

## APPEAL NO. 980007

Following a contested case hearing held on September 22, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), The hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_, and did not have disability. Claimant has appealed on the grounds of evidentiary insufficiency. The respondent (carrier) in reply asserts the sufficiency of the evidence to support the challenged findings and conclusions.

### DECISION

Reversed and remanded.

Claimant testified that he commenced employment with (employer) about 10 years before his claimed date of injury, (all dates are in 1997 unless otherwise stated). According to the Employer's First Report of Injury or Illness (TWCC-1), claimant commenced employment on March 15, 1990. Claimant stated that the employer made chemical cleaners for carburetors, fuel injection systems, and emission control systems, that the manufacturing line was automated, and that until his employment was terminated on \_\_\_\_\_, he worked in the warehouse around the chemicals used to make the products. Claimant said his duties included mixing the chemicals which emitted very strong odors which he inhaled, that thrice annually he cleaned the two mixing vats, and that the employer provided no breathing or safety equipment. Claimant said that when he and his three coworkers cleaned the vats, which were six feet in height and partially enclosed on top, they got inside them, one at a time, and cleaned the interior with 409 cleaner and paper towels, that they wore gloves for this task, and that they stayed inside the tank about five minutes before alternating with another coworker, and that it took about 35 minutes to clean a vat. Claimant further testified that he had no lung problems before commencing employment with the employer; that he last cleaned a vat in January or February, that he had difficulty breathing inside the vat, and that he afterwards experienced dizziness, nausea, and a runny nose and was diagnosed with an upper respiratory infection; that he returned to work and last worked on \_\_\_\_\_; that his treating doctor, (Dr. P), has him off work; and that he has been unable to work since \_\_\_\_\_, due to his condition which developed on the job. He said exertion leaves him out of breath and exhausted and that he gets colds more frequently and they last longer. Dr. P's slip of April 10th states that claimant has chemical lung damage and needs to avoid further exposure at all times. Dr. P's certificate to return to work of April 24th states that claimant will be able to return to work on May 12th and his certificate of May 9th states that claimant will be able to return to work on May 28th and also contains the remark, "possible release." Claimant stated that his condition has not significantly improved since he stopped working for the employer even though he is no longer around chemicals. Concerning the issue of disability, we agree with claimant's assertion that the hearing officer's statement in his statement of the evidence is incorrect in stating that if claimant were found to have a compensable injury, he has only had disability from April 19th until his treating doctor released him to return to work

on May 10th. Dr. P's later certificate stated the release date as May 28th. However, the hearing officer actually found that claimant had no disability because he failed to prove a compensable injury and that finding does not require our reformation.

Claimant introduced a copy of an Occupational Safety and Health Administration (OSHA) Expedited Informal Settlement Agreement between OSHA and the employer indicating the employer was fined for four violations including failure to assess the workplace to determine if hazards were present which necessitate the use of personal protective equipment, and that protective eye and face equipment was not required where there was a reasonable probability of injury. The document characterized these violations as "serious." Claimant also introduced material safety data sheets (MSDS) or portions thereof pertaining to the products HiTEC 3000 Performance Additive, 5335, Nalco V-20384M Intermediate, and Vista MR Solvent.

The May 13th report of (Dr. O), apparently a cardiologist, states that claimant was referred by (Dr. F) because of recent development of a burning sensation in his chest and throat; that the burning sensation feels like food is coming back up; and that claimant has no exertional chest pain, shortness of breath, or palpitations. Dr. O performed EKG and stress tests and his impression was atypical chest pain unlikely of cardiac etiology and upper gastrointestinal abnormality, for example reflux esophagitis, as the most likely etiology. Dr. O also commented that claimant needed to lose weight.

Dr. P wrote on August 1st that he examined claimant on March 18th, that claimant gave a history of cleaning out a chemical tank at work without any breathing apparatus, safety clothing or any other safety protection; that the workers had been exposed to the chemicals over a period of time; and that after the exposure to chemicals while cleaning the tank, claimant became weak, short of breath, and developed other symptoms of chemical exposure. Dr. P further reported that claimant has lung damage resulting from inhaling chemical fumes at work, that claimant provided him with the MSDS sheets and with the OSHA citations which confirm that claimant was exposed to hazardous chemicals in the workplace, and that it is his opinion that the hazardous chemicals in use at the workplace were the cause of claimant's lung damage.

Dr. F's response to deposition questions on September 11th stated that he is specialized in pulmonary and critical care medicine; that he first evaluated claimant on May 12th; that claimant then complained of breathing difficulty, chest tightness, and easy fatigue; that he referred claimant for cardiac evaluation; and that after two more visits, he feels the most likely diagnosis represents the subacute form of hypersensitivity pneumonitis. Dr. F further stated that the etiology of claimant's condition is difficult to state but that it seems to coincide with claimant's exposure to various chemicals at work over a period of time, and that he feels the most likely cause of the condition was claimant's chemical exposure at work. He further stated that there are a number of chemicals that are known to cause this disease.

(Dr. M), a clinical professor of internal medicine at a medical school and a member of the school's pulmonary research division, reported on September 19th that he had reviewed the records of Dr. P, Dr. F, and Dr O; that Dr. P's letter contains "nothing but nonspecific generalizations about [claimant] and his alleged chemical lung injury"; that Dr. P's letter "does not present a single piece of objective information to support his conclusions"; and that there is no information about any specific exposure and no documentation of any specific medical illness or treatment occurring as a result of the exposure. Dr. M further reports that Dr. F's pulmonary consultation notes are "not entirely coherent or decisive," that the chest x-ray is normal, that the first pulmonary functions studies were completely normal although those studies, as well as two later studies, were not performed according to national standards, and that there is "absolutely nothing to suggest " Dr. F's diagnosis of hypersensitivity pneumonitis. Dr. M's report also mentions the employer's serious OSHA violations, the history of claimant's periodic cleaning of the mixing tanks without protective gear, claimant's indicating that the work environment was very irritating and would cause burning of his eyes and exposed skin, and claimant's reported increase in the number and severity of respiratory infections. He also mentions claimant's fear of being fired if he complained of or objected to the working conditions.

Dr. M further states that the persistence of claimant's symptoms after being off work "strongly indicates there has to be another causative factor" and that "all the evidence points to gastroesophageal reflux" for which claimant repeatedly gives a classic history. Dr. M goes on to state his opinion to a reasonable medical certainty that claimant was exposed over a long period to the toxic chemicals identified earlier in the report which caused him to experience significant irritation of his eyes, skin, and respiratory tract; that these effects have subsided to some degree but have been aggravated by gastroesophageal reflux which is now with a reasonable medical certainty the principal causative factor in claimant's persistent upper airway inflammation and symptoms; that it is virtually impossible to ascertain the degree to which claimant's previous occupational exposure is responsible for his present problems; that the most important fact is that he has no evidence of lung involvement or impairment; and that "all of his disease is involving the upper airways as described above."

Dr. M's diagnoses include subacute and chronic rhinitis, left nares; subacute and chronic nasopharyngitis predominantly left side; and subacute and chronic laryngitis. Concerning these diagnoses, Dr. M states as follows: "All (1,2,3) secondary to gastroesophageal reflux. The role of prior occupational exposure is problematic but with a reasonable medical probability is minor at worst at 5 months after last exposure, since there is no indication of hyperreactive airways disease." Dr. M further diagnoses gastroesophageal reflux, severe obesity; and reconditioning, the latter resulting in symptoms of easy fatigue. An attached test report stated "no pulmonary impairment."

Claimant has challenged findings that neither on April 18th nor at any time prior thereto did he experience damage or harm to the physical structure of his body as a result of chemical exposure in the workplace, and that his inability to obtain and retain employment at wages equivalent to his wages prior to \_\_\_\_\_ at any time since

\_\_\_\_\_ is because of something other than chemical exposure at work. Based on these findings, the hearing officer concluded that on \_\_\_\_\_, claimant did not sustain a compensable injury and that he has not had disability.

The injury issue was framed in the benefit review conference (BRC) report of August 5, 1997, to be whether claimant sustained a compensable injury on \_\_\_\_\_ "in the way of toxic chemical exposure that damaged his lungs and internal organs. [Emphasis in original.]" However, at the outset of the hearing and after introducing the BRC report, the hearing officer paraphrased the injury issue to be whether claimant sustained a compensable injury on \_\_\_\_\_. The parties responded in the affirmative when the hearing officer asked if they agreed that the disputed issues were as he had stated. In his opening statement and closing argument, claimant stated that he had just that morning received Dr. M's report and Dr. F's answers to deposition questions, that he had not had a chance to go through Dr. M's report "in detail," and that both Dr. M and Dr. F established that claimant was exposed to toxic chemicals on the job which caused his "condition." The carrier argued that the reports of Dr. M and Dr. O established that claimant's condition is gastroesophageal reflux and not lung damage. In his appeal, claimant contends he met his burden of proof, referring to his treating doctor, Dr. P, as stating that "claimant's problems were directly related to his exposure to chemicals at work" and as opining that "the cause of claimant's medical problems are due to exposure to chemicals at work." Claimant also points to Dr. P's letter stating that claimant's lung condition was the direct result of exposure to chemicals at work and states that claimant testified he had difficulty breathing after such exposure.

Because the disputed injury issue, as reframed by the hearing officer, was not limited to a chemical exposure injury to the lungs, and because the report of the carrier's expert, Dr. M, provides evidence that claimant may have sustained a chemical exposure injury to his upper airway system if not to his lungs (or eyes or skin), and because Dr. M's report also refers to the gastroesophageal reflux as having aggravated the upper airways injury, we must reverse the appealed injury and disability findings and conclusions and remand the case for such further consideration and findings and conclusions as the hearing officer may deem appropriate in determining whether the evidence established that claimant sustained a compensable chemical exposure injury and had disability.

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 a 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.

Philip F. O'Neill  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Alan C. Ernst  
Appeals Judge