APPEAL NO. 950062
FILED FEBRUARY 23, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 21, 1994. The issues at the hearing were: (1) did the appellant (claimant) sustain a compensable injury in the form of an occupational disease on _____; (2) did the claimant have disability resulting from any injury suffered on _____; (3) what is the date of maximum medical improvement (MMI); and (4) what is the whole body impairment rating (IR). The hearing officer determined that (1) the claimant does not suffer from the occupational disease silicosis and therefore does not have a compensable injury (2) the claimant has not suffered disability as a result of the alleged injury of _____; and (3) the claimant's date of MMI and IR cannot be determined since he has not suffered a compensable injury. The claimant appealed arguing that the determination of the hearing officer that the claimant did not suffer a compensable occupational disease is so against the great weight of the evidence as to be manifestly unjust and requests that we reverse the decision of the hearing officer and render a decision that the claimant suffered an occupational disease with a date of injury of _____; that he suffered disability since December 26, 1992; that the claimant reached MMI on January 4, 1994, with a 15% IR as reported by the designated doctor. The respondent (carrier) replied urging that the determinations of the hearing officer are supported by sufficient evidence and requesting that they be affirmed.

DECISION

We affirm.

The claimant testified that he started working for the employer in 1984. For the first two months, he did sandblasting outside every day. He said that after that he worked inside as a coater's helper and in quality control. He said that there were fans to suck out the dust and that he used three types of protective equipment but sand still got into his mouth and nose. He said that while working around coating he wore a paper mask and coating would get inside the mask. After looking at photographs of work areas at the employer's facility, he stated that he did not work near the sandblasting equipment in the photographs but that it was usually dustier than in the photographs. He said that he first saw (Dr. W) in November 1992. He said that he had shortness of breath, was getting tired, had pain in his joints, and that his finger tips would turn purple or blue. He said that Dr. W, Dr. Nugent (Dr. N), and (Dr. P) told him not to work in a dusty environment, and that he has not been able to work since late 1992 or early 1993. The claimant introduced nine exhibits including photographs of work areas at the employer's facility, curriculum vitae of Dr. W, medical records, and a material safety data sheet on the coating product used.

The carrier called (Mr. M), a supervisor for the employer. He said that he worked right beside the claimant all day every day. He said that employees do everything, but that he did not see the claimant sandblasting. He said that the employer uses six 48-inch fans to remove powder from the work area and OSHA inspections have found the ventilation to be adequate. After reviewing the photographs, he said that the photographs show more powder than is normally there, that the powder is turned very high, and that the claimant would be at the other end of the shop about 40 or 50 feet away. He also said that the sand is never turned up that high, that the process does not kick up dust like that, and the pictures do not accurately depict sandblasting. The carrier introduced 16 exhibits including a curriculum vitae of (Dr. B) and medical records.

The evidence in the medical records is conflicting. In addition, some medical records indicate a history of nine years of sandblasting which is not consistent with the testimony of the claimant at the hearing. In a letter dated September 19, 1994, to the claimant's attorney Dr. W wrote:

> [Claimant] has biopsy proven accelerated silicosis with mixed dust pneumoconiosis. He has impairment of diffusion capacity, which is moderate, and has a weakly positive pulmonary gallium scan. He also has a positive rheumatoid arthritis factor. Chest x-ray is equivocal for pneumoconiosis at the present time, however the total picture is consistent with accelerated silicosis, as we have a tissue diagnosis.
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> (Dr. A) of the _____, performed the study of the biopsy material and prepared the tissue diagnosis referred to above by Dr. W. In a letter to Dr. W dated May 24, 1993, Dr. A wrote:
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> My review of the lung tissue contained in block "A1" shows multiple areas of atelectasis which may be in part the result of surgery artifact. There are some small airways containing mucous and cellular exudate in the lumen which may also be related to the focal areas of atelectasis. Most of the lung is histologically otherwise normal except for areas of airspace filling and focal interstitial accumulation of macrophages containing very fine opaque dust. I did not observe any silicotic nodules or other granulomas. This biopsy is consistent with a very mild degree of mixed dust deposition with minimal fibrosis.
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> The tissue microanalysis revealed a concentration of total exogenous particulate of 556 million per cubic centimeter of tissue. The types of particulate found included silica (46 million), aluminum silicates (137 million), miscellaneous silicates (16 million), gypsum (80 million) and metals (276 million).

* * * * * *

> These findings document a more significant dust burden than was evident by light microscopy alone. This was not surprising as the average size of all particles detected was 0.5 µm, with the average size for silica particles being 0.43 µm and the average size of metal particles being 0.38 µm. Many of these particles would be too small to observe by light microscopy.
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> In summary, the analytical findings confirm significant very fine particulate dust exposure and retention of a mixture of dusts including silica, silicates and metals as well as gypsum in [claimant's] lung. This is associated with mostly a macrophage accumulation in the lung at the time of biopsy.

In a Report of Medical Evaluation (TWCC-69) dated May 3, 1994, (Dr. P) reported that the claimant reached MMI on January 1, 1994, with a 15% . In a narrative attached to the TWCC-69, Dr. P reported that his diagnosis was "[s]ilicosis, confirmed by lung biopsy, responsive to removal from exposure to silica and conservative medical management."

(Dr. G) reported: [p]er consultatIon with Dr. [A] and Dr. [W] the findings are consistent with very fine particulate dust exposure and retention of a mixture of dusts including silica, silicates, and metals as well as gypsum." Dr. G 's diagnosis was "LUNG, LEFT LOWER LOBE, LINGULA, WEDGE BIOPSY - CONSISTENT WITH MIXED DUST DEPOSITION AND WITH MINIMAL FIBROSIS."

Other doctors had contrary opinions. In a letter dated September 13, 1994, Dr. B wrote:

> Laboratory studies included a urinalysis on 6/29/93 which was within normal limits. His nasal cytology was also within normal limits. His pulsoximeter and arterial blood gas done on 5/12/93 was normal. A chest x-ray on 5/12/93 revealed a normal chest. Sputum for fungus culture and smear was negative. Delayed skin testing was all within normal limits (and included a PPD). Multi-stage treadmill stress test was done at the (Provider) on 5/27/93 and was interpreted as normal. Complete pulmonary function test with CO2 Diffusion was completely normal. Flow values were above average (>100%).

Dr. B also stated that additional tests would be necessary before he could provide a MMI date and IR, but "based on laboratory results that have been completed, there is strong evidence against silicosis and no evidence of disability." In a letter dated August 9, 1994, (Dr. W) reported: "There are no radiographical apparent abnormalities of interstitial lung markings. Chest radiographs do not show evidence of interstitial lung disease in this man." Reports from Diagnostic Imaging Associates reflect normal results. The hearing

officer had the claimant examined by Dr. N at the (Provider). In a report dated October 10, 1994, Dr. N reported:

> On today's examination, his chest is clear to auscultation. There are no crackles. Pulmonary function is normal except for a very mild restrictive ventilatory defect. Chest x-ray is normal except for infiltrate that is most likely secondary to his prior biopsy. At this point the patient does not appear to have significant chronic lung disease. It is almost certain that he has had significant exposure to silica. There is some possibility that he may develop clinical disease in the future. This would take a long time to develop and might require up to 20 years. However, at this time the patient does not meet the criteria for simple silicosis. He appears to have some symptoms consistent with Raynaud's phenomenon. (His hands spontaneously turned blue after pulmonary function testing.) . . . Based on current chest x-ray this patient does not have silicosis.

The burden of proof is on the claimant to prove by a preponderance of the evidence that he sustained an injury in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer, as the finder of fact, 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 resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). After reviewing the evidence the hearing officer determined that the claimant was exposed to silica in his work environment but that he does not currently have silicosis. An appeals 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 Insurance Company of Pittsburgh Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for sufficiency of the evidence, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The evidence, including the expert evidence, is sufficient to support the determination of the hearing officer that the claimant does not have silicosis. A finding of a compensable injury is required before than can be a finding of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. The same is true for MMI and IR.

The claimant on appeal states that the date of the claimed injury is _____, not _____. At the hearing the parties agreed to the issues and entered into stipulations using _____. Since we found the evidence to be sufficient to support the determinations of the hearing officer and because the parties agreed to _____,

as the date of the claimed injury at the hearing, we will not address the date of the claimed injury.

Accordingly, the Decision and Order of the hearing officer is affirmed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge