

APPEAL NO. 990494

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 December 7, 1998, and January 4, 1999. The issues reported as unresolved at the benefit review conference were (1) what is the date of the claimed injury; (2) is the respondent (carrier) relieved of liability because of the appellant's (claimant) failure to timely notify the employer of the claimed injury; (3) did the claimant timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) and, if not, did good cause exist for failing to timely file a claim or did the employer or carrier not contest compensability of the claim; (4) did the claimant sustain a compensable injury in the form of an occupational disease; and (5) did the claimant have disability. After making determinations concerning jurisdiction and venue, the hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. By _____, the Claimant knew or should have known that her symptoms, including her respiratory symptoms, may be connected to her employment.
3. While the Claimant has experienced a constellation of symptoms, including shortness of breath, coughing and headaches, both before and after _____ and _____, the evidence does not establish within reasonable medical/toxicological probability that these symptoms were caused, enhanced or aggravated by a specific or repetitious identified chemical exposure(s) at work.
4. On March 6, 1997, the Claimant obtained treatment from Dr. Nguyen [Dr. N] for a fall she sustained that resulted in pain and/or harm to her right arm and wrist.
5. The evidence does not establish within reasonable medical/toxicological probability that the Claimant's complaints of numbness and tingling into her arms, joint pain/stiffness or fainting spells were caused, enhanced or aggravated by a specific or repetitious identified chemical exposure(s) at work.
6. On February 26, 1997, the Claimant reported to her supervisor, [Ms. H], that her absences at work were due to work-related illnesses relative to chemical exposure(s).
7. The Claimant did not inform [employer], nor did it have actual notice, of an injury due to chemical exposure at work before February 26, 1997.

8. The Claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to report to [employer] a work-related occupational disease injury/condition on or before April 6, 1996.
9. On _____, [Mr. V], who was a Group Leader at [employer], spilled some HumiSeal in the Conformal Coating area of the plant. At the time of the spill, the Claimant was approximately 15 feet to 40 feet away from where the spill occurred. The smell/fumes from the spill caused seven employees, including the Claimant, to feel or become sick. Only one employee, [Ms. B], was taken to the hospital. After the Claimant was seen in the [employer], [Ms. H] asked [Mr. M] to take the Claimant home. Before the Claimant and [Mr. M] actually left the premises, however, the Claimant informed him, among other things, that she was o.k. and that she did not need him to take her home.
10. The Claimant did not sustain harm to the physical structure of her body on _____ due to an activity or an identified chemical exposure that originated in and had to do with [employer's] business and that was performed by the Claimant in furtherance of the business or affairs of [employer].
11. The Claimant did not file a claim for compensation with the [Commission] until July 18, 1997.
12. The Claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to file a claim for compensation with the [Commission] on or before March 6, 1997.
13. The claimant has not been unable to obtain and retain employment at wages equivalent to her wage before _____ or _____ as a result of a claimed injury of _____ or _____.

CONCLUSIONS OF LAW

4. The date of injury, if any, is _____.
5. The Claimant did not sustain a compensable occupational disease injury on _____ while in the course and scope of her employment with [employer].
6. The Claimant failed to timely report a work-related _____ injury to [employer] without good cause.

7. The Claimant failed to timely file a claim for compensation with the [Commission] for a _____ occupational disease injury without good cause.
8. Since the Claimant did not sustain a compensable occupational disease injury, no period of disability, as that term is defined in the Act, can be established.

The claimant appealed. She summarized evidence that she contended established a different date of injury and that she timely notified the employer of the claimed injury; contended that she timely filed a claim with the Commission on July 18, 1997, after the employer filed Employer's First Report of Injury or Illness (TWCC-1) forms after the _____, chemical spill; urged that since the Appeals Panel has affirmed a hearing officer's decision that Ms. P, a coworker who performed the same work as she did, sustained a compensable chemical exposure injury, the same medical evidence established within a reasonable medical/toxicological probability that she sustained a compensable occupational disease and that the overwhelming weight of credible medical evidence supports that she sustained a compensable injury in the form of an occupational disease; and requested that the Appeals Panel reverse the decision of the hearing officer. The carrier responded, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that her decision be affirmed.

DECISION

We reform in part, affirm in part, and reverse and render in part.

The claimant testified that she began working for the employer on December 4, 1994; that in prior jobs she did not work around chemicals; that for the first five or six weeks she worked in a department where no real chemicals were used; that she was transferred into a job building new printed circuit boards; that she used some chemicals in that job; that in August or September 1995 she was transferred to a subassembly job; that in that job she used a solvent and Humiseal; that the Humiseal was sprayed from an aerosol can; that sometimes she used Humiseal once or twice a month and sometimes she used it every week; that she did not use Humiseal every day; that Humiseal was used in a small cubicle; that the exhaust system in the cubicle was stopped up and did not work; that two people worked using Humiseal; that after complaints were made, one respirator was obtained in November or December 1996, but she had to work with Humiseal when another employee was using the respirator; and that about once a month she sprayed Humiseal until February 1998 when she was taken off work by Dr. C. The claimant stated that when she was a child she had three or four migraine headaches a year; that after she became an adult, she had a migraine headache about every two or three years; that in September 1995, she started getting more headaches and getting congestion or colds and the intensity of her migraine headaches increased. She testified that she smokes about a pack of cigarettes a day. The claimant said that in February 1996, she used a solvent without a respirator or gloves for about seven hours, that she became as "high as a kite," and that an engineer sent her outside to get fresh air.

The claimant stated that she started having shortness of breath, congestion, flu-type aching of joints, and loss of memory. She said that she tried to obtain Material Safety Data Sheets (MSDS) from the employer on chemicals used by the employer because she wanted to see if her problems were caused by the chemicals; that she was not able to obtain the MSDS from the employer; that she made a complaint to the Occupational Safety and Health Administration (OSHA); that in January 1997 OSHA made its first visit to the employer; that she obtained copies of MSDS; that she went to Dr. M in February 1996; that Dr. M said that she had bronchitis, did not attribute it to her workplace, and placed her on antibiotics; that Dr. M referred her to Dr. B; and that in _____ Dr. B told her that he agreed with Dr. M that she had bronchitis and that it was not caused by her work. She said that she missed work a lot in February 1996, that supervisors asked her about excessive absences, and that she told them that the absences were because of the problems that she was having. She stated that other employees were also getting sick and going to doctors. The claimant testified that after the spill of Humiseal on _____, she and other employees were taken to the industrial clinic; that that was the first time that she was told that she suffered from a chemical exposure; that the doctor told them to return to work and return to the clinic the next week to be checked; that the employer did not return them to the clinic; and that they were told to see their own doctors. She said that in February or March 1996 no health care provider attributed her problems to chemical exposure in the workplace. The claimant was asked:

So at least as of February of 96, you're telling [Dr. M] and [Dr. B] about the exposure to chemicals. You had—and you had suspicions that those might have been causing problems, but you didn't know. Would that be a fair characterization?

She responded yes. She also said that she told Dr. B about the exposure to chemicals at work, that he told her that she had bronchitis, and that that told her that the chemicals were not contributing.

Ms. P testified that she worked for the employer from June 1994 through January 1998; that she worked with the claimant; that they worked side-by-side and used the same chemicals; that Humiseal was sprayed from an aerosol can; that one respirator was obtained in about September or October 1996; that several people became ill and OSHA came to the plant; that there was a spill of Humiseal in June 1997; that in October or November 1997 she was transferred to shipping; that she has neurological and liver damage from chemical exposure; that her date of injury is _____; that Dr. M referred her to Dr. C because Dr. M did not know about chemicals; and that she and the claimant are under the care of Dr. C.

In a note dated February 12, 1996, Dr. M, an internal medicine doctor, recorded that the claimant said that she thought that she had the flu, cough, fever, and headache. In a letter to Dr. M dated _____, Dr. B, a respiratory consultant, stated that the claimant had been treated for an upper respiratory infection with antibiotics, Prednisone, and a vaporizer; that a recent chest x-ray was unremarkable; that she said that she had been exposed to

noxious fumes, including toluene and acetone at work; that it was his impression that she had resolving bronchitis; and that he encouraged her to discontinue her smoking habit. Neither medical record states a cause for the claimant's problems. In a note dated June 25, 1996, Dr. M noted that the claimant had a migraine headache, nausea, and vomiting. In a report dated September 7, 1997, Dr. H stated that the claimant told him that sometimes she wakes up in the morning, gets up, again wakes up on the floor, does not recall losing consciousness; that she has had migraine headaches for years; that she is concerned about exposure to toluene and benzene at work; that there was a spill at work in June 1997; and that her symptoms have become worse after the spill. In a note dated February 2, 1998, Dr. C reviews the claimant's history; notes the chemicals she said that she was exposed to; and lists the many problems she has. In a letter dated March 24, 1998, Dr. C stated that the claimant has been under his care since February 2, 1998; that she is suffering from injury/illness secondary to toxic chemical exposure; and that it is medically necessary that she remain off work until June 24, 1998. In a letter dated November 4, 1998, Dr. C said that the claimant had severe muscle weakness, chronic fatigue, immune dysregulation, pulmonary restriction, neurological deficits, and a number of other health problems and that she remained completely disabled.

At the request of the carrier, Dr. F reviewed the records of the claimant. In a letter dated March 19, 1998, he stated that there was not sufficient information to opine that any chemical injury caused the claimant's problems; that based on the limited description in the records, if any exposure to chemicals occurred, it was low level; that such a low level exposure would not be expected to cause injury or result in prolonged aggravation of any preexisting condition; and the fact that her lungs were clear reinforced his position. At the request of a Commission benefit review officer, Dr. K examined the claimant on April 15, 1998, and reviewed her records. In a letter dated June 23, 1998, Dr. K stated that records indicated that the claimant suffered from breathing troubles prior to the alleged exposure to toxic fumes, that a spirometry study in February 1996 showed mild restrictive ventilatory defect which improved with inhaled broncho dilator treatment, that the claimant said that her joints were killing her, that she said that she was allergic to cats, that a full pulmonary function study done in April 1998 showed a very mild obstructive defect with normal lung volumes, that she suffers from recurrent attacks of migraine headaches, that she may have some evidence of early arthritis, that he agreed with Dr. F that the claimant's exposure to chemical fumes for a short duration in a well-ventilated area is probably trivial in nature, that it would be of interest to note if other employees suffered from the similar condition as did the claimant, and that he was not quite sure if her respiratory symptoms resulted from any chemical exposure since her pulmonary findings have been normal.

A report dated November 24, 1998, from Dr. E, who has a Ph.D. in biochemistry, is in the record. Dr. E also testified at the hearing. He said that he had reviewed the records of Dr. C and that he agreed with Dr. C's opinions and conclusions. He said that the claimant was exposed to several chemicals; that exposure to more than one chemical has synergistic results; that the chemicals that the claimant was exposed to can result in eye irritation, nausea, vomiting, skin irritation, fatigue, numbness and tingling in the extremities, muscle and joint pain, and headaches; that they can increase the frequency of migraine headaches; that in reasonable toxicologist's probability, the claimant's condition was

caused by the exposure to the chemicals; and that the exposure to chemicals more likely than not had a direct relationship to the cause of the claimant's problems. He testified that spirometry tests reveal airway resistance, that those tests do not look at exchange of oxygen and carbon dioxide, that smoking has very little impact on the exchange of air, that spirometry tests alone would not indicate the claimant's problems, that the chemicals have cumulative impact on the nervous system and the liver function, and smoking was unlikely to cause the problems the claimant had.

We first address the determination that the date of the claimed injury is _____. Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the employment may be related to the employment (emphasis added). There is considerable evidence on the issue of the date of injury. We do not necessarily agree with the importance that the hearing officer gave to the mention of exposure to chemicals in the _____, report of Dr. B; but the claimant was asked as of February 1996 if she had suspicions that the chemicals might have been causing the problems but did not know and responded yes. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it 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). That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determination that the date of injury is _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and we affirm it. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer also determined that the claimant first reported the claimed injury to the employer on February 26, 1997. The evidence on the date of reporting the claimed injury to the employer is also conflicting. The employer's supervisors may have known that the claimant missed work earlier than that date, but for there to have been notice of an injury the employer must have known the general nature of the injury and that it was work related. Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. The determination on the date the employer first received notice of the claimed injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed.

The hearing officer also determined that the claimant did not have good cause for not timely notifying the employer of the claimed injury. At the hearing, the claimant contended that the date of the injury was _____. The hearing officer considered the circumstances concerning the notification of the employer and determined that the claimant did not have good cause for delay even though good cause was not argued at the hearing. Whether good cause exists is a question of fact and will be reversed only upon a showing of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 950115, decided March 3, 1995. The test for abuse of discretion is whether the hearing officer acted without reference to any guiding standards, principles, or rules or without any basis in the record. Appeal No. 950115; Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. The hearing officer did not abuse her discretion in determining that good cause did not exist for not timely notifying the employer of the claimed injury.

We next address the determination that the claimant did not timely file a claim. It is undisputed that the claimant filed her claim on July 19, 1997. On appeal, the claimant argued that her time to file a claim was extended because the employer did not timely file the first report of injury. Section 409.008 provides that if an employer has been given notice of an injury or has knowledge of an injury and does not file the first report of injury, the period for filing a claim by the claimant does not begin to run against the claimant until the report is filed. The employer filed Employer's First Report of Injury or Illness (TWCC-1) forms dated June (probably should have been July since it used a _____, date of injury) and June 25, 1997. The time for the claimant to file a claim did not begin to run until sometime in June 1997 and she filed her claim in July 1997. We reverse Finding of Fact No. 12, Conclusion of Law No. 7, and the portion of the decision that the claimant failed to timely file a claim for compensation without good cause and render a decision that the claimant timely filed a claim.

Lastly, we address the determination that the claimant did not sustain an occupational disease from chemical exposure in the course and scope of her employment either over a period of time or specifically on _____. We note that the hearing officer made a conclusion of law that the claimant did not sustain a compensable occupational disease injury on _____. We have previously pointed out the problems associated with a finding that a claimed repetitive exposure or repetitive trauma injury did or did not occur on a specific day. We reform Conclusion of Law No. 5 to state that the claimant did not sustain a compensable injury with a date of injury on _____. The evidence on the issue of whether the claimant sustained a chemical exposure injury in the course and scope of her employment is conflicting. In her appeal, the claimant contends that Dr. K did not have all of the medical records when he rendered his report and that he did not consider all of her claimed injuries. We note that in her Decision and Order the hearing officer listed the report of Dr. K as an exhibit but did not comment on Dr. K's report in her statement of the evidence. There is no indication that the hearing officer gave inappropriate consideration to the report of Dr. K, who was selected by the Commission to evaluate the claimant. The claimant also contends that the hearing officer should have determined that she sustained an occupational chemical exposure disease injury in the course and scope of her employment because another hearing officer determined that a coworker who worked side-

by-side with her sustained such a compensable injury. The claimant presents no authority for her argument that findings of fact and conclusions of law made after a hearing held by another hearing officer involving another claimant are *res judicata* for the hearing concerning her claim. Disputes concerning each claimed injury must be independently decided on the merits. Again, that a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of the hearing officer. The determinations that the claimant did not sustain a chemical exposure injury from repeated exposure with a date of injury of _____, or from a single exposure on _____, are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed.

Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, she cannot have disability and we affirm the determination that she did not have disability.

We reverse the determination of the hearing officer that the claimant did not timely file a claim and render a decision that she did timely file a claim; reform the determination of the hearing officer to state that the claimant did not sustain a claimed occupational disease injury with a date of injury of _____; and affirm the determinations of the hearing officer that the claimant did not sustain an occupational disease injury in the course and scope of her employment with the employer and did not have disability.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge