APPEAL NO. 92256

On May 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue to be determined at the hearing was whether the claimant, (claimant), respondent herein, "reported the injury timely to her employer." The hearing officer determined that respondent had timely complied with all reporting requirements under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), and decided that respondent is entitled to benefits consistent with the decision and the 1989 Act.

Appellant, the employer's workers' compensation insurance carrier, contends that there is no evidence or insufficient evidence to support certain findings of fact, and that those findings and the hearing officer's conclusion that respondent timely reported her injury to her employer are against the great weight and preponderance of the evidence. No response to appellant's request for review was filed.

DECISION

The decision of the hearing officer is affirmed.

When reviewing a "no evidence" point of error, we examine the record for evidence that supports the finding while ignoring all evidence to the contrary. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist] 1988, no writ). When reviewing questions of "factual sufficiency," we consider and weigh all the evidence, both in support of and contrary to the challenged finding, and uphold the finding unless we determine that the evidence is so weak or the finding is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Howeth, *supra*.

The parties stipulated that on (date of injury), respondent was employed by (employer) and that appellant was the employer's workers' compensation insurance carrier on that date. Appellant admitted at the hearing that a sodium sulfhydrate spill occurred at the employer's (city), Texas, facility on (date of injury). A report of that spill indicated that 2,300 gallons of sodium sulfhydrate leaked out of a tank, and that when that chemical contacts an acidic material it results in a chemical reaction which produces hydrogen sulfide, an extremely toxic gas which can result in serious illness or even death in high concentrations. For that reason, personnel were evacuated from all buildings in the immediate vicinity of the tank farm as well as those buildings which were immediately downwind from the tank farm.

In Finding of Fact No. 4 the hearing officer found that "[c]laimant was exposed to the sodium sulfhydrate spill at her place of employment on or about (date of injury)." Appellant contends that there is no evidence or insufficient evidence to support that finding, and that the finding is against the great weight and preponderance of the evidence. Respondent testified that while she was working at the employer's (city), Texas, facility on (date of injury), she felt dizzy and experienced headaches, breathing problems, and a sore throat, and that

she and two coworkers were sent to the nurse's station by their supervisor, (Mr. D), when they reported their problems to him. Respondent said a nurse told her and her two coworkers that there had been a sulfuric acid spill and to stay away from the fumes. In a transcription of a recorded statement, (Mr. D) said that he was respondent's foreman; that there was a chemical spill in (date of injury); that the odor of the chemical was strong enough to smell in the department where he and respondent worked; that it caused a burning type sensation; that everybody in his department, including respondent, complained of breathing problems; that he directed respondent to the first aid department; and that quite a few people were allowed to leave the room despite the fact that the "safety people" told him the people in his department were not close enough to the spill to be harmed. In a signed written statement, (Mr. W) stated that on May 26th (the employer's report of the chemical spill shows the date of the spill to be (date of injury)) she and respondent were exposed to a chemical spill of sulfuric acid which made them both ill and that they went to the first aid station where they were given Tylenol and told to get out of the immediate area. (Ms. W) also stated that a woman in another area was overcome by the fumes and passed out. After reviewing the evidence of record supporting the challenged finding, we overrule appellant's no evidence point. After reviewing all of the evidence, we conclude that there is sufficient evidence to support Finding of Fact No. 4, and that the finding is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 244 S.W.2d 660, 661, 150 Tex. 662 (1951).

In Finding of Fact No. 7 the hearing officer found that "[o]n or about (date of injury), claimant reported to her immediate supervisor, (Mr. D), that she was experiencing difficulties in breathing, headaches, and a sore throat because of the chemical spill exposure at work." Appellant contends that there is no evidence or insufficient evidence to support that finding, and that the finding is against the great weight and preponderance of the evidence. Appellant does not contest Finding of Fact No. 6 which finds that respondent's immediate supervisor, on or about (date of injury), was (Mr. D). Respondent testified that on (date of injury), she told (Mr. D) that the problems she experienced that day--breathing difficulties, headaches, and a sore throat--were from the chemical spill. In the transcription of his recorded statement, (Mr. D) said that on the day of the chemical spill respondent did complain to him about breathing difficulties and that he sent her to the first aid station. However, he said that she did not give him any "definite" reason for her breathing problem; that respondent did not tell him that she thought her problems were caused by the chemical spill; and that she had had respiratory problems prior to the chemical spill for which she had taken time off work. In what purports to be patient notes for respondent (the doctor is not indicated in the notes) there are several notations for February and March 1991 where respondent complained of congestion, coughing, and headaches. On June 4, 1991, respondent's family physician, (Dr. B), diagnosed asthmatic type bronchitis and strongly encouraged respondent to avoid chemical exposure at work. (Dr. B) referred respondent to (Dr. E), who also diagnosed asthmatic bronchitis which he said was likely a combination both of cigarette smoking and her exposure to sulfuric acid while at work. (Dr. E)'s opinion was that respondent's current condition was aggravated by her exposure to the toxic fumes during (date of injury), and he believed that she likely had some degree of underlying

preexisting lung disease which was significantly aggravated by the exposure. (Dr. E) further stated that he felt it was the combination of respondent's underlying airways reactivity and the subsequent exposure to the toxic fumes which produced the symptoms that she is presently experiencing. The symptoms included a marked degree of exertional dyspnea and wheezing. According to Dorland's Illustrated Medical Dictionary, 27th Edition, (W.B. Saunders Company 1988) p. 521, dyspnea is difficult or labored breathing. Although the question of whether respondent sustained a compensable injury was not an issue at the hearing, we note that in United States Fidelity & Guaranty Company v. Bearden, 700 S.W.2d 247 (Tex. App.-Tyler 1985, no writ), the court held that the medical testimony that repeated daily inhalation of dust encountered by the claimant in the course of his employment aggravated the claimant's preexisting lung diseases, which included bronchial asthma, was sufficient to sustain the jury's finding of a compensable injury.

There was a conflict in the evidence as to whether respondent told her supervisor on the day of the chemical spill that the problems she experienced that day were from her exposure to the chemical fumes. Respondent said she did; the supervisor said she didn't. The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). The Supreme Court of Texas has said that when presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). In the present case it is apparent that the hearing officer believed respondent's testimony concerning reporting of her breathing problems to her supervisor as work-related which the hearing officer was entitled to do. After reviewing the evidence of record supporting the challenged finding, we overrule appellant's no evidence point. After reviewing all of the evidence, we conclude that there is sufficient evidence to support Finding of Fact No. 7, and that the finding is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, *supra*.

In Conclusion of Law No. 3 the hearing officer concluded that "[i]n accordance with the Texas Workers' Compensation Act, claimant timely reported an injury suffered due to exposure to sodium sulfhydrate at work to her employer as required by the Act." Appellant contends that this conclusion is against the great weight and preponderance of the evidence.

For an injury other than an occupational disease, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). In DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532-533 (Tex. 1980), the Supreme Court of Texas stated that the purpose of the notice of injury provision is to give the insurer an opportunity immediately to investigate the facts surrounding an injury. The court said that this purpose can be fulfilled without the

need of any particular form or manner of notice. The court further stated that, to fulfill the purpose of the statute, the employer need only know the general nature of the injury and the fact that it is job related, and that more details of the occurrence will be supplied by the claim. In Associated Employers Insurance Company v. Burris, 321 S.W.2d 112, (Tex. Civ. App.-Amarillo 1959, writ ref'd n.r.e.), the court held that there was sufficient evidence to support a finding of timely notice of injury where the claimant swore he told his foreman about his injury on the day it occurred, the foreman swore he didn't, and the trier of fact believed the claimant. The hearing officer was faced with a similar conflict in the evidence in the present case. Respondent testified that she related to her supervisor on (date of injury) that her breathing difficulties on that day were from the chemical spill which occurred on that day. The hearing officer was entitled to believe respondent, and believing her, could conclude that timely notice of injury was given to the employer. We conclude that Conclusion of Law No. 3 is supported by Findings of Fact Nos. 5, 6, and 7, and that the conclusion is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. *See* Burris, *supra*.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge