BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAN H. ARMSTRONG	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 138,085
CITY OF WICHITA	)	& 141,299
Respondent	)	
AND	)	
	)	
SELF INSURED	)	
Insurance Carrier	)	

ORDER

ON the April 7, 1994, the application of the respondent for review of an Award entered by Special Administrative Law Judge William F. Morrissey, dated February 25, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, James P. Johnston of Wichita, Kansas. The respondent, a qualified self insured, appeared by and through its attorney, David J. Morgan of Wichita, Kansas. There were no other appearances.

RECORD

The record consists of that specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are those as specifically set forth in the Award of the Special Administrative Law Judge.

ISSUES

Respondent appeals from an Award entered by Special Administrative Law Judge William F. Morrissey ordering continued temporary total disability benefits. Issues decided by the Special Administrative Law Judge and considered on appeal are:

(1) Whether claimant met with disablement by occupational disease by exposure on March 8, 1989 or October 24, 1989.

(2) Whether claimant's disablement arose out of and in the course of his employment with respondent.

(3) Nature and extent of claimant's disablement.

(4) Whether certain treatment expenses of Dr. Charles Hinshaw should be ordered paid by respondent.

(5) Whether respondent should be ordered to provide continuing medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the entire record and consideration of the arguments of the parties, the Appeals Board finds, for the reasons stated below, the decision of Special Administrative Law Judge William F. Morrissey awarding ongoing temporary total disability benefits should be affirmed.

Respondent argues that the claim should be denied and states the following reasons:

(1) Multiple chemical sensitivity which claimant alleges resulted from exposure to chemicals in his employment does not exist;

(2) If there is such a condition as multiple chemical sensitivity, claimant does not have such a condition;

(3) Claimant's condition is not the result of exposure of special risk or hazard in the course of his employment;

(4) Claimant has not provided competent evidence to support the claim that he has a disease arising out of and in the course of his employment; and,

(5) Claimant has failed to provide expert testimony regarding work disability and has failed to prove work disability.

The Appeals Board does not consider it necessary to determine whether there is such a condition as multiple chemical sensitivity or whether claimant has such a condition. The record reflects there is no uniformly accepted definition of multiple chemical sensitivity. It is, in general, a diagnosis which describes a condition or circumstance where an individual has been exposed to one or more chemicals, sometimes at relatively low levels, and as a result develops hypersensitivity to numerous other chemicals. Likewise there does not appear to be any uniformly accepted criteria for diagnosis of the condition. In fact, it appears that the diagnosis is made, in large part, by eliminating any other possibility. Without expressly finding that such a diagnosis is a valid diagnosis, the Appeals Board does conclude, from the evidence presented, that claimant suffers a condition as a result of his exposure to chemicals at work which has resulted in a disability.

The evidence in this claim is technical and the record is voluminous. It includes depositions of medical experts, treating physicians, chemists and a psychologist, as well as the claimant himself and two lay witnesses. In many cases the witnesses were deposed on multiple occasions.

The factors supporting the decision to find this claim compensable include first the evidence of exposure to chemicals in the course of claimant's employment. Claimant began work for the City of Wichita's water treatment facilities in 1987 and after approximately two months as a maintenance worker began working as an equipment operator. As an equipment operator, he removed the floating solids or grease from the city plant and transported them to the landfill. Claimant testified he began experiencing headaches, nausea and flu-like symptoms. The symptoms became more frequent. He missed work from time to time and had difficulty earning enough sick leave or vacation time to cover his time off. Finally, on March 9, 1989, claimant became unusually sick, nauseous and confused. He described his condition as being like a super flu. He testified that on that day he smelled terrible odors and a pesticide-like smell. Those odors are confirmed in the log kept by other employees.

Claimant worked for a day or a day and one-half after the exposure of March 9, 1989, and was then off until November 1989. He attempted to return to work in November and on one later occasion as a water service representative. The work as water service representative involved very little exposure to chemicals. Claimant was nevertheless unable to tolerate the limited exposure and has not otherwise worked since.

Claimant's exposure to chemicals is confirmed by expert testimony. Morgan Padgett, Ph.D., testified regarding claimant's opportunity for exposure in the course of his employment. Dr. Padgett has his doctorate in physical organic chemistry from Berkeley University. He has worked in industry for Monsanto Chemical, Shell Oil, Great Chemical, and Koch Industries. He has also worked for a private consulting and research company.

Dr. Padgett first consulted for the City of Wichita regarding chemical releases by Coastal Derby refinery. His study, dated November 15, 1989, lists what he describes as unauthorized emissions which violate both city and federal codes. He testified that they exceeded standards for discharge. He found, from testing done, BTEX chemicals which included Benzene, Toluene, Ethyl Benzene and xylene. He testified that the health effects reported by workers of dizziness, disorientation, and limb fatigue were consistent with the published effects of the BTEX chemicals, perhaps augmented by high concentration of sulfides and phenols.

From city records, Dr. Padgett also established the extent of opportunity for exposure by the claimant. Although he was not able to determine the exact concentrations or specific chemicals, he believed that the documentation established the emission of large quantities of aromatic hydrocarbons and established exposure to toxic chemicals. He testified in summary that he believed they were dealing with exposure to chemicals, both known and unknown, the effects of which are unknown in detail. He concluded that nevertheless the toxic effects of each chemical was established and that an individual exposed to these chemicals had a high probability of biological effect.

The evidence also establishes that the unauthorized chemicals described by Dr. Padgett were present in claimant's blood at somewhat elevated levels and were shown by a fat biopsy to be present in his fat tissue. Dr. Hinshaw testified regarding the blood testing. Dr. Hinshaw is a board-certified pathologist in Wichita, Kansas. He is currently president of the Academy of Environmental Medicine. Although testing done shortly after the exposure of March 8, 1989 showed no significant elevation of any hydrocarbons or pesticides, test results received June 22, 1989, did show marked elevations of toluene, ethyl benzene and xylene. Dr. Hinshaw attributes the timing of the elevation to the fact that the chemicals have been stored in fat tissues. Biopsies of fat tissue done in June 1990 showed high levels of chloroform and trichloroethylene. Dr. Hinshaw testified that those are not chemicals to which you would be exposed in the normal course of day-to-day living. The Appeals Board notes parenthetically that there was a challenge to the validity of the blood testing on the grounds that the results might have been caused by contaminated test tubes. The Appeals Board finds the evidence does not support that contention and finds more probably than not that the test results were valid.

It also appears from the record that other possible explanations for claimant's condition have been ruled out. Claimant has undergone numerous tests, including an MRI, an EKG, a CT scan and nerve biopsies. He has been tested for lupus, liver disease, and

AIDS. Conditions such as multiple sclerosis, Guillain-Barré syndrome, pernicious anemia and toxic brain syndrome have been ruled out. He has also been tested for vitamin B-12 deficiency, infectious mononucleosis, Lyme disease, and screened for the possibility that his condition is caused by heavy metals. None of the testing produced any diagnosis which appears more probably the explanation for his condition than is his exposure to chemicals in the course of his employment.

From the record, it also appears evident that claimant is not malingering or intending to deceive. None of the examining physicians gave any testimony that would in any way suggest that the claimant's symptoms and conditions are anything other than quite real to the claimant himself. Claimant has, in addition to the above described physical testings, undergone a series of psychological tests. Dr. Marc Alan Quillen, Ph.D., testified that from the testing he concluded that claimant was not a malingerer. He found specific cognitive or new learning deficit which, although he could not specifically link it to the chemical exposure, did not, in his opinion, exist prior to that exposure. He testified that from his review of the neuropsychological literature that his exposure to the chemicals would very likely have produced both physical and psychological effects such as headaches, dizziness, fatigue, nausea, and numbness which claimant exhibited.

Finally, claimant has introduced the testimony and opinions of Dr. Hinshaw directly linking claimant's current disability to his exposure to chemicals at work. Dr. Hinshaw became one of claimant's treating physicians pursuant to Order of the Administrative Law Judge from a preliminary hearing. Dr. Hinshaw is a board-certified pathologist practicing in Wichita. He began treating claimant in late March of 1989, and has continued since. His testimony details the progression of symptoms from headache and dizziness to hand tremors and numbness in the legs. From the history, his examination and testing, he concluded claimant suffers from multiple chemical sensitivity caused by exposure to chemicals in the course of his employment for respondent.

Taken as a whole, the evidence establishes that claimant suffers a very real and disabling condition. The symptoms include numbness in the legs and extreme headaches. Exposure to almost any chemical makes him sick. He also suffers from drop foot and a broad-based gait. He is unable to travel into a city without becoming sick. Exposures to chemicals used in farming also make him sick. There is evidence of damage to the immune system and the central as well as peripheral nervous systems. The Appeals Board believes the evidence establishes more probably than not these symptoms and disabling conditions were caused by claimant's exposure to chemicals in his work for respondent.

Respondent also contends that even if claimant's condition was caused by exposure to chemicals at work, claimant's condition is not compensable because it was not the result of exposure to special risk or hazard in the course of his employment. K.S.A. 44-5a01(b) defines “occupational disease” as a disease arising out of and in the course of employment resulting from the nature of the employment. “Nature of the employment” is then defined

as an occupation or trade to which there is attached a particular and peculiar hazard of the disease which distinguishes the employment from other occupations and employments. From the evidence presented in this case, it seems apparent that the work in which claimant engaged on behalf of the City did involve a particular and peculiar hazard which created a hazard of a disease in excess of that hazard in general. The testimony of Dr. Padgett, as well as Dr. Hinshaw, establishes that the levels of exposure in this employment to toxic chemicals was greater than that found in other occupations or employment.

Respondent next contends that claimant has failed to establish work disability. This contention is based upon the fact that the claimant has not presented expert vocational testimony. There is, however, substantial evidence of the nature of claimant's impairment. This evidence includes a rating by Dr. Hinshaw indicating claimant is ninety to one-hundred percent (90-100%) impaired. Dr. Quillen testified that the claimant is essentially unemployable. Dr. Quillen's opinion is based upon his examination and psychological testing of the claimant. In addition, the evidence establishes that claimant becomes sick when he travels into a city and that he becomes sick if he works around farm machinery or chemicals. The evidence, in effect, does establish claimant's current state of permanent disability. Dr. Hinshaw indicates that his ability to work an eight-hour day is virtually non-existent and that any work he would do would have to be in a chemically-free environment. Dr. Hinshaw indicated he was not aware of any chemical-free environments. Dr. Hinshaw also testified, however, that the claimant's condition could yet substantially improve. From this evidence, the Appeals Board concludes claimant is totally disabled at the present time but should be considered as temporary totally disabled because he may yet improve to a point where he is able to work.

The Special Administrative Law Judge decided two additional issues. He approved claimant's request for future medical treatment with Dr. Hinshaw as the treating physician. He denied claimant's request for payment of the medical expenses incurred for treatment by Dr. Hinshaw prior to the designation of Dr. Hinshaw as the treating physician. The Appeals Board approves and adopts both these findings.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 25, 1994, should be, and hereby is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: James P. Johnston, PO Box 3089, Wichita, KS 67201
David J. Morgan, 600 Hardage Ctr., 100 S. Main, Wichita, KS 67202
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director