APPEAL NO. 991406

Following a contested case hearing held on February 12 and April 14, 1999, with the record closing on May 24, 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 on _____, while in the course and scope of his employment with (employer); and that, since claimant did not sustain a compensable injury, no period of disability, as defined in the 1989 Act, can be established. Claimant has appealed these conclusions and certain factual findings on sufficiency of the evidence grounds. The respondent (carrier) has replied, urging the sufficiency of the evidence to support the challenged findings and conclusions.

DECISION

Affirmed.

At the outset of the hearing, the hearing officer, referencing an apparent prehearing discussion of the parties, advised that she was changing the claimed date of injury in the two disputed issues of injury, the course and scope of employment and disability, from May 13 to _____, and the parties agreed. We note that _____, was the date claimant first sought medical treatment for his claimed injury.

Claimant testified that he is 58 years of age; that he is a welder and has been one for around 30 years; that in the past he smoked about one-half pack of cigarettes every two weeks but has now quit smoking; that on March 12, 1998, he began welding on an off-shore steel platform being constructed at (plant); that he worked 12-hour shifts on this project; that the platform contained some compartments constructed by welding steel plates together; and that he and three other welders on his shift, as well as the welders on the other shift, made the welds to construct the compartments which required them to do some of the welding in confined spaces. He said he did not disagree that the period of time when the confined space welding took place was from April 9 to April 26, 1998. Claimant further stated that the areas of the steel plates to be welded had to be preheated to 250 degrees with the torch before the flux core welding was done; that the welding process created smoke around it; that the welders had fire-retardant blankets to lay on in the confined spaces; that during the first week of welding in the confined spaces, the welders were issued small painter's masks which were inadequate and after a week were issued larger, thicker masks; that he wore such a mask under his welding hood for the duration of the compartment welding; and that he would be in the confined spaces welding for periods of 45 minutes to an hour at a time. He said that about a week before seeking medical attention from Dr. H on _____, he began to have hoarseness, dizziness, and headaches which, he contended, resulted from the fumes he was subjected to while welding in the confined spaces; and that he told his foreman, Mr. E, about his illness. He also agreed that he had told Mr. E that he had forgotten to file his group health insurance paperwork when the job commenced in March 1998 and that he was concerned about not having health insurance. Claimant also contended that his voice has been "messed up" and that he

continues to get headaches and has dizziness. His medical records indicate he may require the surgical removal of vocal cord polyps.

Mr. DL, the "lead man" welder on claimant's shift, testified that the area where the platform was being welded together was open and fully ventilated; that the welders only welded in the confined spaces for periods of five to 10 minutes, 15 minutes at most, because they would preheat and then weld an area of approximately 18 inches at a time; and that, contrary to what claimant said, a welder could not lay in such an area for 45 minutes at a time. He, too, could not disagree that the welding in confined spaces took place from April 9 to April 26, 1998. Mr. DL agreed that the air in the confined spaces in the areas of the welds was smokey and warm but said that nobody quit the project, that the welders wore protective masks under their hoods in the confined spaces, and that he was unaware of any of the other welders who worked in the confined spaces complaining of hoarseness and dizziness. He said he measured the temperature inside his hood during such a weld at 110 degrees.

The affidavit of Mr. PL stated that in March and April 1998 he was the lead man of a crew of eight contract welders who came from (state 1) to complete the fabrication job, reporting to Mr. E; that neither he nor any member of his crew became ill or complained of any illness on that job, specifically, any throat problems, dizziness, or hoarseness; and that, after completing the contract welding, he and his crew returned to state 1. He further stated that he is unaware of any welders leaving the job early due to illness.

Mr. E, the fabrication supervisor who was also claimant's supervisor, testified that the welders on the project spent four to five hours of the 12-hour shifts welding in the confined spaces for periods of five to 10 minutes on average; that he had been a welder for more than 25 years and had never heard of a welder complaining of hoarseness and dizziness from welding; that when claimant was complaining of his symptoms, various people including himself had irritated throats and sinuses from the smoke or haze that came into the area from (country) in early May 1998; and that in early May 1998, after the unit was completed, claimant stayed home for a day and one-half saying that his throat was sore and then returned to work for two to three weeks before he stopped working. Mr. E also stated that claimant had failed to complete the paperwork for his health insurance when the job started, that he tried to help claimant with that problem, and that claimant later alleged that his illness was work related. Mr. E agreed that there was smoke in the confined spaces during welding. He also said the maximum temperature he was able to get the air up to inside his welder's hood was 110 degrees.

Ms. B, a vice-president at the plant, testified that Mr. E came to her on June 4th or 5th and asked for help in getting some health insurance for claimant; that claimant had failed to complete his health insurance paperwork within 30 days of the start of the job; that she got a call from a doctor asking about claimant's insurance; and that claimant subsequently claimed that his condition was work related. She also stated that the welding began on April 9th and was completed on April 26, 1998; that her husband and some other employees not involved with welding got scratchy throats and hoarseness from the Mexican

haze; and that she was unaware of any other employee on the project becoming ill. Ms. B further indicated that while a complaint had been made to the U.S. Department of Labor's Occupational Safety and Health Administration, that agency did not come to the plant and perform an investigation but did communicate with the plant. The carrier introduced documents pertaining to the smoky haze from forest fires in (country) including a May 12, 1998, announcement by the Texas Natural Resources Conservation Commission of the declaration of a public health alert for the Texas coastal region.

Dr. H's _____, note reflects claimant's complaint of sore throat and cough and the diagnosis of laryngotrachitis. Dr. H's June 9, 1998, notes reflect that claimant's throat was no better, that he had weight loss and hoarseness, and that Dr. H referred him to Dr. HM. On July 10, 1998, Dr. H wrote as follows: "Patient was sent to [Dr. HM] which diagnosed his condition to be work related. Therefore, our first diagnosis was wrong."

Dr. JB wrote on July 1, 1998, that claimant reported losing his voice due to a work-related inhalation injury and he diagnosed laryngitis due to inhalation injury and depression. Dr. JB's August 13, 1998, report states that claimant reported that he had to weld in an area that was not well-ventilated and that the smoke fumes irritated his throat and he has since developed chronic laryngitis. On February 9, 1999, Dr. JB reported that he has been seeing claimant since July 1, 1998, "for a work related injury"; that claimant first reported that he had developed bronchitis and laryngitis secondary to an inhalation injury at work; that claimant has been told by a surgeon that he will require surgery on his vocal cords and that he has become depressed; and that he took claimant off work and will continue that status until claimant has a proper evaluation of his chronic laryngitis and depression. Dr. JB further stated that, although a doctor he referred claimant to, as well as the carrier's required medical examination doctor, found claimant's injury to be work related, the carrier continues to deny treatment.

Dr. K reported on September 30, 1998, that the Texas Workers' Compensation Commission requested that he evaluate claimant's throat and voice. He said that claimant related that his voice was normal before welding on an offshore rig in May 1998; that claimant described the conditions as an enclosed space, heated to about 250 degrees to facilitate the welding, with poor ventilation; that claimant inhaled welding fumes and hot air; and that claimant reported that several workers quit because of the conditions. Dr. K further reported that claimant has a falsetto-like voice, has positional dizziness, has developed severe depression, and, in his opinion, claimant's injuries and impairment are work related.

Dr. JM, whose written report is also in evidence, testified that he is board certified in internal medicine and occupational medicine; that he did not examine claimant but did review his medical records and the medical literature and visited the work site; and that, utilizing a five-step methodology recommended in a recognized medical treatise for determining cause and effect relationships for injuries of the type claimant asserted, he concluded that claimant's hoarseness, dizziness, vertigo, and headaches were not related to his employment. Dr. JM further stated that the reports of Dr. H, Dr. JB, and Dr. K do not

meet the accepted standards of scientific methodology, noting, in particular, the inadequacy of the histories obtained by these doctors. Dr. JM cited as examples the mention of claimant's having been in an environment of 250 degrees (a temperature which Dr. JM, a gourmet cook, said would "cook" claimant), no mention of claimant's 30-year smoking history, and no mention of the Mexican haze documented by the carrier. Dr. JM further stated that it was "medically improbable" that claimant ceased welding in confined spaces after April 26, 1998, and yet developed symptoms on April 29th or 30th because any chemicals taken into his system, despite wearing a protective mask, would be "long gone" by then, and that by August 1998 he was still not improving. Dr. JM concluded that the chemical fumes to which claimant was exposed were not the medically probable cause of any of his symptoms and that the exposures claimant had between April 9 and 26, 1998, would not cause irreversible symptoms nor aggravate any existing condition. Dr. JM further stated that, while a case could be made for an association between claimant's symptoms and the Mexican haze or ordinary diseases such as allergies and infections, such case could not be made for an association with his work. He also stated that, in his opinion, a one-half pack per week for 30 years or 15-pack years of smoking was "significant."

Dr. K wrote a supplemental report on December 8, 1998, stating that he was rebutting Dr. JM's critique of his earlier report. One of the points Dr. K makes is that, according to claimant, the reason his coworkers did not experience similar symptoms is that they all quit shortly before or shortly after sustaining injury from the fumes. Dr. K felt that there was a temporal relationship between the welding and the symptoms and concluded that he agreed with Dr. HM, the initial examining otolaryngologist, that claimant's changes are work related and that, regardless of his home environment or air pollution, claimant did not have any vocal changes until exposed to these noxious fumes in the confined spaces with elevated temperatures.

The Appeals Panel has recognized that the "inhalation of substances traceable to a definite time and place, which result in damage or harm to the physical structure of the body, can constitute an injury under the workers' compensation act. [Citations omitted.]" Texas Workers' Compensation Commission Appeal No. 92059, decided March 23, 1992. The claimant in a workers' compensation case has the burden of proving by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). To establish an occupational disease injury, the evidence must show a causal connection between the employment and the disease, that is, that the disease is inherent in the employment as opposed to employment generally or is, at least, present in an increased degree. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. And where, as in the case we consider, the causal connection is not a matter of general knowledge, the claimant must prove the causal connection by reasonable medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). The fact that proof of causation is difficult does not relieve a claimant of the burden of proving it. Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993. The claimant can, however, give probative, non-expert testimony on the circumstances of the employment alleged to

have caused the injury. Texas Workers' Compensation Commission Appeal No. 93668, decided September 14, 1993.

Whether the necessary causation exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(e)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, 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 makes clear in her discussion of the evidence why she found Dr. JM's testimony and report to be the more credible expert evidence on the causation issue.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge