APPEAL NO. 93665

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 28, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. She determined that BL, the appellant (claimant), suffered an injury in the course and scope of her employment. The hearing officer ordered that Truck Insurance Company, the respondent (carrier), is liable for temporary income benefits if claimant has established or can establish that she had disability for eight days or more. The carrier appealed on the issue that the claimant did not suffer an injury in the course and scope of her employment. The claimant argues that the decision of the hearing officer is clearly supported by a preponderance of the evidence.

DECISION

Determining that sufficient evidence exists in the record to support the hearing officer's decision and that the hearing of ficer findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm. The hearing officer found that the claimant did suffer an injury that arose out of the course and scope of her employment. Sufficient evidence supports this finding.

The issue appealed was whether the claimant suffered an injury in the course and scope of her employment. An "injury" is defined as "damage or harm to the physical structure of the body." Section 401.011(26). The claimant presented both her own testimony and reports of medical experts to establish an injury. The carrier did not present any evidence to contradict the claimant's medical condition reported by her medical doctors. A "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). The carrier presented expert scientific testimony and medical opinions to contradict that the claimant suffered an injury in the course and scope of her employment. The only medical reports presented at the hearing from direct examinations of the claimant support the claimant's testimony that she suffered an injury in the course and scope of her employment.

The claimant worked as a lens technician for (employer). She testified that she injured herself while fulfilling her job duties of cleaning and cementing the lenses and repairing scopes for hunting rifles. In order to clean the lenses, she would place the lenses in containers of acetone using her unprotected bare hands. The claimant would then remove the old cement, and put then put the lenses under a light to bake. She would also make the new cement. The claimant further testified that no extra ventilation was in the work area other than the usual air conditioning system. The claimant testified that when she was working, the chemicals were contained in uncovered "cookie" containers, which were wide open and never covered. The claimant further testified that she would get blisters on her hands and that her nails were awful from her cleansing of the lenses without any protection on her hands or anywhere else. She informed her doctor, (Dr. C), about the chemicals to which she had been exposed at work including ether, acetone, epoxy,

versamid and others.

The claimant is 51 years of age and testified that (date), was her last day of work. The claimant testified that she got up and walked to work because her car would not start on (date). She testified that she had a fever, difficulty breathing, and an inability to perform her work. The next morning she could not work, and she was taken to the hospital. Since (date), the claimant stated that she cannot walk a lot, she gets out of breath very easily, she perspires a lot, she is not as active as she used to be, and she has not worked. The claimant stated that she does have diabetes and that she stopped smoking about six years ago.

The carrier disputed that the claimant's injuries and problems were at all related to any inhalation of toxic chemicals. The carrier presented considerable evidence to refute any claim of toxic chemical inhalation causing the claimant's health problems. However, the carrier, apparently elected not to have its own doctor perform a direct medical examination of the claimant. The carrier's medical doctors analyzed the medical history of the claimant. After reviewing medical information on the claimant, (Dr. K), a medical doctor for the carrier, could only conclude in her letter dated February 5, 1992, that she was "at a loss to explain [the claimant's condition]." In his letter of January 13, 1993, (Dr.B), a medical doctor for the carrier, stated that "I have found very little evidence that this syndrome has been identified in association with inhalation injury."

The carrier provided two chemical experts at the hearing to present detailed scientific evidence. (PhD M), testified for the carrier. PhD M said he has a PhD in instrumental analytical chemistry and has had 33 years of experience in analytical chemistry. Ph.D. M performed tests at the place of employment of the claimant. These tests, he testified, were to determine the amounts of chemical compounds in the air on a regular workday. The first test was performed on March 17, 1992, and a second test was done thereafter. From the tests of the place of employment, PhD M found no chemical compounds in the air for an eight hour workday even close to the acceptable limits of OSHA/NIOSH for concentrations which would do irreversible or irreparable harm. PhD M testified that from the two tests, nothing in the results indicated any relation between the work air and the claimant's problems. On cross examination, PhD M testified that he knew of no earlier tests and that this test was conducted over three months after the claimant last worked. The claimant testified, uncontradicted by the carrier, that the work environment had changed since she left work to be more protective of the workers. PhD M testified further that he is not a medical doctor and could not testify at all with regards to the claimant's particular medical condition.

(PhD W) testified for the carrier. PhD W has his PhD in toxicology and has been practicing as a toxicologist for 23 years. PhD W reviewed both medical reports on the claimant and the scientific evidence of PhD M's air tests. PhD W stated that he was a forensic toxicologist whose education and experience allow him to help explain the effect of

the concentration of chemicals on biological systems. In this case, he specifically looked for a cause and effect for the claimant's problems. After reviewing medical and scientific reports, PhD W testified that all the indications show an absence of any correlation between the chemicals in the workplace and any of the problems suffered by the claimant. PhD W argued also that the medical problems of the claimant were not related to her former work environment. PhD W testified, on cross examination, that he is not a medical doctor and that he has never been to the employer's work location. PhD W did testify from his examination of medical reports and scientific tests that nothing suggests the claimant is suffering from toxic chemical problems. In his letter of May 8, 1992, PhD W writes: "From [scientific and medical records of the claimant] it is within all reasonable scientific probability that [claimant's] medical problems are familiarly related or intrinsic to her existing diseases." PhD W bases his opinion upon eliminating other explanations and concludes that the medical problems of the claimant, since he cannot relate them to the chemicals, must be genetic or symptoms from her existing illnesses.

(Dr. C), a medical doctor, wrote in his letter dated July 7, 1992: "My impression is that the patient suffers from interstitial lung disease (bronchiolitis and pulmonary hemorrhage) most likely secondary to the multiple solvents at work, since there is no other explanation for her symptoms." Dr. C directly contradicts Ph.D W's testimony because Dr. C explained that no genetic or relation to other illnesses appears to have caused the claimant's injuries.

A (Dr. M) performed a biopsy on the claimant's left lung and ends his report dated 1991 by stating, "The arterial changes noted are suggestive of pulmonary hypertension; this may be due to .... or, as most likely in this situation, secondary intrinsic lung disease (emphysema and fibrosis)."

(Dr. IC), examined and treated the claimant when she was hospitalized. On (date), and the next day, the claimant developed a fever, chills, a cough, and general malaise according to the medical discharge summary of Dr. IC. In her letter of June 10, 1992, Dr. IC explains that:

> [The claimant] was hospitalized with a profound anemia found to be secondary to a severe hemorrhagic pneumonitis. Open lung biopsy and drainage was done, and marked pulmonary fibrosis was found underlying the acute hemorrhage.
>
> We searched for a cause of this fibrosis, but were unable to find an organic etiology, i.e. there was no evidence of collagen vascular disease, tumor, tuberculosis, sarcoidosis, amyloidosis, or eosinophilic granuloma,[sic] (which are the most common causes of such destruction).
>
> My consultants and I feel that this condition is most likely due to the inhalation of toxic

fumes over a long period of time in a poorly ventilated room.

(Dr. L), another medical doctor, reviewed the claimant's situation at the request of Dr. IC. In his letter of August 31, 1992, Dr. L wrote:

> After a thorough evaluation of the case, and a brief period of observation I have concluded that this patient suffers from bronchiolitis obliterans with organizing pneumonia (BOOP).
>
> It is my opinion that her pulmonary illness is probably due to inhalation of chemical fumes at work.

The opinions and reports of three medical doctors for the claimant and two scientific PhD's and medical analyses for the carrier, resulted in considerable conflict in the evidence before the hearing officer. Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing, and the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign their testimony, and then resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeals No. 93155, decided April 14, 1993. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; *citing* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports a fact finder's conclusions and his findings are not against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); *citing* Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951). Where the matter of causation is not an area of common experience, expert or scientific evidence may be necessary to satisfactorily establish the causation between the injury and the employment. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992.

In this case, the exact issue is determining the causal relation, or lack thereof, between the claimant's medical problems and her employment. Determining the issue of causation, the Supreme Court of Texas has held:

> . . . in worker's compensation cases expert medical testimony can enable a plaintiff

to go to the jury if the evidence establishes "reasonable probability" of a causal connection between employment and the present injury.

Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199, 202 (Tex. 1980). In Schaefer, the court found that the doctor based his opinion not upon reasonable medical probability but relied on mere possibility, speculation, and surmise. Id. at 204. The fact that the proof of causation is difficult does not relieve the claimant of the burden of introducing some evidence of causation. Id. at 205; Parker v. Mutual Liability Insurance Company, 440 S.W.2d 43, 46 (Tex. 1969).

Here, the medical evidence introduced by the claimant goes beyond a mere speculation, and the medical evidence eliminates biological explanations for the claimant's problems and leaves only the most likely explanation of the chemicals used at her employment as the cause of her injuries. Reasonable medical probability has not been established when there is an absence of any evidence of probative force to raise an issue of causation to get to the trier of fact. Illinois Employers Insurance Company of Wausau v. Wilson, 620 S.W.2d 169, 174 (Tex. Civ. App.--Tyler 1981, writ ref'd n.r.e). In Wilson, the treating doctor could not testify that the chances weighed more heavily in the favor of the producing cause to the plaintiff's injury because the doctor could only state that "it could be" on the causation theory. Id. at 173, 174.

The present case has much more definitive medical evidence than that in Wilson. Three doctors who examined the claimant provided evidence supportive of the claimant's theory of her injury being suffered in the course and scope of her employment. The carrier did present medical and scientific evidence contradicting the claimant's doctors, and the hearing officer, acting as the trier of fact, has the authority to make findings of fact. Section 410.168(a)(2). The hearing officer, just as in the case of other evidence, judges the weight to be given medical testimony and opinions and resolves conflicts and inconsistencies in such expert medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2nd 286 (Tex. App.-Houston [14th Dist) 1984, no writ); Atkinson v. United States Fidelity Guranity Co., 235 S.W.2nd 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.s.e.) The hearing officer found as fact, in finding #8: "CLAIMANT'S pulmonary problems are the direct result of her exposure to chemicals at work, as supported by the overwhelming weight of the medical evidence presented." With the authority to act as the fact finder, the hearing officer must determine the relevance and the materiality of the evidence, consider and weigh the evidence, assess the credibility of the evidence, and resolve conflicts of the evidence. Section 410.165(a); Texas Workers' Compensation Appeal No. 92178, decided June 17, 1992.

The findings of fact made by the hearing officer are supported by sufficient evidence. The hearing officer's decision was not against the great weight and the preponderance of the evidence. Pool v. Ford, 715 S.W.2d 629, 634 (Tex. 1986).

Finding no reversible error and finding sufficient evidence to support the challenged findings, we affirm the hearing officer's decision and order.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge