APPEAL NO. 94082

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held in (city), Texas, on December 3, 1993, the hearing officer, (hearing officer), determined that the appellant (hereinafter claimant) knew or should have known that her alleged injury may have been related to her employment on (date of injury), but that she reported such injury to her supervisor on May 18, 1992; therefore, she neither timely reported her alleged injury nor had good cause for such failure to report. The hearing officer also held that the claimant did not sustain an injury including an occupational disease which arose out of and in the course and scope of her employment, and that any inability to obtain and retain employment at pre-injury wages was not due to an alleged injury claimant had while working for her employer. The claimant appeals the hearing officer's decision, pointing to evidence which she says is contrary to the hearing officer's findings of fact and conclusions of law. The respondent, hereinafter carrier, contends that claimant failed to meet her burden to establish that her physical symptoms are caused by her work.

DECISION

We affirm the decision and order of the hearing officer.

The claimant was employed as a secretary/receptionist in the office of (employer) at a facility which disposed of fly and bottom ash and scrubber sludge from an electric utility plant. In January of 1992 the claimant said there was black dust or soot on her desk which, she was told, was being blown out of the ventilation system due to a broken fan belt. On (date), claimant said she first experienced difficulty breathing while at work and the following day was taken by ambulance to an emergency room due to breathing problems (medical records show she had said she had a cough and cold for at least the past three days). Claimant was hospitalized for 10 days and treated by (Dr. R) whose discharge diagnosis was severe reaction airway disease, diabetes, and hypertension. He prescribed inhaled steroids.

Dr. R also referred claimant to (Dr. S), a pulmonary specialist, who on (date of injury), assessed acute asthmatic bronchitis, probably related to occupationally induced asthma, and stress induced hyperglycemia. He recommended that claimant stay off work pending health inspection studies of the workplace. On that date Dr. S also wrote that claimant's pulmonary function studies showed "a rather severe airway obstruction." On April 28th the claimant had another pulmonary function test and Dr. S stated that she had "reduced effusion capacity and all of this is consistent with severe chronic bronchitis that can be consistent with occupationally induced asthma since the patient had been working several hours" prior to the test. On May 13th, Dr. S reported that claimant said her cough persisted but cleared up when she went home; on June 10th he reported improvement since the claimant had at that time been off work nearly 2½ weeks, and he recommended she get a second opinion.

The claimant said she was contacted (but not seen by) employer's doctor, (Dr. C), who was in C, and on June 22nd, she was seen by (Dr. D), a doctor of occupational medicine. In her report, which was written August 5th, Dr. D summarized claimant's complaints and the testing Dr. S had performed; however, she noted that Dr. S did not perform a prework pulmonary function and stated "[t]herefore, this is not a valid indication of reduced air flow secondary to occupational exposure." Dr. D recommended an industrial hygiene report, intradermal testing for allergens, a thorough cleaning of the air filtration system at claimant's workplace, and a lung spirometry test administered prior to work and repeated after four to five hours of work exposure.

An industrial hygiene study was performed by a consultant, LOHM, Inc., on July 1st. (Mr. T), president of the company, testified that the first study sampled for airborne substances over one workday's time; these included silica (which is present in increased amounts in fly ash) and heavy metals including lead, arsenic, aluminum, and selenium in particulate form, as well as total dust. He stated that the test, the report of which was in evidence, found no respirable silica in claimant's office or in the shop area; he also said it found no lead, arsenic, selenium, or aluminum in claimant's office and one to three micrograms of aluminum in the lunchroom and outside the building (he stated this amount was "not even a tenth of a percent of the OSHA standard"). One-hundredth of a milligram of dust was found in claimant's office.

Because of the results of the first study, a second study performed on September 3, 1992, sampled for indoor air pollution ("sick building syndrome"), including such things as carbon dioxide, volatile organic compounds, formaldehyde, bacteria, and fungi. In addition to air sampling, Mr. T said the ventilation system was checked and wipe samples taken. Mr. T interpreted the results of the testing as not showing "anything particularly unique" about the workplace environment, and that the air inside the building was basically the same as that outside. He said the bacterial organisms found were considered those that would normally be found on humans or in the environment. Organic compounds were "negligible or below detectable limits in the parts per billion range," formaldehyde was not found, and carbon dioxide levels were found to be stable. Mr. T said a recommendation was made that the ventilation system be cleaned due to slime growth, although this "wasn't translating itself into an airborne hazard."

Mr. T was also asked about the black soot on claimant's desk; while this had not been brought to his attention while the studies were being done, he said the soot probably came from a fan belt, which is made mostly from carbon black. He called such dust "nuisance dust, not toxic."

Sampling was also done at claimant's home in March 1993. Mr. T said that the study found fungi and bacteria levels inside that were much higher than those outside, although

he said such levels were not harmful. He concluded that the testing disclosed "nonsignificant results" at both claimant's home and her workplace.

Dr. D received the reports and wrote that "it does not appear that the patient had significant exposures to agents that could have caused or contributed to a pneumoconiosis. Certainly her evaluation indicates some emphysema of more long-term duration as she has history of smoking heavily for many years, although she quit 6.5 years ago. The question is whether or not the patients [sic] more recent diagnosis of asthmatic bronchitis is exacerbated or caused by any occupational exposure." Dr. D repeated her earlier recommendations, including intradermal skin testing for certain organisms.

Claimant saw (Dr. F), an allergist, in August 1992. He stated that claimant "basically has a fixed lung obstruction and probably is not influenced greatly by outside stimuli." He also stated her allergy survey was negative, but he also wrote as follows:

> It is felt that this patient is not allergic but nevertheless had chronic obstructive pulmonary disease with secondary bacterial infection involving bronchitis and rhinosinusitis and that exposure to a variety of substances in the environment served as irritants. Percisely (sic) which irritant she was exposed to is not clear. She was exposed to some type of particulate matter which was some type of ash that was used in the scrubbing process . . . It is common knowledge that when one has mucosal respiratory disease and is exposed to particles such as a dust storm . . . or any other airborne irritants it will aggravate and cause symptoms. Once her infection was brought under control and once she left the environment of irritation she was able to heal and now she is relatively symptom-free. I believe she can return to employment.

On August 5th, Dr. S wrote Dr. C that he had seen the reports from the consultant as well as Dr. D's report indicating that claimant "is probably not being exposed to any toxic agents at her work. She does have rather severe chronic obstructive lung disease that has improved since she has left work, but only to a mild degree and I suspect that her overall work environment, if it is kept as clean as indicated by the industrial hygiene report, is probably not responsible for her current lung problems." During the same period of time claimant was still being seen by Dr. R, who took claimant off work and diagnosed allergic asthmatic bronchitis secondary to work environment. On November 4, 1993, Dr. R wrote that claimant could work in a clean air environment with adequate ventilation.

The claimant testified that she reported an injury to her supervisor, (Ms. H), in May 1992, because after she saw Dr. S in May she found out for certain that her condition was work related. (She also testified that when she was in the hospital in (month) it was suspected, but not confirmed, that her condition was related to her work, and that she also spoke with Ms. H during that time.) Included in the record was a document detailing the

periods of time claimant missed work due to illness or having been taken off work by a doctor. She testified that she was terminated by the employer on February 15, 1993.

There was testimony from several of employer's employees that samples of bottom ash and scrubber sludge were collected periodically and sent away for testing; claimant said the containers were sometimes stored in her office and that a lab employee would sometimes throw ash around. Employer's operations supervisor said there was dust in the building but not more than a usual amount, and that the building was cleaned three times a week.

In her appeal, which thoroughly documents evidence in the record, the claimant takes exception to the hearing officer's findings of fact concerning the conclusions of medical and other expert reports that claimant's condition was not caused by her workplace. As she points out, Dr. S several times referenced the possibility that claimant's respiratory problems were occupationally induced. However, air and other sampling at claimant's workplace and home, cross-checked by allergy tests, did not demonstrate any causative link between claimant's job and her physical problems. Indeed, Dr. S, following receipt of test results, amended his preliminary findings to conclude that claimant's job was not responsible for her respiratory problems.

The Appeals Panel has held that to support a finding of an occupational disease, the evidence must demonstrate a causal connection between a claimant's employment and the disease; that is, the disease must either be indigenous to the employment or present in an increased degree. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. The fact that proof of causation is difficult does not relieve a claimant of the burden of introducing evidence thereof. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. While expert testimony is necessary to prove causation by reasonable medical probability, lay testimony about working conditions is also admissible. Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993. The fact that an injury occurred during a period in which a claimant was employed does not mandate a conclusion that the employment caused the injury. Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer judges the weight of lay and medical testimony and opinion and resolves such conflicts and inconsistences as exist. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Thus, the hearing officer could accept the opinions of Dr. D, Mr. T, and Dr. S rather than those of Dr. R and the early reports of Dr. S. Our review of the evidence in this case leads us to the conclusion that the hearing officer's determination that the claimant's injury was noncompensable is supported by the evidence in the record.

On the issue of timely notice of injury, the hearing officer found that on (date of injury), the claimant knew or should have known that her alleged injury was related to her employment, but that she did not notify her employer of such injury until May 18th. Section 409.001(a) requires that an employee notify the employer of an occupational disease not later than the 30th day after the date on which the employee knew or should have known the injury may be related to the employment. The claimant contends on appeal that she informed Ms. H of this fact while she was in the hospital in January 1992. Claimant's testimony in this regard was somewhat confusing, and the hearing officer was entitled to credit her statement that she reported her injury to her employer in May 1992 after the cause of her condition was confirmed.

With regard to the issue of disability--defined in the Act as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage, Section 401.011(16)--the evidence shows claimant was taken off work by several doctors pending further tests. However, a finding of a compensable injury is a necessary prerequisite to a determination of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992.

Upon review, we hold that the hearing officer's determination of the issues in this case is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge