APPEAL NO. 93976

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 convened in (city), Texas, on September 8, 1993, and was recessed and reconvened on October 4, 1993. The appellant (hereinafter claimant) requests our review of hearing officer (hearing officer) decision that the claimant did not sustain a compensable injury on (date of injury), while in the course and scope of his employment, and that he did not have disability. The respondent, hereinafter carrier, contends that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant was employed as a delivery and warehouse assistant for (employer) from January 1991 to July 1992. It was claimant's position that he sustained a compensable occupational disease affecting his lungs from exposure to paint vapors and cigarette smoke in the workplace. The date of injury was alleged to be (date of injury).

The claimant, who does not smoke, said there were four or five employees who smoked in the office, and that he complained about the smoke to (Mr. M), employer's branch manager, in March or April of 1991. He also said that several areas in the workplace, including the paint mixing room and the warehouse, contained paint fumes and vapors and were inadequately ventilated. (He said that he had been issued a respirator mask but that it was a disposable one that was never replaced.) The only relief claimant got from the workplace environment was when he made deliveries, which he estimated he did for approximately three hours during each eight-hour day. Mr. M disagreed with claimant's description of the workplace, contending that the areas were ventilated pursuant to OSHA standards. He also said a respirator was provided and that claimant used it, although he said he was in the office only about 25% of the time. He also believed about 75% of claimant's time was spent in the delivery van, which he said was air conditioned.

In March of 1992 the claimant said he began spitting a lot, and in April or May of that year he began producing mucus. He reported this to his supervisor, DF, and sought permission to see a doctor. The first doctor he treated with was (Dr. S), on May 18, 1992. Dr. S apparently performed several tests and on June 10, 1992 wrote as follows: "[Claimant] has had severe chronic sinusitis, allergic rhinitis and bronchitis. I advised him on 6-1-92 not to return to industrial respiratory exposure until I have released him from medical care." In a June 19, 1992, return to work slip, however, Dr. S stated that claimant's condition was not work related. (Claimant said he had asked for a work release, which he needed due to the fact he was taking medication.)

On June 16, 1992, the claimant saw (Dr. W), an allergist, who performed a skin test and a CT scan of claimant's head (sinuses), which was normal. In an August 11, 1992, letter

Dr. W said the claimant denied symptoms from, among other things, paint fumes, and he said his initial diagnosis was possible allergic rhinitis and sinusitis. The claimant said Dr. W told him he was allergic to cats but not to molds, although a September 1, 1992, letter from Dr. S stated that Dr. W found claimant to be "strongly allergic to molds and spores, etc, as is approximately 50 to 75% of the population of (city)."

On May 19, 1992, the claimant was asked by his employer to resign due to an incident in which claimant became drowsy while making deliveries and pulled off the road to sleep in his truck. The claimant said his drowsiness was caused by the medication he was taking as the result of his injury, and that his employer ultimately placed him on a three-day suspension. He resigned from employer on July 6, 1992, and began working for Junior Achievement on or about July 1, 1992, as a delivery driver. The claimant said he continued working at that job until January of 1993, when he suffered a job-related back injury for which he received workers' compensation benefits. He was terminated by Junior Achievement on August 15, 1993.

Because he said his problems became worse after he had left employer, the claimant sought treatment in November of 1992 with (Dr. SK). On January 30, 1993, Dr. SK wrote that the claimant had worked for several years in an environment "with a great deal of smoking," and that claimant appeared to have "a bronchitic condition with considerable congestion untouched by most all antibiotics." Dr. SK referred claimant to (Dr. TK), a pulmonary specialist. Dr. TK performed diagnostic tests including a fiberoptic bronchoscopy and bronchial washings which were found to be essentially normal with a small amount of mucoid secretions. On May 11, 1993, Dr. TK wrote that claimant suffered from a chronic cough and congestion "that apparently started while he was working in the vicinity of paint fumes. Despite extensive evaluation, the etiology of the cough remains unclear. All studies have been unrevealing to date." The claimant stated at the hearing that he was still treating with Dr. TK and that he had an upcoming appointment scheduled.

The claimant also stated that he had suffered from blurred vision which he attributed to the chemical exposure. Claimant originally saw (Dr. C) who referred him to (Dr. A). A July 15, 1993, letter from Dr. A indicates that claimant was diagnosed with "angle closure glaucoma OD and narrow angle glaucoma OS," and that an "emergency yag peripheral iridectomy" was performed. The claimant said he was continuing to treat with Dr. A. He also said that a rash recently had appeared on his hand, but that he had not seen a doctor about this condition.

Also included in the record were records of a pre-employment physical claimant took, as well as pulmonary tests which claimant said were performed about every six months. The January 9, 1991, test stated that claimant's heart, lungs, and bony thorax were all within normal limits. A pulmonary test dated May 14, 1992, also said the results were within normal limits.

The hearing officer found that the evidence in the case did not establish that on (date of injury), or at any other time, the claimant sustained harm to the physical structure of his

body due to exposure to paint chemicals or cigarette smoke while engaged in an activity that originated in and had to do with the business of employer and that was performed by the claimant in furtherance of the business or affairs of employer. She also found that the claimant had not been unable to obtain and retain wages equivalent to his wage before (date of injury), because of an injury claimed to have occurred on or about (date of injury).

As the court of appeals stated in Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana 1982, no writ), "To be compensable as an occupational disease, a disease must be one arising out of and in the course of the claimant's employment, and cannot be an ordinary disease of life to which the general public is exposed outside of employment. . . To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's work and the disease. . . ."

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of its weight and credibility. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer is entitled to resolve them. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ).

The evidence in this case clearly shows the claimant to have sought medical treatment for the condition which he described in his testimony. However, Dr. S stated that he did not believe such condition to be work related, and Dr. W found claimant to be allergic to substances found in the environment generally and noted that claimant at the time of that treatment denied any symptoms from paint. Dr. SK expressed concern at the resistance of claimant's condition to medication and Dr. TK performed extensive tests which were unrevealing as to etiology. Claimant's treatment with the latter two doctors, however, took place some four to eight months after he had ceased working for employer. In addition, there was conflicting testimony concerning the workplace itself and the amount of time each day that claimant spent away from the workplace. With the evidence in this posture, there was sufficient probative evidence to allow the hearing officer to conclude that claimant had not met his burden of proof to establish that his physical condition was causally related to his occupation. Washington v. Aetna Casualty & Surety Company, 521 S.W.2d 313 (Tex. App.-Fort Worth 1975, no writ).

With regard to the issue of disability, we note that as the hearing officer correctly observed, a finding of a compensable injury is a necessary prerequisite to a finding of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. However, we also find sufficient evidence upon which to sustain a finding of no disability, as claimant was released to return to work for employer on several occasions, and it was undisputed that upon his termination he immediately went to work in a similar capacity for another employer where he remained until he suffered a job-related injury. (Although the evidence did not include a comparison of the wages of the two jobs, the claimant does not raise this on appeal, and we believe there is still sufficient evidence to support the hearing officer's findings on this issue.)

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge