APPEAL NO. 93675

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act). On July 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. He determined that (claimant) did not establish an injury suffered in the course and scope of his employment. The appellant, claimant, appealed the hearing officer's decision. The respondent (carrier) argued that the decision of the hearing officer is supported by a preponderance of the evidence.

DECISION

Determining that sufficient evidence exists in the record to support the hearing officer's decision, we affirm.

The issue appealed is whether the claimant suffered an injury in the course and scope of his employment. The claimant presented both his own testimony and a medical report to establish an injury in the course and scope of his employment. The carrier presented medical evidence and lay testimony to contradict the claimant's evidence.

The claimant also appealed the issue of an occupational disease. The hearing officer concluded that the claimant did not suffer from an occupational disease. Section 401.011(34) defines occupational disease as:

> [A] disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is incident to a compensable injury or occupational disease.

The record showed that (employer) manufactured three different types of materials: polypropelene, polyethylene and flex nylon, which are used as plastic tubing for electrical wiring. The machines which produced this plastic tubing would emit fumes and a mist upon start-up. According to the production manager, (Mr. M), the machines were all located in a production area which contained three extractors, seven ceiling fans, and five floor fans. Mr. M also testified that fresh air would always be circulating through the production area. The fumes and the mist would dissipate within minutes after one of the machines was started, according to testimony of both Mr. M and the claimant.

The claimant stated that he had worked for the employer for approximately three years beginning in September of 1989 until July of 1992, when the claimant became too ill to continue working. The claimant testified that he worked as a quality control technician when he first started working for the employer. As a quality control technician, the claimant stated that he just checked the product being manufactured for quality and

that he filled out paperwork. This work was done in the production area of the plant, the claimant testified. The claimant continued to testify that he was promoted to relief operator, which involved a variety of duties from operating the machines, to cleaning the parts, and supervising the operations in the production area. The claimant eventually was promoted to a supervisor and would work 42 hours a week in the production area. The claimant testified that the symptoms of his injury were numbness on the left side of his body, chest pains, dizzy spells, blurred vision, memory loss, and numb lips. The claimant testified that he has not worked since he left his employer, but that he has mowed some lawns.

Mr. M testified to the following: that the claimant told Mr. M that he, the claimant, was feeling sick and that the claimant's family had a history "about the heart;" that the claimant returned to work two days later, and again complained of being sick; and that the next time the claimant returned was to file an accident report and give the office manager the business card of his lawyer. Mr. M also testified that, prior to the accident report, the claimant never complained about feeling ill or having any problems because of being exposed to fumes at work.

The claimant testified as to seeing his family doctor, (Dr. U), who told the claimant that it was the fumes that affected him. There was no medical evidence from Dr. U. The claimant testified that he saw another family practitioner,(Dr. H), who told the claimant that his symptoms were work-related from exposure to toxic fumes, which is supported by Dr. H's letter dated February 10, 1993. The claimant also testified to the same scenario with (Dr. T), who the claimant went to see to get another opinion. There was no medical evidence from Dr. T.

Dr. H referred the claimant for testing by a neurodiagnostic specialist (Dr. G). In his Electroencephalography and Evoked Response Battery Report of August 28, 1992, Dr. G described the various tests performed on the claimant to evaluate his symptoms reportedly resulting from long-term exposure to toxic substances from his employment. Dr. G summarized the results of his tests as follows:

> Essentially this neurophysiologic battery of tests should be considered within normal limits for this patient. The absence of the major wave form P300, however, clinically trends with the patient's history of toxic exposure. The clinical significance of this absent P300 wave form is undeterminable at this time with the other components of the battery being normal. Should the patient's symptoms persist or progress would recommend a followup [sic] study.

After examining the claimant as reported in the pulmonary consultation dated April 15, 1993, the carrier's doctor, (Dr. W), M.D., F.C.C.P., refuted Dr. H's report that "the

neurodiagnostics `were compatible with exposure to toxic substances.'" Dr. W wrote that when the actual neurodiagnostic report is read, that Dr. H's diagnosis is not true, and Dr. W questions why the claimant was not examined by a neurologist and how Dr. H, a family practitioner, could make such a diagnosis without more data. At the end of his medical report dated April 15, 1993, Dr. W writes:

> . . . I find no evidence to support [claimant's] allegations or [Dr. H's] diagnosis of toxic fume exposure. They are well described clinical syndromes related to exposure to Polymer fumes from a wide variety of materials. The pulmonary symptoms are primary to those of irritation and or asthmatic response. [Claimant] has none of these. The neurological symptoms associated with exposure to Petro Chemicals are associated with much higher exposure than [claimant] could have been exposed to. Therefore, as my opinion, [claimant's] symptoms have no relationship to his former employment.

In his letter of April 27, 1993, Dr. W wrote: "It is still my opinion that [claimant's] condition does not have any occupational origin." Dr. W also expressed his opinion that he did not believe any more testing was necessary to try to determine the origin of the claimant's symptoms.

Both OSHA and McKee Environmental Health, Inc., conducted air tests to determine the safety of the employer's facility. The OSHA test conducted on November 5, 1992, revealed no traceable amount of the toxic chemical substances which were the subject of the test. The OSHA test was unannounced to the employer prior to the test. The employer hired McKee International to conduct a test on February 5, 1993, and no hydrocarbons were found in the air samples collected at the employer's facility on that date. From the tests of the air nothing was indicated to establish a causation between the claimant's former place of employment and his illness.

Under the 1989 Act, the hearing officer is the trier of fact at the 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. 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. Further, the hearing officer has the authority to judge the weight and the credibility of conflicting medical evidence. Texas Workers' Compensation Commission Appeal No. 93010, decided February 16, 1993. 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). The hearing officer found that the claimant did not suffer an injury that arose out of the course and scope of his employment. Sufficient evidence supports this finding.

In the present matter, the primary issue is in trying to determine a connection between the claimant's medical problems and his employment. In determining 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). When the trier of fact does not have the expert knowledge needed to determine causation, expert testimony may be required when the claimant alleges a complex injury from his employment. Parker, 440 S.W.2d 43, 46. Lay testimony of a claimant's working conditions may be considered along with medical and scientific evidence in determining the probabilities of causation, and by no means is expert testimony the exclusive method of proving an occupational disease. Texas Workers' Compensation Commission Appeal No. 92604, decided December 30, 1992. When a disease has an uncertain cause to a lay person, then expert testimony is required. Hernandez v. Texas Employers' Insurance Association, 783 S.W.2d 250, 253 (Tex. App.-Corpus Christi 1989, no writ); Texas Workers' Compensation Commission Appeal No. 92421, decided October 1, 1992; Texas Workers' Compensation Commission Appeal No. 92202, decided July 6, 1992. The cause of a disease is often more difficult for a lay person to have knowledge of than the cause of a physical injury, and in such an instance, the cause, the progression, or the aggravation of a disease will require expert testimony to establish a "reasonable probability" that the employment was the causation of the disease. Id. *citing* Insurance Company of North America v. Myers, 411 S.W.2d 710, 713 (Tex. 1966). The standard required for the

claimant to raise a fact issue is for the claimant provide evidence of a reasonable medical or scientific probability. Texas Workers' Compensation Commission Appeal No. 92604, decided on December 30, 1992.

In the present case, not even a medical note was introduced from two of the three doctors referred to by the claimant. The claimant and carrier both introduced the report of Dr. G, who described all but one of the tests as normal. Based on the results of all the tests, Dr. G stated that the significance of the one test as possibly favorable to the claimant, but Dr. G noted the significance was "undeterminable" because all of the other tests being normal. Dr. W's opinion stated that the claimant's condition did not originate from his employment. 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 strongest medical evidence to support the claimant in the present case is a family practitioner's, Dr. H's, opinion that toxic substances from the place of employment caused the claimant's injury.

In the present case, the hearing officer had medical evidence from the claimant's hearsay testimony that three doctors who examined the claimant said the claimant's injury was caused by toxic chemicals from work. The medical report of Dr. H, a family practitioner, supported the claimant's theory. The carrier did present medical and scientific evidence contradicting the claimant's theory, 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 found as fact, in Finding of Fact No. 12: "Claimant was not injured in the furtherance of his Employer's business." As the sole 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 Commission Appeal No. 92178, decided June 17, 1992. Even if Dr. H's diagnosis were enough to be a reasonable medical probability, the hearing officer had sufficient scientific and medical evidence to reach the conclusion of the claimant not being injured or sustaining an occupational disease in the course and scope of his employment.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge