by Three M had varying levels of respirability. Dr. H stated that the presence of silica in a lung biopsy would indicate exposure but not necessarily the disease of silicosis. Dr. H said that a gallium scan was sensitive and would indicate an inflammatory process, but was not at all specific on the cause of such process.

In response to the hearing officer's questions, Dr. H described his assumptions as: a respiratory program based upon written policies; OSHA investigation of work sites; that the companies in question had a safety officer; that claimant had not done sandblasting or been exposed to it; that he had maximum ventilation during his insulation work outside, and that this was 65% of his work time. Dr. H testified to his understanding that there were paper masks available capable of filtering out three to five micron particles (the size of respirable silica). Dr. H's written report, and a few articles concerning the interpretation of pulmonary function tests, are included in the record as carrier exhibits.

A product safety information sheet for SuperCaltemp (used by claimant in insulation) warns that prolonged breathing of dust from the product could cause silicosis. (Company) company warning labels for unidentified products, but which claimant had testified he had seen on some bags, warn against prolonged exposure to dust, as does the Kruzite 70 label. The record does not contain any material data safety sheets or other data concerning permissible or impermissible exposure levels, nor is "prolonged" exposure defined. A material data safety sheet for Pabco Insulation does not identify any respiratory diseases in connection with overexposure.

Dr. W's reports indicate that he reads claimant's pulmonary function tests as abnormal. A gallium scan in December 1993 was reported as weakly positive for an inflammatory process. On May 27, 1994, claimant forwarded to his supervisors a copy of a May 10, 1994, medical report from Dr. W, and filed a claim for occupational lung disease. A May 10, 1994, letter from Dr. W to claimant's attorney recites that others at claimant's plant are ill, and that there are no requirements for masks. Dr. W notes decreasing diffusing capacity and states that silicosis certainly must be considered.

Exposure to toxic substances through inhalation, and the resultant effect on the body, are matters beyond common experience, and medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. *See* Houston General Insurance Company v. Pegues,

514 S.W.2d 492 (Tex. Civ. App.- Texarkana 1974, writ ref'd n.r.e); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 93774, decided October 19, 1993.

In considering the contentions made, and the state of the record here both on the presence of disease and the causal link to the work place, our attention is inevitably drawn to the analogous case of Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1990). We note that in that case, the contention was made by the claimant, who was afflicted with a rare bacterial tuberculosis, that the presence of such an organism in the soil, and his occupation crawling around underneath houses, established the causal link to employment. The Schaefer case involved a claimant with a positively established disease, something not present in the record here.

The Supreme Court stated that expert medical testimony must establish "reasonable probability" of a causal connection; in the absence of reasonable probability, the inference of a causal connection was not more than speculation or conjecture.

The Supreme Court noted that there was no evidence of the actual presence of the bacteria where Schaefer worked. The Supreme Court determined that the medical testimony amounted to no more than a suggestion of possibilities as to how or when the claimant was exposed. The Court stated:

> The fact that proof of a causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation.

We believe the Schaefer case is directly applicable to analysis of the evidence in this record, and supports the hearing officer's overall determination that claimant did not prove the existence of a compensable injury.

The burden was not on the carrier here to show that there was no respirable silica present. It was on the claimant to establish the causal link. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). If there were air tests from the various work sites that could have assisted claimant in proving his case, it was his burden to develop that evidence. We observe the absence of even lay testimony concerning the duration and extent of any exposures to "dust," let alone silica, by the claimant. The carrier produced uncontroverted evidence that substantially all of claimant's insulation work took place outside. Claimant did not attribute dust to his insulation work or contact with at least two of the substances. Moreover, Dr. W's May 10, 1994, letter, in which he indicated that silicosis "should be considered," assumed at least two facts which claimant indicated were not true: that he used no mask, and that coworkers were also ill. Dr. H indicated that history was an important part of the diagnosis. He testified that while he thought the presence of respirable silica in dust was "possible," it was not probable.

While the hearing officer based his decision primarily on the lack of a diagnosis, his conclusion that claimant does not have disability because he does not have a compensable injury is firmly grounded in a record that lacks not only proof of the presence of silicosis, but of evidence beyond mere speculation of any causal link to the workplace.

We note that the first finding of fact that the hearing officer made, that claimant was "last injuriously exposed" to silica dust on May 26, 1994, may be disregarded as surplusage, because the identity of the employer or carrier in this case was not in issue, and the hearing officer further found that there was no injury. There may be no injurious exposure without an injury. Likewise, what disease or conditions may or may not develop in the future and/or a conclusion of law that claimant would have no disability even if he had "simple" silicosis, is speculation beyond the issues in the case.

On the matter of disability, the only evidence regarding claimant's ability to work was that Dr. W recommended he work in dust free environment, and the employer did not have such work. There is no indication in the evidence that claimant was unable to perform gainful employment, only that he was told not to do his former job. As the hearing officer noted, the lack of a finding of compensable injury supported a lack of disability.

We will affirm the hearing officer's conclusion that notice was timely, and his implied finding of fact that the date the claimant knew or should have known he may have a disease related to his employment was on May 27, 1994. Section 408.007 states 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." This will not, in every case, mean the date on which a concrete diagnosis is rendered. While another finder of fact could regard as significant claimant's response to and his testimony about the radio advertisement as a strong indicator of a (month year) date of injury, and there is also evidence that claimant was led to believe shortly thereafter that he had tuberculosis, and no contention that this was work related. Therefore, we do not find reversible error in the determination that timely notice of the alleged injury was given.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951). We affirm the decision and order of the hearing officer, subject to our points about findings that go beyond the issue at hand.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Tommy W. Lueders
Appeals Judge