APPEAL NO. 991153

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 4, 1999. With respect to the single issue before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____. In his appeal, the claimant asserts that that determination is against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was working as a technician for a company that repaired air conditioning, refrigeration, and cooking equipment in restaurants. He stated that on that date he was called to a restaurant to repair an air conditioner; that after he completed that job, he asked the manager if they had any other problems; that the manager told him he had a problem with an ice cream freezer; that the claimant crawled under a counter to look at the freezer; that he plugged in the freezer; and that the compressor came on, blowing a white powder all over the claimant's face. The claimant testified that he had trouble getting out from under the counter and that when he was able to do so, he was dizzy and had difficulty breathing. He stated that he did not know what the substance was at the time he was covered in it, but that he has subsequently learned from the people who applied it that it is a rat poison comprised of boric acid and silicon gel. The claimant testified that he obtained a sample of the substance which was in the process of being analyzed in connection with a third-party claim. He also maintained that he had taken photographs of the restaurant, which were not available to him because they are in the custody of his attorney for that claim.

The claimant stated that, although he had chest pains and difficulty breathing after the incident, he did not seek medical treatment and he went on his scheduled vacation to (City). He testified that about a month after the incident he went in for a cervical MRI for an unrelated injury and the doctor noticed nodules on his lungs, so he went to his family doctor, Dr. B, to have them examined.

In January 7, 1998, progress notes, Dr. B references the lung abnormalities revealed by the diagnostic testing but states that the claimant "denies respiratory symptoms." In April 7, 1998, progress notes, Dr. B states that the claimant's chief complaint was coughing and that he had "been having lung problems for quite awhile." Dr. B noted that the claimant had been referred to a pulmonologist and that "[a]ll of the workup was negative, there was a possible correlation between his problem and boric acid, according to the patient." Likewise, in notes of June 11, 1998, Dr. B states that the claimant "is still certain that it is the Boric Acid that created the condition." Dr. B's June 24, 1998, progress notes diagnose "chronic lung disease of undetermined etiology." Finally, in a "To Whom it May Concern" letter of July 28, 1998, Dr. B noted that the claimant had been exposed to an "unknown

toxin at a restaurant where he worked" and that "[s]hortly thereafter, he had some shortness of breath and abnormal chest x-ray, with subsequent abnormal CAT scan, which was suggestive of histoplasmosis." Dr. B concluded:

> In my opinion, based upon reasonable medical probability, it is probable that the patient's lung and breathing difficulties are related to his exposure to the toxic substance, which as of this date has been unidentified.

In a report of January 28, 1998, Dr. G, a pulmonary specialist to whom Dr. B referred the claimant, stated that the claimant had multiple lung nodules, calcified in the upper lobes. Dr. G opined "that the findings most likely represent a deep seated fungal infection, most likely histo, and due to calcification, this is most likely old." Dr. T conducted a peer review on behalf of the carrier. In his report of October 19, 1998, Dr. T stated that "the evidence thus far, gleaned from the available records indicate that the patient's shortness of breath, cough and sputum production are likely not secondary to Boric Acid inhalation."

Mr. P, the owner of the company where the claimant worked at the time of his alleged injury, testified that the time sheets which are generated from the service order invoices indicate that the claimant did not work on _____. In addition, Mr. P stated that the dispatch log indicates that the claimant was not sent to the restaurant where he claims he was injured on that date. In addition, Mr. P stated that the only time the claimant was sent to that restaurant was on or about October 21, 1997, when he was sent to fix an oven and that the records do not state that he was sent out at any time in October 1997 to fix the air conditioner at that location. Mr. P stated that when the claimant reported the alleged injury to him, he advised him to go to the doctor to see if his problems were related to that exposure and if they were found to be so, Mr. P told the claimant, he would be happy to turn in a workers' compensation claim. Mr. P stated that about a month later the claimant told him that he had been exposed to boric acid at the restaurant but that he could not find a doctor who would agree that his condition was related to the exposure incident at work.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and judges the weight to be given to the evidence before him. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

In this instance, the hearing officer properly noted that an analysis of the effects of an exposure of the type claimed here is a matter beyond common experience such that expert evidence of causation is required. The hearing officer determined that the claimant did not sustain his burden of proving that he sustained an injury as a result of exposure to the combination of boric acid and silicon gel. In so doing, the hearing officer noted that there were "serious problems with Claimant's testimony." Specifically, the hearing officer noted that the claimant testified that he knew he had been injured immediately after the powder blew in his face, yet he delayed for over a month before he went to the doctor; that he only found out about the problems with his lungs when he underwent diagnostic testing for an unrelated cervical injury; and that the claimant insisted that he was injured on _____, but the payroll records and the dispatch log reflected that the claimant did not work that day. In addition, the hearing officer noted that there was no proof that the claimant was actually exposed to boric acid and silicon gel; that the claimant stated he had obtained a sample of the substance before he went on his vacation, however, a laboratory analysis of the substance was not in evidence. Finally, the hearing officer stated that he was discounting Dr. B's opinion that the claimant's breathing difficulties are related to his exposure to toxic material at work because his opinion "is not supported by any diagnosis or even an analysis of the allegedly toxic materials." The hearing officer properly considered each of those factors in assessing the weight and credibility of the evidence and in determining what facts had been established. Nothing in our review of the record demonstrates that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination on appeal. Pool, *supra*; Cain, *supra*. The claimant asserts that the hearing officer applied an incorrect standard in evaluating Dr. B's opinion, arguing that as an expert, Dr. B was not required to explain or provide a basis for his opinion. After carefully reviewing the hearing officer's decision, we cannot agree that he applied an incorrect standard in evaluating Dr. B's causation opinion. Rather, it appears that the hearing officer's observations in that regard were advanced to explain why he had rejected that opinion. We perceive no error.

The claimant also asserts error in the Texas Workers' Compensation Commission's (Commission) not having selected a specialist to determine causation. While the Commission has the authority to appoint a required medical examination doctor to provide such an opinion, the claimant cites no authority for the proposition that the Commission was required to do so in this instance and we are unaware of any such authority. In the absence of an obligation, we cannot agree that the Commission's "failure" to do that which it was not required to do constitutes error.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge