APPEAL NO. 94440

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 14, 1994, a contested case hearing (CCH) was held. At issue was whether appellant (claimant) suffered a compensable chemical inhalation injury on _____, in the course and scope of his employment with (Employer), a certified self-insurer under the 1989 Act (employer/carrier), and whether the alleged injury caused disability within the meaning of the 1989 Act. The hearing officer determined that claimant did not sustain his burden of proof on the issue of injury in the course and scope of employment and as such, that claimant did not have any resultant disability. Claimant's request for review challenges two of the hearing officer's findings of fact and two of his conclusions of law. Employer/carrier's response urges affirmance, arguing the sufficiency of the evidence in favor of the hearing officer's decision and order.

DECISION

We affirm.

Claimant testified that on _____, he worked his regular shift as a grinder for employer, beginning work at 4:30 p.m. It is undisputed that in his position, claimant wore a respirator which plugged into an air line. After claimant had been at work for about ten to fifteen minutes, an alarm went off signifying the presence of a contaminant in the air line. Claimant removed the respirator and after a few minutes, during which time the air system was apparently purged, claimant and the other employees were apprised that they could put their respirators back on and return to work. Shortly thereafter, the alarm sounded for a second time and after an estimated three-minute delay the claimant again removed his respirator. After a delay of about five minutes duration during which time the system was again purged, claimant put the respirator back on and continued working. Claimant testified that when he started working following the second alarm, he felt a "head rush," light-headedness, dizziness, and developed a headache for which he was given an aspirin by his supervisor, (Mr. A). When he was getting the aspirin, claimant apparently asked Mr. A if there had been anything in the air line when the alarms sounded that could have caused his headache and Mr. A assured him there was not. Claimant completed his shift, although he testified that as he was cleaning up his equipment, he started to feel pain in his chest. Claimant left the plant at about 3:00 a.m. and went home.

Claimant testified that his pain intensified when he got home, that he was having difficulty breathing, and that he had severe congestion and felt as if he needed to "cough something up." Claimant had a friend drive him to the hospital. In the emergency room, claimant was treated by Dr. K. Thereafter, Dr. K admitted claimant to the hospital. Claimant was discharged from the hospital on _____. Dr. K diagnosed bronchopneumonia and reactive airways, which he "felt to be chemically induced." Dr. S was called in for consultation during claimant's hospitalization. Dr. S diagnosed "Hemoptysis--probably secondary to chemical bronchitis" and "[c]hemical bronchitis--most likely secondary to chemical exposure to fumes and chemical substances." However, Dr.

S also noted that "the definite nature of the chemical substances is not known at the present time." Both Dr. K and Dr. S make reference in the history sections of their reports that the claimant reported that he did not have any history of allergy, upper respiratory difficulties, or smoking.

The evidence presented by the employer/carrier demonstrated that two alarms sounded on _____, indicating the presence of a contaminant in the air system, believed to be carbon monoxide from smoke emitted by welding rods; that no other employees on the air respirator system had any symptoms; and, that claimant's statements to his treating doctors that he had no history of allergy, smoking, or upper respiratory problems were inconsistent with the information provided by the claimant in his pre-employment physical examination, where he was diagnosed with upper airway obstruction and acknowledged allergies, sensitivity to strong odors and a history of upper respiratory problems.

It is well-settled that a claimant has the burden of proving by a preponderance of the evidence that an injury occurred in the course and scope of employment. That the claimant must link a contended injury to an event in the work place and establish a causal relationship between the injury and the employment. Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992; Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. In Appeal No. 92187, *supra*, (*citing* Parker v. Employer Mut. Ins. Co., 440 S.W.2d 43 (Tex. 1969)) the Appeals Panel further noted "that the fact that a determination of causation is difficult does not excuse a plaintiff from introducing evidence proving causation."

Claimant challenges the hearing officer's findings that claimant had not identified the contaminant or the amount of contaminant present in the air system and that the claimant did not breathe contaminated air which caused the symptoms resulting in claimant's hospitalization. In so doing, claimant asserts that it was the employer's responsibility to order testing to determine what contaminants were present in the air system. In addition, claimant relies on statements from (Mr. D), a Board Certified Physician Assistant hired as an expert by the claimant, that "the alleged exposure had not been disproven" and that it "is possible that [claimant's] coworkers had become accustomed to breathing the same substance which made the claimant ill." Claimant's arguments miss the mark. It was not required that the employer/carrier disprove that the injury occurred. It was not incumbent on the employer/carrier, in regard to the 1989 Act, to order tests to determine what contaminant, if any, claimant was exposed to and the level of any such contaminant in claimant's body. In addition, the statements from Mr. D are of no moment, as they are no more than a statement that the exposure might or might not have happened. Finally, we note, as did the employer/carrier, that there is a dearth of objective evidence of a cause related to chemical exposure from either Dr. K or Dr. S. Thus, it appears that in this case as in Appeal No. 92187, *supra*, the doctors' respective diagnoses, attributing claimant's illness to chemical exposure, are more in the nature of a recitation of the history given by claimant, rather than a medical opinion as to causation. That recognition is made more troubling in this instance by the apparent omissions in the medical histories claimant provided Dr. K and Dr. S herein.

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 that the evidence. Section 410.165(a). The trier of fact can believe all, part, or none of any witness's testimony, including that of the claimant. The hearing officer judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony and the evidence. 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. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In concluding that claimant did not suffer a compensable injury in this case, the hearing officer apparently discredited the claimant's testimony and resolved the other inconsistencies in the evidence against the claimant. Our review indicates that the hearing officer was acting well within his province as fact finder in so doing. Thus, we find no basis for disturbing the determination that claimant did not sustain his burden of proof on the injury issue. As a result, we note that the hearing officer correctly concluded that the claimant did not suffer disability within the meaning of the 1989 Act, as the existence of a compensable injury is a prerequisite to a finding of disability. *See* Section 401.011(16).

Finding no error in the hearing officer's conclusions of law and sufficient evidence to support his factual findings, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge