APPEAL NO. 931035

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held in (city), Texas on October 14, 1993, (hearing officer) presiding. The appellant, hereinafter claimant, appeals the hearing officer's determination that claimant did not sustain an injury in the course and scope of his employment, did not timely report his injury and did not have good cause for failing to timely report, and that he did not have disability as the result of his injury. There was no response by the carrier.

DECISION

We affirm the hearing officer's decision and order.

The claimant testified that he began working for (employer) around August of 1991; at that time he was assigned to take the floor out of oil storage tanks located at an (business, city). The claimant said, as he and the rest of the crew worked inside the tanks, the torches they used to cut the flooring ignited oil residue which caused the tanks to fill with smoke. Claimant said the smoke caused him and the other crew members, who had not been issued any breathing apparatus, to cough and spit up, become dizzy, and to leave the tank in order to breathe. A signed statement from two co-workers also said there was constant fire and fumes in the tank while the crew was working. Claimant said he asked his supervisor if he could see a nurse, but the supervisor wouldn't allow it. The claimant continued to work at the job for two or three weeks, then resigned due to concerns about the safety and because he was dissatisfied with the wages. The claimant's wife testified as to the symptoms he was experiencing, and said he had not had these sorts of problems in the past.

The claimant said when his symptoms--including headaches, dizziness, nausea, and swelling of the feet--became worse he went to see (Dr. M). Dr. M's patient notes indicate claimant first saw him on June 22, 1992, noted that claimant complained of his symptoms "x 3 m," and that Dr. M referred claimant to a neurologist, (Dr.S). (He also wrote on July 17th that the claimant was "totally incapacitated and unable to work.") A July 9, 1993, report from Dr. S recited the claimant's symptoms and said they had been getting gradually worse after exposure to chemicals when he was working on a tank. Dr. S reported that EMG nerve conduction studies were within normal limits, and he advised a CT scan of the head and serum for heavy metals. Dr. S referenced two doctors claimant had seen for his lungs, but reports from these doctors were not in evidence. Dr. S's impression was "post chemical exposure syndrome."

At the carrier's request the claimant was also examined by (Dr. W), a neurologist. On September 24, 1993, Dr. W wrote that the claimant had seen multiple physicians, including pulmonary specialists and neurologists, and had had CT scans and an EMG, although Dr. W said he had seen none of these records. Dr. W concluded that claimant's neurological examination was normal, and he said the combination of respiratory symptoms and a chronic daily headache suggested a muscle contraction vascular type headache. He also noted that the claimant's "symptoms of headaches and numbness in the extremities

did not begin until approximately four, or possibly six, or possibly eight months after the chemical exposure and I do not believe that there can be any relationship between these symptoms."

In a July 1992 recorded statement claimant gave to the carrier, he stated that he had begun feeling sick about three months earlier, possibly in April, but that he did not relate it to the job at that time. He testified at the hearing that after he saw a doctor he called the employer several times and attempted to speak to a field supervisor, but was unable to do so. He said he talked to the person who answered the telephone about his physical problems and asked what he should do; he said he was told to do nothing. He said he also followed up the telephone call with a letter to the employer. Included in the record was a June 10, 1992, letter to the employer stating that claimant had filed a claim with the Texas Workers' Compensation Commission (Commission) in regard to toxic chemical exposure at the (employer) in August of 1991. The same day he wrote to the Commission, stating that "I have just recently connected the way I feel to being exposed to toxic chemicals."

The claimant essentially challenges the sufficiency of the evidence supporting the hearing officer's decision, citing evidence that the claimant reported his injury when he had the first confirmation that his symptoms were work related, upon seeing Dr. S's report. He also cites that report as showing the claimant suffers from "post chemical exposure syndrome," whereas the carrier's doctor, Dr. W, did not review claimant's medical records. As the hearing officer notes in her decision, the 1989 Act requires that if an alleged injury is an occupational disease, such as claimant has contended here, the employee shall notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. Section 409.001. As the hearing officer further notes, the claimant's testimony with regard to the time frame in which he first knew that his symptoms were related to working in the tanks was confused and conflicting. As a result, the hearing officer stated that she believed the inconsistencies in the claimant's testimony "cannot provide an acceptable basis for a decision in claimant's favor."

The hearing officer, as sole judge of the relevance and materiality of the evidence and of its weight and credibility, Section 410.165(a), was entitled to give such testimony the appropriate weight. As the court said in Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.) fact finders are "privileged to believe all or part or none of the testimony of any one witness . . . . " Texas courts also have held that a fact finder may accept some parts of a witness's testimony and reject other parts, "when the testimony given is inconsistent, contradictory, contrary to established physical facts, or from the manner and demeanor of the witness creating a doubt of its truthfulness, or because of the interest the witness has in the fact sought to be established . . . " Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Dallas 1947, no writ).

With regard to the issue of injury in course and scope, the hearing officer stated she found Dr. W's report to be more credible than that of Dr. S. While, as the carrier notes, Dr. W did not have access to claimant's medical records at the time he rendered his report, that

document shows he gave claimant an extensive neurological examination. We would additionally note that Dr. S himself recommended further testing of claimant at the time of his report, which was apparently rendered after claimant's initial visit. As finder of fact, the hearing officer is equally entitled to judge the weight to be given expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Finally, the hearing officer wrote that the medical records indicate claimant is unable to work, but she found that such inability was not the result of a compensable injury. *See* Section 401.001(16), which defines "disability" as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. As this panel has held, a finding of no compensable injury will preclude a finding of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. We find no error in the hearing officer's determination of this issue.

Upon review of the evidence in the record, we do not find the hearing officer's determination of the issues to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We thus will not substitute our judgment for that of the finder of fact.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge