APPEAL NO. 94226

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On January 12, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues to be determined at the contested case hearing were whether appellant MO, who is the claimant herein, had sustained a compensable injury in the course and scope of his employment, and whether he had disability therefrom.

The hearing officer found that claimant did not prove that he had sustained an injury as a result of exposure to chemicals, and therefore did not have disability, defined as the inability to obtain and retain employment equivalent to his pre-injury wage as a result of a compensable injury. Section 401.011(16).

The claimant appeals, arguing evidence he believes was in his favor. The carrier likewise points out evidence it believes mandates in favor of affirming the decision.

DECISION

We affirm the hearing officer's decision and order.

Claimant's theory of injury appeared to be that he had long term exposure to benzene and other chemicals in the course of his work as a supervising electrician for (employer), and that such exposure made him more susceptible to the effects of specific benzene releases into the air which occurred in (month year). Claimant had been employed for 12-13 years, working since 1984 in the phenol plant. He maintained he did not start having problems with allergies until he began working for the employer. He stated he had new symptoms after (month year).

Claimant said that he typically began work at around 6:00 a.m. A sewer of "oily" water used to dispose of waste chemicals ran beneath the floor of the control room where he often worked, and was covered by a grate in an outside alleyway between two buildings.

Claimant stated that sometime in (month) he smelled benzene around the control room area and was told he probably shouldn't be there. Afterwards, he recalled being at a meeting where possible benzene exposure was discussed. He says that people were asked to be tested but said that they were also intimidated into not getting tested. Claimant also conceded that he knew of no one being fired because they reported sickness. Aside from the claimant opining that he had been exposed to chemicals throughout his years working at the phenol plant, there was no other evidence of the occurrence and nature of exposures prior to (month year).

Most of the specific facts relating to two benzene discharges came from other witnesses. (Mr. C), a former safety official for employer, said there were two exposures, on (date). He stated that benzene was vented by the air conditioning system into the control room area because a seal over a pipe that had been hooked up to a removed sink was

disturbed. Mr. C maintained that another exposure occurred on (month day) of around 30 parts per million (ppm). He stated that he believed the threshold for smelling benzene was around 15-20 ppm. Other exposures he had documented occurred after claimant had left the employer.

(Mr. P), the supervisor of operations and maintenance for the phenol plant, said that disturbance of the seal resulted from vacuuming out the sewer system during the plant shutdown period. On (month) 1st, at around 2-3 a.m., the sewer was vacuumed and at around 4 a.m. an odor was detected. He stated that the testing device in the area detected 7.46 ppm of benzene, 2.23 ppm of cumene, and 0.22 ppm, of toluene. Mr. P said that the area was evacuated at 4:16 a.m. and completely cleaned out by 6:00 a.m. ("cleaned" meaning no ppm of benzene). Mr. P said that the (month) 9th release resulted in measurement of 0.74 ppm of benzene at 4:50 a.m.; by 6 a.m. on that day, there was still measurable benzene but still at less than 1 ppm. Mr. P said no one was allowed to enter the area without a fresh air mask (which contained its own air supply). He opined that inhalation of benzene from filling a personal auto with gasoline would be less than 1 ppm, although the gasoline itself had 50-150 ppm of benzene in its liquid form. Mr. P stated that two safety meetings were called after the second exposure and employees were encouraged to be tested. The mechanisms of how the exposures occurred were detailed in a memo produced by the employer and admitted into evidence.

Claimant said he left work on (month) thinking he had the flu. He had not returned as of the date of the hearing. There was testimony that he had lost a lot of weight, and undergone a change in outlook. He stated that he had memory loss and difficulty with concentrating, and was subject to panic attacks.

Medical evidence in the case is conflicting. A chest x-ray taken June 15, 1992, was normal, as was a blood test taken on June 16, 1992. (Dr. S), with whom claimant consulted after he became dissatisfied with his HMO doctor, took him off work June 4, 1992, citing the diagnosis as "chemical pneumonitis." Claimant also presented the opinion of (Dr. E), who first saw claimant on March 8, 1993, that he had "xenobiotic overload" that could cause his multiple symptoms. (Claimant stated that he understood this term to mean he had an internal chemical imbalance.) Dr. E attributed the triggering event as the "chemicals" he was exposed to, based upon a history of inhaling fumes from a burnt motor. On February 24, 1993, claimant's blood testing was normal. He had an unremarkable brain MRI on April 29, 1993. A consultant neurologist for the carrier, (Dr. G), examined him April 5, 1993, and opined that he suspected depression underlying a number of claimant's complaints. Dr. G noted a normal EEG performed on April 28, 1993. Another consultant doctor for the carrier, (Dr. D) of Respiratory Consultants of Houston, found claimant's subjective complaints to be out of line with objective findings from tests and physical examination. He characterized Dr. E's treatment of claimant, and Dr. E's practice of environmental illness, as controversial and not altogether supported scientifically. Dr. D had examined claimant twice, in October 1992 and in August 1993. In October 1992, Dr. D reported no evidence of respiratory impairment. Dr. H, a neurologist, opined in January 1994 that claimant's EEG demonstrated disruption to electrical impulses in his brain, which resulted, in his opinion, from "multiple chemical

exposures" that occurred in (month year). Literature presented by claimant listed effects of long-term benzene exposure to include some of the symptoms of which claimant complained.

(Dr. DH), of the Health Sciences Center, testified at the hearing. He stated that an exposure to toxic levels of benzene would have had immediate effects and that testing thereafter would not have been normal. He said that long term exposure would not have resulted in normal testing. He stated that his opinion, upon reviewing medical records and listening to testimony during the hearing, was that claimant suffered from depression, and did not have chemical pneumonitis, as initially diagnosed by Dr. S. He testified that he found no basis for Dr. S's diagnosis. Dr. DH stated that chemical pneumonitis would be caused by benzene exposure levels of more than 200 ppm. He stated that a 4-5 year exposure to benzene could possibly weaken the immune system. He stated that benzene exposure would not cause a person to test normally right after exposure, and then abnormally a year later. Dr. DH said that xenobiotic overload as a diagnosis had been referred to in some circles as "junk" science. While he stated that he assumed that medical records he reviewed were accurate, he opined that, leaving aside the history of illness as recited in those reports (some of which history was inaccurately stated), he did not find evidence that claimant had injury from a chemical exposure. He said that claimant's reported symptoms would be atypical for his exposure to benzene as indicated by the testimony. Dr. DH stated that there should not be emotional or physiological effects from exposure levels of lower than 35 ppm of benzene, even on a regular daily basis. He indicated that the maximum recommended exposure levels were set based upon linkage to higher rates of development of leukemia where exposure exceeded 1 ppm.

Resolution of this case amounted to weighing conflicting evidence to determine if the claimant had proven that he sustained a work-related injury. The hearing officer evidently found that claimant had proved he was exposed to benzene on (month) 9, 1992. However, he was not required to believe that as a result of exposure, injury occurred.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's employment and the disease. INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.- Beaumont 1990, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.- Amarillo 1980, no writ). Where the matter of causation is not in an area of common knowledge or experience, expert or scientific evidence (month) be essential to establish causation. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.- Texarkana 1974, writ ref'd n.r.e.). In this case, there was conflicting medical evidence. These opinions were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses, their expertise, the basis of their conclusions, and the record as a whole. The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions (month) be drawn

upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer evidently chose to accept some medical opinions over the others. He also evidently did not find evidence in this record, beyond guess or speculation, that claimant had a long-term exposure to chemicals prior to (month year).

Because disability is defined in terms of the existence of a compensable injury, the hearing officer's conclusion that there was no compensable injury defeated the claim for disability.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The determination of the hearing officer has support in this record and is not against the great weight and preponderance of the evidence, and we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Alan C. Ernst
Appeals Judge