APPEAL NO. 991706

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 July 13, 1999. She (hearing officer) determined that the respondent (claimant) had disability as a result of a compensable chemical inhalation injury on _____, from February 4, 1999, through the date of the CCH. The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant worked as a job foreman at a chemical plant. It was not disputed that on _____, he was exposed to phosgene, hydrochloric acid, and a form of benzene. The carrier accepted "chemical inhalation as being compensable." The claimant estimated that he was in a cloud of these gasses for four to five minutes. He was treated on the scene and the next day by employer-provided doctors. Chest x-rays, spirometry, and blood tests were normal. The diagnosis by Dr. P was chemical exposure and chest pain "most likely not related to this exposure." Dr. P released the claimant to regular duty effective February 8, 1999. The claimant said he attempted to return to work, but due to shortness of breath and chest tightness, he was unable to do the required climbing.

The claimant then selected Dr. C as his treating doctor. He first saw Dr. C on February 19, 1999. His diagnoses included noxious vapor inhalation injury, chemical bronchitis/bronchiolitis, and airway hyperreactivity. Dr. C gave the claimant a restricted duty release effective February 22, 1999. The restriction was to "avoid irritant vapors and dusts." There was no evidence that the employer offered the claimant a job that met this restriction.

The claimant testified that, at least initially, his main problem with returning to work was his inability to climb stairs because of restricted breathing. Mr. K, the safety manager, testified that no one else exposed at the time of the claimant's exposure seemed to still have problems. Dr. K reviewed the claimant's records at the request of the carrier. He concluded that the claimant's exposure was essentially transitory; that based on normal test results the exposure was not significant; that one or two weeks off work would be "appropriate"; and that any further time away from work would be related to "psychosomatic factors related to fear of exposures rather than something that is organically or chemically caused."

Section 410.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Whether disability exists is a question of fact for the hearing officer to decide and can be

proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found disability from the date of the injury and continuing. In its appeal of this determination, the carrier essentially reiterated Dr. K's position that the exposure was limited and the test results were normal. It also argues that no physical restrictions other than the avoidance of further inhalation were imposed by Dr. C and that a restriction limited to not working around certain substances as a preventative measure does not establish disability. In support of this proposition, carrier cites our decision in Texas Workers' Compensation Commission Appeal No. 951062, decided August 15, 1995. That case involved a compensable chemical inhalation injury and disability wherein the hearing officer found no disability. The decision of the Appeals Panel noted that "there was conflicting evidence on the issue of whether claimant's injury prohibits her from working altogether or whether she is only precluded from working in the particular position with employer where she sustained the compensable injury." These conflicts in the evidence were resolved by the hearing officer against the claimant's assertion of disability.

In the case we now consider, both Dr. K and Dr. P believe the claimant, at some point within one or two weeks of the injury, could return to his previous work. Dr.C's work releases initially were conditioned on the avoidance of further exposure and no climbing of multiple flights of stairs. He later dropped the climbing restriction. The claimant testified that he still had trouble climbing stairs, but was generally recovering from this restriction. Thus, we have a situation where disability is premised not only on an avoidance of chemicals, but also on the claimant's assertion of physical limitations on climbing. *See also* Texas Workers' Compensation Commission Appeal No. 982543, decided December 14, 1998. Whether the job actually involved such climbing and whether the motive for the claimant not returning to work was the exposure injury or fear of future injury or some combination of these was a matter for the hearing officer to decide. She found the claimant credible in his assertion that his climbing activities were restricted, that climbing was part of his job, and that he could not yet return to work. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we believe the testimony of the claimant, found credible by the hearing officer, was sufficient evidence to establish disability as found by the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge