APPEAL NO. 991064

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 3, 1999. By order of the hearing officer dated February 12, 1999, the record was reopened and the hearing reconvened on April 28, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable occupational disease; the date of such injury; whether the appellant (carrier) was relieved of liability because of claimant's failure to timely report the injury; whether the claimant filed a claim for compensation within one year or if there was good cause for any failure to timely file; and whether the claimant had disability, and if so, for what period. The hearing officer determined that the claimant sustained a compensable occupational disease; that the date of injury was _____; that the claimant timely reported the injury to the employer; that the claimant filed his claim in a timely manner; and that the claimant had disability from October 14, 1997, through April 28, 1999. The carrier appeals virtually all the hearing officer's findings of fact and conclusions of law, urging that the claimant failed to establish by a preponderance of the evidence his burden of proof on all issues. There is no response on file from the claimant.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and adequately the evidence in this case and we will only summarize pertinent portions of it here. This is a chemical exposure case with a key issue involving whether there was a causal relationship between the claimant's injury and his work. There is conflicting evidence on all the issues, which presented the hearing officer with arriving at factual determinations by assessing the credibility and weight of the testimony and evidence before him. Section 410.165(a). The difficulty he experienced, particularly on the issue of causal relation, is shown by his reconvening the hearing and obtaining additional matters from the doctors involved in examining and treating the claimant. Resolving conflict and inconsistencies in the testimony and evidence is a responsibility of the hearing officer. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

As a backdrop to this case, the claimant, a senior equipment operator with an oil field service company which uses chemicals in its operations, sustained a compensable hernia injury in 1995 for which he had surgery in 1997, and sustained a compensable back injury in 1997. He was taken off work for these injuries sometime around March 19, 1997, received workers' compensation benefits, and was returned to work around September 14, 1997. According to his testimony, both before his earlier injuries and being off work and

after his return to work, he worked with toxic chemicals in a "chem-ad" unit and regularly had chemicals spill and splash on him. He stated after again working with the chemicals his leg and arm pain intensified (after abating during the time he was taken off work) and that his symptoms recurred (from his prior work around the chemicals). He stated that this was the first that he realized he had a work-related injury caused by the chemical exposure, although he had experienced some of the same symptoms prior to being off work from his hernia and back injuries. He testified variously that on _____, he told someone whose name he did not know that he was going back to the doctor for a recheck because he was hurting; that on October 15, 1997, he told the district manager, Mr. T, that his doctor had placed him back off duty pending further medical tests and that being exposed back into the environment made his legs and arms hurt as well as his back; and, responded "that's correct" to a question from the hearing officer about his talk with Mr. T that "you told him that the chemicals that you were exposed to were causing you problems." On October 15, 1997, the claimant also gave a letter to the employer, with an attached off-work note from Dr. M, which stated that he had been placed off work, cannot return to work pending further medical tests, and that "being placed back into that environment has made it impossible for me to tolerate the pain in my back, legs and arms." The claimant testified that he continues to have the pain in his legs, feet, ankles and arms, and that he is still suffering significant effects from the neuropathy injury.

Mr. T testified that he had a conversation with the claimant around October 15, 1997, but that it only involved his hernia and back injury; that there was never any mention about any chemical exposure; and that he only learned that claimant was asserting an injury from chemical exposure in 1999. He states he has no recollection of having received the October 15, 1997, letter that the claimant testified he sent to the employer.

The claimant testified to and offered in evidence employer's Material Safety Data Sheets on a number of chemicals that were used by the employer and which claimant testified spilled and splashed on him during his employ. Although some data sheets describe various effects of exposure such as simple to severe skin irritation, nausea, headaches, and the like, none mention nerve damage or neuropathy. Medical records in evidence show various diagnostic tests performed on the claimant, apparently trying to find the source of his extremity pain and believing that it was most likely related to the spine. These tests tended to rule out the spine as the source and an EMG showed some intrinsic damage to the nerves. The claimant testified that his doctors wanted to proceed with testing regarding the chemical exposure but that the carrier would not authorize it, as the carrier denied this injury. In addition to Dr. M, the claimant was seen, examined, and treated by Dr. P and Dr. T. All three doctors' records were in evidence and all state their opinion that the claimant has peripheral neuropathy/axonal neuropathy and that it was caused by the exposure to the chemicals the claimant worked with. The hearing officer, being concerned with the dearth of the underlying factual basis for the opinions expressed, ordered the record reopened, wrote to the doctors for more information concerning their opinions, and reconvened the hearing. In response, Dr. P and Dr. T reiterated their

opinions on the causal relationship between claimant's neuropathy and his work. However, of significance was the response of Dr. T, who, after expressing offense at what she perceived as questioning her ability to correctly diagnose her patient, referred to the three common causes of peripheral neuropathy, including chemical exposure, and definitely ruled out the other two (alcoholism and diabetes). She stated that the claimant had been her patient since February 1998 and that she had seen him on numerous occasions (other medical records are in evidence), and had seen the safety data material on the chemicals to which the claimant had been exposed, and stated:

> For a young man to have such significant peripheral neuropathy, it is my opinion, based on my education, training and experience in treating patients with spine and nerve problems for the last twelve and a half years, [claimant] is experiencing peripheral neuropathy directly related to his chemical exposure at work.

The hearing officer found the date of injury to be _____, the day the claimant knew that he may have a work-related injury. For occupational diseases, the date of injury is stated to be the date on which the employee knew or should have known that the disease may be related to the employment. Section 408.007. The claimant testified that the first he knew his chemical exposure injury may be related to his work was _____, shortly after he returned to work from other injuries. The other injuries obviously complicated and added to the difficulty in sorting out the claimant's condition and the causes thereof. It is clear from the medical records that the claimant's pain into the extremities was initially thought to be related to the back or spine injury. Indeed, diagnostic tests were conducted until this source was ruled out. Although the claimant stated he had symptoms and pain in his extremities prior to the period he was off work for the other injuries and that he had been exposed to the chemicals since he started working in 1995, he did not think that he had an injury from the chemical exposure until _____, shortly after he had returned to work, was again exposed to the chemicals, started having debilitating pain, and knew his injury was related to his job. At this point, claimant stated he informed his employer of his injury and ceased working. It is apparent that the hearing officer found the claimant to be credible in his testimony and determined that the date of injury was _____, and that the claimant gave notice to his employer on October 15, 1997. While there was some conflict in the evidence, a matter for the hearing officer to resolve (Garza, *supra*; Section 410.165(a)), the hearing officer could give greater weight to the testimony of the claimant on these issues. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). We cannot conclude from our review of the evidence that the findings of the hearing officer regarding these issues were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). With the date of injury and date of notice established, it is clear that the claimant timely (within one year) filed a claim for compensation in this case not later than August 25, 1998. Section 409.003.

The focal issue in this case, and the one causing a reconvening of the hearing, was the causal relationship of the claimant's peripheral/axonal neuropathy to the work. Clearly, three doctors who have examined and treated the claimant state rather unequivocally that the nerve damage is related to the work which involved chemical exposure. Thus, we are not faced with whether the language used amounts to an opinion of reasonable medical probability. Rather, as the hearing officer clearly recognized and states in the record, the matter involved whether there were sufficient underlying facts to support the conclusions reached. In Texas Workers' Compensation Commission Appeal No. 972478, decided January 16, 1998, we reversed a determination of a compensable repetitive trauma injury where expert medical opinion was necessary and the medical opinion on causation was based upon demonstrably factually flawed considerations. We went on to observe:

> In Merrell Dow Pharmaceuticals v. Havner, 953 S.W.2d 706 (Tex. 1997) a child was born with defects, the plaintiffs contended the defects were caused by a prescription drug ingested by the mother during pregnancy, and the trial court rendered a judgment in their favor. The Supreme Court stated that Rule 702 of the Texas Rules of Civil Evidence permits a witness qualified as an expert to testify in the form of an opinion; that the issue before it was whether the evidence was scientifically reliable and thus some evidence to support the judgment; that an expert's bare opinion will not suffice; that the substance of the testimony must be considered; that the underlying data should be independently evaluated in determining if the opinion itself is reliable; that if the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable; and that an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. The Supreme Court cited several cases, including Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995), in which the Supreme Court stated that when an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment. We are aware that Section 410.165(a) provides that in a [CCH], conformity to the legal rules of evidence is not necessary.

The carrier points out that blood tests and other possible tests were not performed to show the chemicals were in the claimant's blood or other body parts (claimant testified that these procedures were denied by the carrier) and that the opinions of causation are thus flawed under the Supreme Court's Havner decision and our decisions in Appeal No. 972478, *supra*; Texas Workers' Compensation Commission Appeal No. 962569, decided February 5, 1997, a case involving a constellation of symptoms claimed to be causally related to a compensable chemical inhalation injury wherein the Appeals Panel affirmed

one of the injuries as causally related to the compensable injury and reversed as to others which had not been sufficiently shown to be causally related based on reasonable medical probability. We do not find that these cases cited control the factual situation here or otherwise mandate reversal.

Initially, we find no basis to conclude that any of the doctors' opinions were based on demonstrably flawed factual matters. And, it is not as if there was a leap to a conclusion that the chemical exposure was a cause of the neuropathy; rather, it is abundantly clear in the medical evidence that diagnostic tests were performed to rule out a causal relation to the other injuries, the hernia and back. There is probative evidence from the claimant, and not really disputed, that he was not just exposed to some inhalation, but repeated spray and splatter with the chemical compounds on a recurring basis. The claimant's neuropathy was shown by diagnostic tests and by expert medical opinion, and the chemicals and data on the chemicals to which the claimant was exposed was shown and known to at least Dr. T who so states in her opinion. Dr. T, with training and over 12 years of experience in spine and nerve problems, and who specifically ruled out the other common causes of neuropathy in the claimant, states unequivocally that it is directly related to the claimant's chemical exposure at work. That possible other tests, apparently disapproved by the carrier, might have been performed in reaching a diagnosis under these circumstances does not, per force, defeat a valid reasonable medical probability opinion. Certainly, it would be preferable to have the most comprehensive medical evidence reasonably possible, but it does not follow that the absence of a possible bit of medical information will result in a flawed medical opinion. Here, the hearing officer, acutely aware of the appropriate standards and precedent, found that the medical evidence, taken as a whole, provided scientifically reliable medical evidence to establish causation in this case. We do not conclude that there is legal or factual error in his determination and thus affirm his findings and conclusions on this issue. Texas Workers' Compensation Commission Appeal No. 941217, decided October 26, 1994.

The claimant's testimony regarding his physical condition, which finds support in the medical records, and his having disability under the definition as set forth in Section 401.011(16), can form a sufficient basis for the disability found by the hearing officer. We have stated that the testimony of a claimant alone, if believed, can support a finding of disability. Texas Workers' Compensation Commission Appeal No. 94198, decided April 1, 1994. We do not conclude that the hearing officer's determination was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge