APPEAL NO. 990707

Following a contested case hearing held on March 9, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease on _____, and that because she did not sustain a compensable injury on that date, she did not have disability. Claimant has appealed these conclusions and two related factual findings, rearguing the evidence argued below. The file does not contain a response from the respondent (self-insured).

DECISION

Affirmed.

Claimant testified that she had been employed since June 1993 at the self-insured's jail and that after working approximately seven months in bookkeeping and timekeeping, she began working most of the time in the main console. She described the console as a small room with darkened windows where she answered the telephone, monitored surveillance cameras, and used a radio to communicate with in-house officers. She said that the console was near a kitchen manned by a trustee who was watched by an officer and that some of the officers would smoke there in violation of a September 1997 ban on smoking inside the jail. Claimant stated that she had been treated by Dr. P in 1995, 1996, and 1997 for symptoms of coughing and vomiting and burning eyes which she associated with exposure to smoke. However, no records of Dr. P were in evidence. She said she later commenced treatment with Dr. E; that he referred her to Dr. S for allergy tests; that Dr. S told her she was allergic to many things and that it was easy for her to be affected by smoke; and that both Dr. E and Dr. S indicated her symptoms were work related. She denied having asthma but conceded she had been diagnosed with allergic rhinitis. She stated that on _____, when she began her shift at 11:00 p.m., she smelled both cigarette smoke and some deodorant spray which had been used to mask the smoke; that she began coughing and her eyes began burning and she also vomited; that she did not complete her shift and went home shortly after 1:00 a.m. and went to bed; and that she woke up with a sore throat. Claimant also indicated that she saw Dr. E that afternoon and said he looked at her throat and told her "it had been going on for quite some time."

Claimant further stated that she got sick at work very often after smoking was banned in September 1997 and her throat would get red, her eyes would burn, and she would cough and vomit. She cited specific instances on October 30, December 20 and December 23, 1997, when she smelled smoke and coughed and vomited and her eyes burnt. Claimant agreed that she had filed previous occupational disease claims on October 28, December 2, and December 29, 1997, and said that none of them resulted in the award of benefits. She also introduced her written documentation of other episodes of having symptoms at work from smoke on December 20, 1997, and on January 12, February 1, June 7, July 18, July 22, and July 23, 1998, and of efforts to be assigned to the "release

console" and to another shift. In evidence is an August 14, 1998, memorandum from Lt. B stating, among other things, that Officer C, who was assigned to the main console immediately prior to claimant, said she did not use any cleaning solutions or smell anything unusual in the console and that when she relieved claimant two hours later, there still were no unusual smells in the console and that she worked the remainder of the shift with no problem.

On August 13, 1998, Dr. S wrote that claimant has allergic rhinitis with extremely reactive airways compatible with moderate persistent asthma; that her allergies make her extremely susceptible to irritants in her environment such as cigarette or cigar smoke which has led to congestion and cough so severe that she has had vomiting on several occasions; and that "this is a work related handicap for her and she should be provided a smoke free work environment." Dr. S wrote a similar letter on November 21, 1998.

Dr. E wrote the following on December 3, 1992: "Reports of severe reactive airway to cigarette smoke. Avoid cigarette smoke." Another of Dr. E's records shows an office visit on July 23, 1998, and the notation "allergies." Dr. E also wrote the following on that date on a prescription note: "The above patient is experiencing cigarette smoke smell in work room - not explainable by smoker's clothes. She is allergic." On another prescription note dated July 28, 1998, Dr. E wrote: "Please excuse from work 7/28 - 8/7/98 due to chemical exposure." On January 6, 1999, Dr. E wrote that claimant was exposed to cigarette smoke and possible chemical exposure at work on December 20, 1997, and _____; that she suffers from allergies and is more sensitive to smoke; that deodorizers or similar agents were sprayed to cover the smoke smell and that deodorizers also can affect allergic individuals.

Not appealed is a finding that claimant suffered an allergic reaction to cigarette smoke while in the course and scope of her employment on _____. Claimant has appealed findings that her allergies and reactive airway disease are ordinary diseases of life and that "[s]econdhand smoke is not present in her workplace in an increased degree than in employment generally." In his discussion of the evidence, the hearing officer noted that no other chemical was identified as having been in use that night; that there is no medical evidence to show what type of exposure claimant suffered; and that based on her testimony and medical history, it appears that the only identified cause of the _____, incident was cigarette smoke which claimant can identify by its particular odor.

Section 401.011(26) defines injury to include an occupational disease. Section 401.011(34) defines occupational disease to mean a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma; and that the term includes a disease or infection that naturally results from the work-related disease but does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

Claimant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether or not claimant sustained an occupational disease injury presented the hearing officer with a question of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey , 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, as an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could conclude from the evidence, namely the report given by Officer C, that claimant failed to prove she was exposed to any particular chemical other than second-hand cigarette smoke.

As for the challenged findings, the Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 941413, decided December 1994, affirmed a hearing officer's determinations that the claimant in that case, a legal secretary who worked four hours per day for a lawyer who smoked, did not sustain a compensable injury in the nature of reactive airway disease caused or aggravated by second-hand tobacco smoke in her place of employment and that she did not have disability. The Appeals Panel cited its decision in Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993, a case involving lung cancer attributed by the employee to second-hand smoke in the workplace. In that decision, which reviewed the principles applicable to establishing a compensable occupational injury, we cited Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana 1982, no writ) for the proposition that"[t]o establish an occupational disease, there must be probative evidence of a causal connection between the claimant's work and the disease, i.e., the disease must be indigenous to the work, or must be present in an increased degree in that work as compared with employment generally [citations omitted]."

As for disability, a compensable injury is a prerequisite. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge