APPEAL NO. 950389

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 1, 1995, in (city), Texas, (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent (claimant herein) sustained a compensable injury in the nature of an occupational disease (severe obstructive lung disease) on (date of injury), and that he had resulting disability from September 30, 1993, through the date of the hearing. The appellant (carrier herein) appeals these determinations arguing that the inhalation incident as described by the claimant did not occur and that, in any case, the claimant did not establish a causal connection between his current medical condition and his employment. To the extent there was no compensable injury, the carrier maintains there could be no disability under the 1989 Act. The claimant replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The claimant, who is 50 years old, has been an ironworker since 1969. He began working for the employer in September or October of 1990. The employer provided contract maintenance service for an aluminum manufacturer. The claimant testified that on (date of injury), he was working outside on some duct work that led to what he called a portable "cooling tower" some 30 feet high and was otherwise described as an environmental scrubber designed to remove exhaust emissions from the aluminum manufacturing process from the air. He said that on this date a weather front came through the area and the gases from the tower would waft in and out of his work area. He said he could tell gases were being emitted from the tower because he saw heat waves similar to what one observes rising off road surfaces in the summer. He stated that, though he tried to avoid inhaling the gases, he still smelled them and when he breathed "it hurt." He further testified that the gases were present more than usual on this date. He stated that he returned to his motel at the end of the work day (the job site was over 175 miles from home) and was unable to sleep most of the night and he said he called his supervisor, (Mr. L), the next day to tell him he was unable to work that day because of the gas he inhaled. He continued working until April 1, 1993, when he changed jobs to one closer to his home, but according to the claimant, was fired after two days on this job because he could not work at the expected pace. He has not worked since.

The claimant also described two other incidents at work where he said he had a reaction to inhaling fumes generated in the aluminum manufacturing process. He could not pinpoint the exact date of either incident. According to the claimant, the first incident happened sometime within the first year of his work at the aluminum plant. He said that he and coworker (Mr. S) were working in the "pot room," one of several large rooms so called because the aluminum ore is smelted in pots in these rooms with the fumes vented by fans to the scrubber, when the power went out and the electric ventilation system stopped. In a

transcript of a telephone conversation between the claimant and an adjuster, the claimant was quoted as saying he looked down and "saw this stuff coming. It looked just like a . . . science fiction movie; it was a yellow-looking gas." The claimant said the gas caused him difficulty breathing and tearing in his eyes. He said he went to the restroom and after about an hour and a half seemed to have recovered and returned to work. The second incident occurred on an unknown date when the claimant said he was working in the open courtyard and inhaled some fumes. He finished his shift and that night he had difficulty in getting to sleep.

According to the claimant, it was not until after the third incident that he gave significance to the preceding two incidents. Despite his general weakness and shortage of breath, the claimant did not seek medical treatment after the third incident until September 27, 1993, when he saw (Dr. D), his family doctor.[1] Dr. D described a complaint of bronchospasm which the claimant attributed to fumes at work. Spirometry testing on November 9, 1993, was "consistent with a severe obstructive ventilatory defect with significant overdistention." In a letter of November 30, 1993, Dr. D wrote that the claimant has "Obstructive Lung Disease with restrictive defect due to the inhalation he had a [sic] work; (Plant)." Further testing revealed that the claimant also had "a moderate amount of extra pleural fat," a large hiatal hernia and a small calcified granulomata in the right hila "suggestive of prior exposure to granulomatous disease."

On February 15, 1994, (Dr. C) provided a "second opinion evaluation regarding disability status" as part of the consideration for a disability pension at the request of the Texas Ironworkers' Trust Funds. The diagnosis of concern in this appeal was "bronchospastic airways disease and resulting dyspnea." Dr. C raises "two possibilities" to explain this dyspnea:

> The first consideration would be that with his first high-concentration exposure to the noxious fume [sic] (identification = ?), he has developed the Reactive Airways Dysfunction Syndrome (RADS) with residual symptomatic and objective pulmonary functional obstructive dysfunction. . . . This second diagnostic consideration would be, simply, that he developed occupational asthma as a result of his repeated exposure to the noxious fumes and sensitization thereto.

Dr. C recommended further treatment and testing before giving a final opinion on the cause of claimant's condition.

The claimant was also examined, at the carrier's request, by (Dr. W), a pulmonologist, who has since become claimant's treating doctor. Dr. W testified at the hearing that his diagnosis of the claimant was that he suffers from RADS as a result of his inhalation of "toxic

[1] The previous visit with Dr. D was on January 11, 1993, when he appears to have been diagnosed with bronchitis.

fumes" at the worksite. He said that, clinically, this diagnosis of RADS is compatible with either occupational asthma or bronchiolitis obliterans, in that there is no actual lung tissue damage, but there is damage to the small airways which prevents the claimant from expelling all the air from his lungs, leaving a large amount trapped. He said the prognosis for recovery is nil, but the chances of stabilizing the condition are good. He was clear in his testimony that he was basing his conclusion solely on the history given by the claimant about exposures to "unknown gases" at work. He insisted that the claimant's condition was not the result of chronic low level exposure, but that the claimant was "engulfed" in gaseous substances. He admitted that ambient gases in the workplace were not at toxic levels in his opinion; that he did not know the levels of any concentration of gases at work; and he had no independent knowledge of the length of any exposure. He stated that there were three possible causes of the claimant's condition. These included a bad viral infection, which he described as the most common cause of this condition; spontaneous asthma; or actual exposure. He was convinced to a reasonable medical probability that the claimant's acute exposure at work was the cause of his current condition.

Also introduced into evidence was a "Report of Industrial Hygiene Monitoring" completed in August 1992 by an environmental consultant. This report discussed levels of aerosol and gaseous fluoride, carbon monoxide and nitrogen dioxide in the ambient air in the courtyard where claimant later worked. According to the report, none of the gases exceeded federal Occupational and Health Administration (OSHA) action levels or permissible exposure limits. No further description of the health effects of these gases in any concentration were offered into evidence. In his testimony, Dr. W stated that these gases were at "low levels", but "at high levels" could cause the claimant's condition.[2] In a report of March 17, 1994, Dr. W stated that the information from the report "is interesting, but may not be applicable to [claimant]. He did not complain about the ambient chemicals." In a letter of July 26, 1994, Dr. W again stated:

It is my opinion that the ambient air analysis performed did not reflect the conditions under which he was exposed to the toxic fumes which most likely contained hydrofluoric acid, fluoride dust, sulphur dioxide and nitrogen dioxide. . . . [Claimant's] severe obstructive lung disease is . . . related to the inhalation of toxic fumes which is well documented in the medical literature to cause this condition.

(Dr. G), who holds a Ph. D in toxicology, testified at the request of the carrier. Not being a medical doctor, he did not examine the claimant, but did consult with people at the plant site. He stated that the process of producing aluminum can generate toxic gases. His review of plant records disclosed no report of incidents of toxic exposure or the discharge of gases in excess of OSHA levels. With regard to the first claimed incident of exposure and the "yellow cloud," Dr. G's opinion was that any "cloud" would have produced such

[2] Dr. W mentioned ammonia in this context even though ammonia was not mentioned in the report.

extremely high concentrations of gas that complaints from other workers would be expected. He also stated that the aluminum manufacturing process does not produce "yellow" gases, but if visible, the gases would be white. He testified that he found no record of a power outage as described by the claimant and there was a backup power system. As to the second and third incidents, Dr. G concluded that a visible cloud in an open area made no "physical or chemical sense" and that in this open area it was not reasonable to expect a high concentration of gases. The reports of a granulomous disease suggested to Dr. G that the claimant had sometime in the past inhaled particulates. He did not believe that the claimant's present condition could result from three separate exposures as described by the claimant.

Mr. S testified that he was a coworker of the claimant and that there were routine odors present at the plant. With regard to the first incident, he said he did not recall a power outage or see a yellow cloud of gas. He also did not recall the claimant ever telling him that chemicals were causing problems or the claimant ever getting ill and complaining of breathing problems at work.

Mr. L, the assistant superintendent for the employer, testified that there were occasional power outages, but was never made aware of any cloud of gas during such an outage. He said if the fans ever stopped working in the potting room, the natural updraft would disperse the fumes through the roof. He admitted he has seen a white gas while working in the potting room.

The carrier appeals the following determinations of the hearing officer:

FINDINGS OF FACT

4.While working at the Employer's job site . . . the Claimant was exposed to toxic fumes on several occasions, but until his final exposure, the Claimant suffered no ill-effects and thought that the exposure was trivial.

5.On (date of injury), the Claimant inhaled toxic fumes while working in the courtyard of the . . . job site near a "short stack" or a "wet scrubber," the fumes from which were blown down to the courtyard by the existing weather conditions.

7.As a result of inhaling the fumes expelled by the wet scrubber on (date of injury), the Claimant experienced shortness of breath and was unable to rest or sleep for the twenty-four (24) hour period immediately following the exposure.

CONCLUSIONS OF LAW

3.The claimant sustained a compensable injury in the course and scope of his employment, obstructive lung disease.

4.The date of injury is (date of injury).

6.Claimant had disability, commencing September 30, 1993, and continuing.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 410.011(26). To establish an occupational disease, the evidence must show a causal connection between the employment and the disease, that is, that the disease is inherent in the employment as opposed to employment generally or at least present in an increased degree. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Where, as here, a causal connection is not a matter of general knowledge, the determination of compensability is ultimately a matter of whether the claimant can prove by reasonable medical probability that there is a causal connection between the claimed injury and the employment. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993. The fact that this proof of causation may be difficult does not relieve the claimant of the burden of proof. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. However, the claimant can give probative, non-expert testimony on the circumstances of the employment that are alleged to have caused the occupational disease. Appeal No. 93668, *supra*. Whether the necessary causation exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994.

The carrier does not dispute Dr. W's medical diagnosis. It argues that the events described by the claimant never took place. Because Dr. W based his diagnosis on the claimant's account of what happened at work, if these events did not happen as claimed, his expert opinion is not probative of a work-related injury. With regard to whether the three incidents of inhalation as described by the claimant occurred, carrier points to the evidence that no one else saw or reported "clouds" of gases and "yellow" gas was a chemical and physical impossibility. Whether the incidents occurred as described was a question of fact

for the hearing officer to decide. She could well have declined to become embroiled in questions about the exact color of the gas, and still conclude, based on the claimant's testimony about his physical reaction to smelling a gas (tearing, difficulty in breathing, burning sensation) and his later description of the gas coming off the scrubber not in terms of color, but in terms of waves, that the claimant was, in fact, exposed to concentrations of a noxious, if not toxic, gas as claimed. This is not unlike our decision in Texas Workers' Compensation Commission Appeal No. 92378, decided September 14, 1992, where the claimant contended he knew he was exposed to ammonia at work because he experienced the distinctive smell at home. Similarly, in the case now appealed, the claimant testified that he experienced distinctive fumes at work that were contemporaneous with certain physical reactions and the hearing officer could, based on this testimony, find as fact that the exposures occurred as described. Under our standard of review, we will not reverse this finding on appeal. The identity of these fumes and whether they were toxic in the sense that they caused the claimant's current lung condition is another matter.

The Appeals Panel has observed that the "fact that an injury occurred during a period in which a claimant was employed does not mandate a conclusion that the employment caused the injury." Texas Workers' Compensation Commission Appeal No. 94082, decided March 4, 1994, citing Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. Causation means more than a coincidence between work and an injury. To meet his or her burden of proving the compensability of an inhalation injury, a claimant must not only reasonably identify the substances or gases inhaled, but must also show by reasonable medical probability that these substances or gases caused the injuries complained of. For example, we have affirmed a hearing officer's finding of no compensable injury where the offending gases are described only as fumes and only the claimant's testimony describes them as noxious. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 94188, decided March 25, 1994, where we affirmed a finding of compensability based on the claimant's identification of silicone as one of the chemicals that caused her condition, the employer admitted that silicone was in use at the time of the injury, and the treating doctor listed silicone as one of the chemicals he considered in arriving at a medical conclusion that the silicone was a causative factor in the aggravation of an allergic rhinitis condition. In the case now appealed, the carrier introduced evidence that fluorides and nitrogen dioxide were present in the ambient air as a result of the aluminum manufacturing process. The claimant is contending, and the hearing officer found, that he was exposed to these chemicals at appreciably higher levels (cloud forming levels) than the normal background presence. Dr. W connected these episodic exposures to the claimant's obstructive lung disease. Dr. G was of the opposite opinion. The hearing officer resolved this direct conflict in the evidence by accepting the opinion of Dr. W. As such, "he was acting within his province as the fact finder in assigning the weight that he did" to the evidence. Texas Workers' Compensation Commission Appeal No. 941376, decided November 30, 1994, a case also dealing with contradictory evidence about the cause of chemical hepatitis and aplastic anemia. Having reviewed the record in this case, we are unwilling to conclude that the decision of the hearing officer

amounted only to "speculation" about the cause of the claimant's current lung condition or, as carrier suggests, that the decision was based on a conclusion that the claimant was exposed to unknown chemicals for undetermined durations. Texas Workers' Compensation Commission Appeal No. 94309, decided April 29, 1994. Rather, we conclude that the decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly 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).

The carrier also appeals the finding of disability to the extent that such disability, in the carrier's view, did not result from a compensable injury. We believe there was more than sufficient evidence, in the form of the claimant's own testimony and the records of Dr. W and Dr. D, to support the finding of disability.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge