APPEAL NO. 950446

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on June 21, 1994, with the record closing on December 30, 1994, with (hearing officer) presiding as hearing officer. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease (occupational asthma), that the date of injury is (date of injury), and that the claimant has had disability as a result of his compensable injury from (date of injury), through the date of the hearing. The appellant's (carrier) appeal challenges each of the hearing officer's determinations as being legally incorrect and factually insufficient. In addition, the carrier asserts error in the hearing officer admitting additional evidence from the claimant after the record closed, without permitting the carrier to respond and in the hearing officer having taken official notice of the Merck Manual, sixteenth edition without giving the carrier notice and the opportunity to object. No response to the appeal was received from the claimant.

DECISION

We reverse and remand.

The claimant testified that since the mid to late 1970's he has worked off and on at the same location for two companies. The claimant stated that his employment at each company was subject to periods where he was laid off. The claimant's employer at the time of the alleged injury, (employer), took over the factory in April 1993. The employer makes pipes and tubing for oil fields. At the time of the alleged injury, the claimant was a "flying cutoff operator." In that position, the claimant is responsible for cutting out defective pieces of the pipe with a saw. The claimant testified that when he operated the saw, a black dust was released into the air, along with other dirt and fumes. The claimant stated that he wore an optional dust mask provided by the company, because of his breathing problems. He also stated that in December 1993 he developed severe shortness of breath. He was hospitalized from December 9 to December 13, 1993, and his discharge diagnosis was viral pneumonia. The claimant was readmitted to the hospital on two occasions in January 1994 and once in (month year).

It is undisputed that the claimant has a history of having been hospitalized for pneumonia and other respiratory problems before December 1993. Specifically, he was hospitalized from February 5 to February 10, 1986, for "left lingular pneumonia." He was hospitalized from February 15 to February 22, 1986, for recurrent pneumonia, located on the right side. From November 1 to November 6, 1986, the claimant was admitted to the hospital for pleuritis and pneumonia. Finally, on February 6, 1989, the claimant was again admitted to the hospital for pneumonia; however, there is no evidence of his date of discharge following that hospitalization.

The claimant's primary treating doctor is (Dr. J). Dr. J referred the claimant to (Dr. F). In a report dated February 22, 1994, Dr. F stated "I believe that this patient has heavy metal pneumoconiosis related to tungsten carbide exposure." In the same report, Dr. F opined that the claimant did not have occupational asthma:

> the denaturation documented by oximetry is abnormal and not at all something that we would expect to see secondary to asthma.

Similarly, in progress notes dated February 11, 1994, Dr. F diagnoses adult onset asthma, noting that the claimant's condition "might be dust irritation superimposed on asthma & smoker. I cannot dx 'occupational asthma' at present . . . ."

At the request of the carrier, the claimant was examined by (Dr. C). In his report, Dr. C concluded that the "workplace environment sustained by this patient is not consistent with either occupational asthma or with what has been termed hard metal disease." With respect to occupational asthma, Dr. C further stated:

> Any patient with asthma is more apt to be intolerant of any type of irritant fumes than is the normal population but irritant fumes and non-sensitizing substances do not contribute to the underlying process of asthma per se.

(Ms. M), the employer's human resource manager, testified that she had had several conversations with the claimant's treating doctor, Dr. J and that in those conversations Dr. J told her that in an effort for the claimant to avoid further exposure to harmful substances in the workplace, he did not want the claimant inside the plant and that it would be better if he did not even enter the premises. In response to those conversations, Ms. M told the claimant that he was neither permitted in the plant nor on the premises. She testified that the company provided optional OSHA-approved dust masks to any employee who wanted one, but she stated that the masks were not required safety equipment. Finally, Ms. M testified that the company conducted air quality sampling in January 1994; however, we note that although both the claimant and Ms. M testified as to that testing, the results from the January 1994 testing were not entered in evidence. Ms. M stated that after the claimant became ill, air quality testing was again conducted in (month year), the results of which were admitted as a carrier's exhibit.

Finally, the adjuster handling the claimant's claim, (Ms. B), testified. She stated that the (month year) air quality testing was conducted by someone in carrier's loss control department under her direction. In addition, Ms. B stated that in the week prior to the hearing the claimant's treating doctor, Dr. J, contacted her and indicated his surprise that the case was ongoing in light of his agreement with Dr. C's report. Ms. B told Dr. J that if he agreed with Dr. C's report, she needed written verification. In response, Dr. J completed a Report of Medical Evaluation (TWCC-69), which provides in relevant part "Due to Dr. [C's] findings in the toxicology consultation, I believe that [claimant] has 0 impairment." The claimant's attorney stated at the hearing that he had not seen Dr. J's TWCC-69 before the

hearing and he requested a continuance based upon his surprise at Dr. J's "aboutface" on the causation issue. The hearing officer denied the motion for continuance, instead holding the record open for 15 days to permit the claimant's attorney to contact Dr. J and file a response addressing Dr. J's apparent change of position.

On July 20, 1994, the claimant's attorney sent a report from Dr. J dated June 27, 1994, to the hearing officer. We note that on the cover letter accompanying the report, the claimant's attorney sent a copy to the carrier's attorney. In that report, Dr. J provides in relevant part:

> [Claimant] has a pre-existing diagnoses of asthma which is aggravated by his current occupation. Pt. is unable to work in an environment of any kind where he is exposed to agents found in that work area which are filled with fumes or dust particles because this may exacerbate his asthma.
>
> It has been recommended by me that [claimant] never should involve himself in an occupation of this nature, as it will certainly worsen his asthmatic symptoms. Again, this is a pre-existing diagnoses of asthma that can be aggravated by any occupation or work environment where he is exposed or involved with fumes or dust particles of any kind.

In its appeal, the carrier argues that the aggravation of a non-occupational disease is not a compensable injury under the 1989 Act. In making that argument, the carrier relies on several cases decided under the previous law. We note that we have previously considered and rejected that argument. Texas Workers' Compensation Commission Appeal No. 950037, decided February 17, 1995, provides:

> The aggravation of a preexisting condition, including the aggravation of a preexisting ordinary disease of life, can be a compensable injury in its own right, provided the claimant establishes a causal connection between the employment and the aggravation. Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994. Whether a condition is a compensable aggravation or a non-compensable natural flare up or the continuing manifestation of the preexisting condition is a question of fact. Texas Workers' Compensation Commission Appeal No. 941331, decided November 18, 1994; Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993.

See also Texas Workers' Compensation Commission Appeal No. 941155, decided October 13, 1994, and cases cited in that decision.

The carrier also complains about the manner in which two evidentiary or procedural matters were handled. We first address the matter concerning official notice. It appears that at some point after the CCH session on June 21, 1994, ended and without any apparent

notice to the parties; the hearing officer took official notice of the Merck Manual. In the discussion in her decision and order, the hearing officer quotes the definition of occupational asthma in the Merck Manual and states "[c]laimant has shown the contraction of occupational asthma." The parties should have been afforded the opportunity to object to her taking official notice of the Merck Manual, and, if she overruled the objection and took official notice of the Merck Manual, the opportunity to present evidence contrary to the information in the Merck Manual and make appropriate arguments.

The carrier also urges the hearing officer improperly admitted into evidence as Claimant's Exhibit No. 3 a medical report issued by Dr. J after the CCH session held on June 21, 1994. The carrier argues that the hearing officer held the record open for 15 days or until July 6, 1994, to receive additional evidence and that additional evidence was not received in that time. In a letter dated July 20, 1994, to the hearing officer with a copy to the attorney for the carrier, the attorney for the claimant provided a supplemental report from Dr. J dated June 27, 1994, and asked the hearing officer to review the document and call if she had any questions. Even though the letter does not state that the report of Dr. J is being offered into evidence, it clearly put the carrier on notice that the report was provided to the hearing officer. It appears that the carrier did not correspond with the hearing officer concerning the report, and the hearing officer did not have a complaint that the report was submitted after the 15 days that the record was kept open or a response to the contents of the report. We observe that in some other cases in which the records were kept open to receive additional evidence, hearing officers have sent documents received to the parties affording them the opportunity to comment. Even though the carrier was aware of the report from Dr. J, the better practice would have been for the hearing officer to have corresponded with both parties advising them of her intentions and affording them the opportunity to comment.

Because the hearing officer took official notice of the Merck Manual without advising the parties, the hearing officer admitted the report of Dr. J without providing the carrier an opportunity to object or comment, and the cumulative impact of those actions on the opportunity to fully litigate the disputed issues, we reverse and remand for further development of the evidence, presentation of argument, and reconsideration of the issues not inconsistent with this decision. 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 the 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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge