

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CECIL D. HITCHCOCK)	
Claimant)	
VS.)	
)	Docket No. 159,167
USD NO. 214)	
Respondent)	
AND)	
)	
TRINITY UNIVERSAL INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appealed the Award entered by Administrative Law Judge Jon L. Frobish on March 6, 1996. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Robert A. Anderson of Ellinwood, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard A. Boeckman of Great Bend, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant requested the Appeals Board to review the findings and conclusions of the Administrative Law Judge in regard to the following issues:

- (1) Whether claimant suffered an occupational disease that arose out of and in the course of his employment with respondent.
- (2) The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant requested Appeals Board review of the Administrative Law Judge's Award that found claimant failed to prove he suffered an occupational disease caused by exposure to chemicals while employed by the respondent. Claimant argues that the most credible medical opinion contained in the record is the opinion of Alfred R. Johnson, D.O., of Dallas, Texas. Claimant contends Dr. Johnson is an expert in the field of environmental medicine and concluded, after extensive examination and testing of the claimant, that claimant suffers from multiple chemical sensitivity (MCS) caused by exposure to chemicals while working for the respondent. The Appeals Board finds, for reasons more fully developed below, the decision of the Administrative Law Judge that denied claimant workers compensation benefits based on an occupational disease should be affirmed.

(1) Claimant alleges he suffers from MCS resulting from exposure to chemicals at work. Claimant commenced working for the respondent as a night custodian in 1986. In 1989, claimant was transferred to first shift as a ground maintenance man. Claimant claims his exposure to certain chemicals on a day-to-day basis through his last day worked of June 5, 1990, caused him to have the debilitating MCS condition. Claimant testified at the regular hearing held on October 18, 1995, that he remains symptomatic, had not been able to work since he was employed by the respondent, and was currently receiving disability benefits.

While employed by the respondent, claimant used a variety of cleaning products, fertilizers, and herbicides composed of a variety of chemicals while he was performing his daily work activities as a custodian and a grounds maintenance man. In addition to the daily exposure to the chemicals, claimant testified he had two specific episodes at work where he was overcome by paint fumes while he was painting inside one of the district's schools in 1990. Claimant testified the chemicals he was exposed to caused him to have various symptoms such as headaches, cramps, diarrhea, nausea, and confusion. Furthermore, claimant contends he remains symptomatic and still experiences those same symptoms when he is exposed to various chemicals while performing his daily living activities. During claimant's regular hearing testimony, claimant described an episode that occurred a month-and-a-half before the hearing where he had coughing and breathing problems at home because of an odor coming through an open window in the early morning hours. Paramedics were called and claimant was administered oxygen in order

to recover from the severe reaction to the odor. Claimant claims that before he was employed by the respondent he had no adverse reactions to chemicals.

The respondent presented the testimony of William H. Brown, associate superintendent for the respondent, who was in charge of transportation, food service, maintenance, and custodial services during the period claimant was employed by the respondent. Mr. Brown testified that claimant was required to use various chemicals while he was performing his job duties as both a custodian and a grounds maintenance man. However, Mr. Brown testified that claimant had made no complaints of physical problems caused by the chemicals until claimant was given a certification manual to review to become certified in the use of pesticides in March of 1990. Contained in that manual were physical signs and symptoms that could result from exposure to certain pesticides. Mr. Brown testified that “almost immediately he started making comments to other members of our staff, Ken Kistler, the supervisor, Gary Gee, his fellow worker, that he had found the answer to some physical problems he had experienced over the years.” Claimant also testified that after he read the certification manual he realized the symptoms he had experienced while he was employed by the respondent were caused from exposure to chemicals. Mr. Brown testified that claimant did not complain of any specific event or occurrence to chemical exposure that had caused him physical problems. Finally, claimant took an extended sick leave in June of 1990 because of his continuing physical problems. Claimant was terminated by the respondent effective October 1, 1990, because of claimant’s claim that his work environment was detrimental to his health.

An occupational disease is defined in K.S.A. 44-5a01(b) (Ensley) as:

. . . only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. “Nature of the employment” shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases

The Kansas Court of Appeals has interpreted the foregoing statute to require only that a claimant have a “disease”, the disease result from claimant’s employment, and that it not be one of the ordinary diseases of life. Armstrong v. City of Wichita, 21 Kan. App.

2d 750, 754, 907 P.2d 923, (1995), *rev. denied* 259 Kan. ____ (1996). The Appeals Board recognizes the principle that in a workers compensation case medical testimony is not essential to the establishment of a worker's disability. See Chinn v. Gay and Taylor, Inc., 219 Kan. 196, 201, 547 P.2d. 751 (1976). The Appeals Board finds, however, that while expert medical testimony is not essential, in this case, it is an important factor in determining whether claimant's symptoms and disability condition have a casual relationship to his work.

The Appeals Board is troubled by the fact that claimant did not start exhibiting disabling physical symptoms until after he found those particular symptoms contained in a pesticide certification manual. The claimant then contends that he had suffered those physical symptoms before he recognized them in the manual. Thereafter, claimant's exposure to the same chemicals at work resulted in claimant's symptoms worsening to the point that he was unable to work in any type of environment. The Appeals Board also questions claimant's reaction to certain diagnostic tests administered by medical personnel following his employment with the respondent. Additionally, the Appeals Board is concerned with the overall lack of objective physical findings by the medical personnel in an effort to substantiate the cause of claimant's disability.

The record contains the testimony of three physicians along with voluminous medical records containing the results of the diagnostic examination and testing of the claimant. After claimant left work in June of 1990, he was first treated by H. C. Palmer, Jr., M.D., an internal medicine physician located in Liberal, Kansas. Dr. Palmer saw claimant on June 11, 1990, complaining of stomach cramps, nausea, and vomiting. Claimant attributed those symptoms to exposure to chemicals, fertilizer, and herbicides used while he was employed by the respondent. Dr. Palmer testified he found claimant to have gastritis and some superficial ulcers. Dr. Palmer treated claimant with medication for both of those conditions. Dr. Palmer's impression was that claimant also suffered from stress and a phobia to chemicals.

Because of claimant's continuing complaints, Dr. Palmer referred him to the University of Kansas Medical Center (UKMC) for diagnostic evaluation and testing in regard to a possible chemical sensitivity condition. Dr. Palmer also made a diagnosis that claimant had "compensation neurosis." Dr. Palmer's explanation for this diagnosis was that he felt claimant was doing everything possible to obtain compensation from the Ulysses school district. The last time claimant saw Dr. Palmer was on September 18, 1990, for consultation concerning his medication for gastritis. That visit followed his examination and testing at UKMC.

Claimant was admitted to UKMC on September 10, 1990, and discharged on September 15, 1990. The purpose of the admission was for a comprehensive medical evaluation in reference to his complaints from chemical exposure at work. Claimant was examined and tested by the following specialists during his stay at the UKMC: Dr. Harold W. Barkman, occupational medicine; Dr. Thomas Hall, psychiatry; Dr. Herbert

Lindsley, allergy; Dr. John Doull, toxicology; and Dr. Minnie Koreska, neuropsychiatric testing.

Dr. Barkman testified by deposition on January 28, 1993, and summarized the results of the claimant's evaluation at the UKMC. One of the tests conducted by the UKMC staff was a challenge test with claimant using four products he had used while working for the respondent. Those products were Velva Sheen mop oil, Urea fertilizer, Porcelain Plus bowl cleaner, and Kilz, a stain killer. Dr. Barkman testified claimant had an adverse reaction to one of the products but the reaction was not from exposure to chemicals but was more characterized as a panic attack. Dr. Barkman concluded the examination and testing of claimant by the team of physicians at the UKMC failed to find any abnormality to establish a diagnosis for a specific disease. Dr. Barkman also concluded that claimant's problem was psychiatric depression and not chemical toxicity. Furthermore, Dr. Barkman opined, that although claimant had been exposed to chemicals at work, there was no link between such exposure and the psychiatric depression.

After claimant was examined and tested by the UKMC, he went on his own to the Environmental Health Center (EHC) in Dallas, Texas. Claimant's first visit to the EHC was on March 18, 1991, and he returned in February 1992 for further testing and examination. Alfred R. Johnson, D.O., directed the examination and testing of the claimant while he was at the EHC. Dr. Johnson testified by deposition on December 21, 1992.

EHC is a medical clinic offering most services involved in the practice of medicine with an emphasis on exploring the impact of many environmental factors on health and human disease processes. Dr. Johnson testified that initially a history was taken from claimant, he underwent a physical examination, and blood work was completed. Claimant's blood was found to have elevated levels of Toluene and 1,1,1-Trichloroethane (TEC). Dr. Johnson identified both of these chemicals as solvents which are neurotoxic which affect the brain. Because of those positive findings, Dr. Johnson had claimant undergo a booth challenge test where he was exposed to low levels of chemicals. Claimant had an adverse reaction to the 1,1,1,TEC and another solution which was composed of 50 percent petroleum methanol. From that exposure, claimant had shortness of breath, chest tightness, marked increase in coughing, facial flushing, and headache. Dr. Johnson testified that both of those chemicals are solvents used in a whole line of products. However, Dr. Johnson, when questioned on cross-examination, could not identify specifically whether or not those chemicals were contained in the specific products claimant used while employed by the respondent. The record also contains the results of the first booth challenge test claimant participated in on February 12, 1992. That test was conducted using a placebo test bottle containing only spring water. Even before the placebo bottle was placed in the booth, the claimant began to react adversely by coughing. After the placebo bottle was placed in the booth and opened, claimant's coughing increased, his face became flushed, he began sniffing, and he had trouble focusing his eyes at the conclusion of the test. Dr. Johnson testified that this challenge test was invalid because claimant started having symptoms prior to the starting of the test.

Dr. Johnson also had claimant undergo a SPECT scan. The SPECT scan is a specialized brain scan to determine brain function. Dr. Johnson testified the results of the SPECT scan showed claimant with global defects compatible with neurotoxicity. Dr. Johnson identified neurotoxicity as nonfunctioning cells damaged by exposure to chemicals. Dr. Johnson testified that another positive test resulting from claimant's physical examination was a very positive Romberg sign. The positive Romberg sign results in an individual not able to stand up in an erect position with his eyes closed. Dr. Johnson testified that a positive Romberg sign was evidence of a neurotoxicity of the central nervous system.

Following the examination and the testing of claimant at EHC, Dr. Johnson opined that claimant suffered from chemical sensitivity directly related to chemical exposure at work. Dr. Johnson further opined that due to claimant's chemical sensitivity condition he was unable to perform any type of substantial and gainful employment. Dr. Johnson prescribed a treatment regimen which required claimant to spend six to eight weeks at the EHC. Claimant would undergo a deep heat sauna therapy program under medical supervision in an effort to mobilize the stored chemicals in claimant's body. The cost of the treatment program was from \$3,500 to \$4,500 per month.

As summarized above, the medical evidence in this case is highly conflicting. After extensive diagnostic examination and testing by two separate medical facilities, UKMC and EHC, and a group of two separate examining physicians, EHC diagnosed multiple chemical sensitivity caused by exposure to chemicals at work and UKMC diagnosed psychiatric depression not caused by chemical exposure at work. The Appeals Board finds when the record in this case is taken as a whole the diagnostic conclusions of the physicians associated with the UKMC are more persuasive and should be given more weight than the diagnostic conclusions of the physicians associated with EHC. This conclusion is supported by medical journal articles entered into evidence by the respondent that questions the scientific validity of the opinions of clinical ecologists or environmental physicians. See Mark R. Cullen, M.D., Martin G. Cherniack, M.D., & Linda Rosenstock, M.D., *Occupational Medicine (Second of Two Parts)*, Vol. 322 *The New England Journal of Medicine* #10, March 8, 1990, at 680 - 1 and Ronald E. Gots, M.D., Ph.D., *Toxic Risk: Science, Regulation & Perception*, pp. 3-9 (Lewis Publishers 1992). Dr. Barkman, board-certified in both internal medicine and pulmonary medicine, questioned the significance and validity of the blood test results that EHC relied on heavily in making their diagnosis that the claimant was afflicted with multiple chemical sensitivity. Dr. Barkman also opined the chemical levels shown in the blood tests were extremely low and the data needed to interpret what those low chemical levels meant was not available. Dr. Barkman was asked if his diagnosis would change because of the blood test results from EHC and he replied in the negative. Dr. Barkman also was asked what if any significance he found from the fact claimant had an adverse reaction to a placebo booth challenge while he was being tested at EHC. Dr. Barkman's reply was such a reaction only supported his diagnosis that claimant suffered from psychiatric depression and not MCS.

Therefore, the Appeals Board concludes claimant's request for workers compensation benefits is denied as the most persuasive evidence in the record supports the conclusion that claimant suffers from psychiatric depression and not from an occupational disease.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated March 6, 1996, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Robert A. Anderson, Ellinwood, KS
- Richard A. Boeckman, Great Bend, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director