APPEAL NO. 991564

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 July 6, 1999. He (hearing officer) made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. From October 27, 1997, through April 17, 1998, the Claimant (appellant/cross-respondent) may have been exposed to various chemical substances in her workplace.

3. There is insufficient evidence to establish what specific chemicals, if any, the Claimant was exposed to.

4. There is insufficient evidence to establish the duration or severity of the possible chemical exposures.

5. [Dr. RK] did not record a correct history concerning the Claimant's smoking habits.

6. Causation, in this case, was based on speculation, conjecture and surmise, rather than reasonable medical probability.

7. The Claimant did not establish a sufficient causal connection between her work related activities and her pulmonary/respiratory problems.

8. The Claimant knew that she may have a work related occupational disease on _____.

9. The Claimant reported the alleged occupational disease to [Mr. T], a supervisor with the Employer, on June 11, 1998.

10. The Claimant was unable to work from _____, through July 6, 1999.

CONCLUSIONS OF LAW

1. The Claimant did not sustain a compensable occupational disease.

2. The date of the alleged occupational disease is _____.

3. The Claimant reported the alleged occupational disease to her Employer in a timely manner and the Carrier [respondent/cross-

appellant] is not relieved of liability pursuant to Tex. Labor Code Ann. Sec. 409.002.

4. The Claimant did not have disability.

5. If on appellate review, it is determined that the Claimant sustained a compensable occupational disease, then she had disability from _____, through July 6, 1999.

The claimant appealed Findings of Fact Nos. 3, 4, 6, and 7 and Conclusions of Law Nos. 1 and 4. She stated that it was impossible to present specific information regarding the degree and length of time she was exposed to chemicals, that the evidence is sufficient to establish that she was injured in the course and scope of her employment, and requested that the Appeals Panel reverse the hearing officer's decision regarding injury. The carrier responded, urged that the evidence is sufficient to support the decision that the claimant was not injured in the course and scope of her employment, and requested that that part of the hearing officer's decision be affirmed. The carrier appealed Findings of Fact Nos. 2, 8, 9, and 10 and Conclusions of Law Nos. 2 and 3; urged that they are against the great weight of the evidence; and requested that they be reversed. The claimant responded, urged that those findings of fact and conclusions of law are supported by sufficient evidence, and requested that they be affirmed. Finding of Fact No. 5 and Conclusion of Law No. 5 have not been appealed and have become final under the provisions of Section 410.169.

DECISION

We affirm.

The claimant and her husband testified. The claimant previously worked for the employer, (Employer), for some unspecified time; again started working for the employer in October 1997; and continued to work until April 18, 1998, one week before her child was born. The claimant testified that in November 1997, she was tired and had headaches and colds; that her son was going to day care; that he would get sick; and that she would get sick and thought that she got sick because her son brought things home and she was more susceptible because she was pregnant. The claimant testified that in December 1997, she went to a hospital emergency room (ER); that she was told that she had bronchitis and was sent home; that she could not breathe; that she returned to the ER, was placed in the hospital, given antibiotics, and stayed for five or six days; that she was released in mid-January 1998; that she stayed at home for about two weeks; and that she returned to work, missed a few days of work because she felt bad, and worked until about a week before her baby was born on April 25, 1998. She said that she was exposed to chemicals at work, but that she did not know what the chemicals were.

The claimant's husband testified that he had previously worked for the employer and knew what was done working for the employer; that when the claimant was hospitalized in

January 1998, the doctors thought that she had pneumonia; that they thought that her immune system was down because of her pregnancy; that their child was born on April 25, 1998; that three days later his wife collapsed in the hospital; that she stayed in the hospital for two additional weeks; that a lung biopsy was taken; that in June 1998 they met with Dr. JK; that the possibilities were Lupus, bacterial or viral infection, or chemical lung injury; that the first two possibilities were eliminated; that Dr. JK wanted to know what chemicals the claimant was exposed to at work; and that Mr. T, the claimant's supervisor, gave them a list of the chemicals and the (MSDS) for those chemicals. The claimant's husband said that his wife was fired in July 1998, that they no longer had health insurance, that Dr. JK would no longer see his wife, and that Dr. JK did not get to see the list of chemicals or the MSDS; that they had to move to another city because of a lack of money; that the claimant saw another doctor and was referred to Dr. RK; and that Dr. RK agreed with Dr. JK's opinion. Both the claimant and her husband said that the claimant had smoked for about 15 years, that she reduced her smoking when she was pregnant, and that she almost completely stopped smoking after her problems developed in December 1997.

In an affidavit dated May 26, 1999, Mr. T stated that he was the claimant's supervisor from October 1997 to April 1998; that prior to her working at that location of the employer, the location had printing presses and press room supplies; that the printing presses and press room supplies were moved before the claimant began working there; that when the claimant worked there, the only chemicals that remained on the premises were glass cleaner and gum arabic; that neither of them are hazardous chemicals; that four copiers were at the location when the claimant worked there; that the claimant worked at the front counter and took and processed orders; that she swept the floors and wiped counters with standard cleaners such as 409, glass cleaner, Pledge, and Endust; that the press room supply sheets are copies from a catalog that they ordered supplies from; that the claimant obtained the press room supply sheets from his desk; that he did not provide those documents or the MSDS to the claimant; and that he did not represent to the claimant that those chemicals were present at the facility where she worked. In a statement, Mr. T said that powder toner was used in the copy machines and that none of the copy machines used liquid chemicals.

In a letter dated January 15, 1998, Dr. JK stated that he evaluated the claimant for pneumonia. In a letter dated June 11, 1998, Dr. JK said that the claimant had been under his care since January 15, 1998, for asthma, atypical pneumonia, and pneumonitis; that she had been hospitalized in January and May 1998 for these problems; that a lung biopsy in May demonstrated diffuse pneumonitis; that she was currently on steroids; and that she was disabled from a physical standpoint. In a letter dated December 1, 1998, Dr. RK wrote:

> [Claimant] is currently being followed at the [Health Center] for significant shortness of breath. Her illness began in approximately January, 1998. Her initial symptoms were dry cough and shortness of breath. She was first diagnosed with viral pneumonia and hospitalized. She was pregnant at the time. She eventually had a lung biopsy which was consistent with acute lung

> injury. Since that time she has been treated with very high doses of systemic steroids as well an inhaled bronchodilators. She has improved somewhat but has developed considerable difficulties related to her high dose Prednisone therapy and continues to have shortness of breath. Her occupational history is significant in that at the time she developed her illness she was working in a print shop and was exposed to numerous chemicals, paints and solvents. In my opinion it is likely that her occupational exposure at least contributed to her illness and may have been causal. At present it is unknown as to whether or not she will completely recover.

In a letter dated February 3, 1999, Dr. RK said that he wished to clarify his previous letter and stated that it was probable that the claimant's lung disease was caused by her exposure to chemical fumes and agents which occurred at her work place. In a report dated October 16, 1998, Dr. RK stated that the claimant never smoked, that chest x-rays showed interstitial infiltrates, and that pulmonary function studies showed borderline restrictive disease. At the request of the carrier, Dr. JB examined the claimant's medical records. In a letter dated May 25, 1999, he stated that the claimant was pregnant and smoked cigarettes when she started working for the employer in October 1997; that she was seen in an ER on December 29, 1997; that she was hospitalized and treated with antibiotics, inhaled bronchodilators, and steroids; that in April 1998, two days after she delivered a baby, she developed respiratory distress and required endotracheal intubulation; that biopsies showed nonspecific inflammatory changes, consistent with multiple possible causes including collagen-vascular diseases, viral infections, drug reactions, or inhalation injury; that the claimant's exposure to potentially toxic agents at her work place was minimal in amounts and duration; and that with a reasonable medical probability he found no evidence or reason to ascribe the claimant's past or present lung problems to her employment with the employer.

Expert medical evidence is required to establish that a chemical exposure occupational disease is causally connected to employment; and the medical evidence on causation must rise to the level of reasonable medical probability, as opposed to possibility, speculation, or guess. Texas Workers' Compensation Commission Appeal No. 951184, decided September 5, 1995. In a toxic exposure case, lay evidence may be sufficient to establish the chemical involved and the time of exposure. Texas Workers' Compensation Commission Appeal No. 972363, decided December 31, 1997. In Texas Workers' Compensation Commission Appeal No. 93665, decided September 15, 1993, the Appeals Panel cited two Supreme Court of Texas cases and stated that the fact that proof of causation is difficult does not relieve a party of the burden of introducing evidence to meet its burden of proof. *See also* Texas Workers' Compensation Commission Appeal No. 941335, decided November 18, 1994. When an expert's opinion is based upon assumed facts that differ materially from evidence presented at the hearing, the expert's opinion lacks probative value. Texas Workers' Compensation Commission Appeal No. 990453, decided April 14, 1999.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). The hearing officer's determinations that were appealed by the claimant and the carrier are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. 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). Since we find the evidence sufficient to support the appealed determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and decision and order.

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Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge