APPEAL NO. 000480

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 February 8, 2000. In resolving the disputed issues he determined that the date of the alleged injury is _____; that the appellant (claimant) timely reported the claimed injury to his employer; that claimant did not sustain a compensable occupational disease injury on _____, _____, or on any other date, and that claimant has not had disability. Claimant challenges the injury and disability determinations for evidentiary sufficiency. Claimant also urges error in the hearing officer's denial of his request for certain subpoenas. The respondent self-insured governmental entity (self-insured) responds that the evidence is sufficient to support the challenged findings and conclusions and that the hearing officer did not err in refusing to issue the requested subpoenas. The determinations that the date of injury is _____, and that claimant timely reported the injury have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

Claimant testified that from February 1988 until August 25, 1997, when he was "fired" by the self-insured's district attorney, he worked as a criminal investigator for the district attorney; that his office was in the self-insured's courthouse; that his work included the obtaining, transporting, and storing of evidence in illegal drug cases; that throughout the period of his employment, various illegal drugs, as well as various chemicals used to make illegal drugs, were stored in plastic bags either in his office or in close proximity thereto; and that the chemicals which were either stored in his office or to which he was otherwise exposed included Formic Acid, Formamide, formaldehyde, Acetic Anhydride, Acetic Acid, Methylamine, Phenylactic Acid, Hydrochloric Acid, Muriatic Acid, Hydrotic Acid, Red Phosphorus, Acetone, Ether, Methanol, Lithium Aluminum Hydride, Mercuric Chloride, Sodium Acetate, Benzyl Chloride, and Benzene. Claimant further testified that he started getting sick in 1997; that he has been diagnosed with chronic lymphocytic leukemia (CLL); that his CLL has been treated by a local oncologist, Dr. A, who diagnosed the condition and indicated it was work related, and by Dr. K, an oncologist at the (hospital); and that he has not discussed the cause of his CLL with either Dr. A or Dr. K. There is no opinion on causation in evidence from either Dr. A or Dr. K.

Claimant further testified that after the termination of his employment, he operated his ranch and also started a private investigator business; that he lost some time due to illness in August and October 1998; that he also lost time from work in late November and in December 1999 and in early January 2000 due to severe flu symptoms; that he probably missed work for a total of about 60 days due to his illness; and that he cannot more specifically identify the dates he missed work. Claimant said his CLL symptoms include

swelling, joint pain, dizziness, and loss of concentration. He conceded in his closing statement below, as well as in his request for review, that he cannot specifically identify the periods of his intermittent disability but contends that his compensable injury will continue to result in intermittent periods of disability.

The August 1998 report of an indoor air quality investigation undertaken in the courthouse revealed the presence of 19 chemical compounds in the building; however, the individual exposure levels for these compounds did not exceed the standard established by the Occupational Safety and Health Administration. The report went on to state that the aggregate volume of the semi-volatile chemical compounds detected is elevated at a level that could cause respiratory tract irritation, headache, nausea, and other health symptoms that could cause annoyance or displeasure for employees exposed to the vapors over an extended period of time.

In evidence is a Leukemia Society of America publication which states that studies have shown that people who are exposed to unusual amounts of radiation or to chemicals such as Benzene are much more likely to develop certain types of leukemia; that the cause of the disease and the method of prevention are still undetermined; and that "[m]edical investigators believe that the disease involves a complex interaction of individual genetic and body chemistry factors with the possible participation of a virus."

The only Material Safety Data Sheet introduced into evidence by claimant pertains to WD-40. Claimant also introduced a list of "Names and Synonyms of Carcinogens" and some other publications.

The April 29, 1999, report of Dr. L, referring to "the significant, long-term, high dose exposure to the toxic soup that composed the [claimant] was compelled to breathe," concludes that it is within reasonable medical probability that "the symptoms of which [claimant] presently complains were caused by and from a continuing *high dose*, work place exposure to highly toxic chemicals, many of which are known carcinogens." [Emphasis in original.]

The April 30, 1999, report of Dr. C, claimant's personal physician since December 1995, states that he recently treated claimant for shingles and was asked to write a letter about his current medical condition. Dr. C goes on to state that it is within reasonable medical probability that claimant's leukemia is the result of his exposure to toxic chemicals daily over a 10-year period.

The August 25, 1999, report of Dr. B, states that claimant "was exposed to more than enough benzene to have caused the leukemia for which he is being treated" and that, absent other causative agents, "it is likely that [claimant's] cancer was caused by benzene and other chemicals to which he was exposed during the course of his employment."

The report of Dr. KU, who examined claimant on November 3, 1999, and reviewed his medical records, notes that there are many factors related to chemical carcinogens causing cancer including a latency or incubation period of at least 15 to 20 years for the types of chemicals to which claimant was exposed. Dr. KU further states that the chemicals to which claimant was exposed did not necessarily include benzene and that benzene contains solvents associated with a different kind of leukemia, namely, acute and chronic myeloid leukemia. He concluded that given these factors and an incubation period of only 10 to 11 years, "there is not a reasonable medical probability associated with the workplace exposure and the CLL."

The September 21, 1999, report of Dr. S, who reviewed claimant's records, concluded that the data presented for review failed to support the development of leukemia and work site exposure to chemicals for several reasons which Dr. S goes on to set out. These include the fact that there are four types of leukemia and CLL is not one of the two linked to industrial exposure; that of all the chemicals claimant was allegedly exposed to, only benzene has proven to be "leukemogenic"; that the levels of benzene felt to be culpable in the development of leukemia exceed the level of claimant's exposure by a magnitude of 10,000; and claimant's latency period is too short. Dr. S concluded that it does not appear that claimant developed his leukemia as a result of workplace exposure to chemicals.

Dr. W, called by claimant, testified that he is a neurologist; that he reviewed claimant's medical records and certain other of claimant's exhibits including the indoor air quality investigation report of the workplace; that he also reviewed certain medical literature; and that in his opinion within reasonable medical probability, based upon claimant's records and the other reports and the literature he reviewed, claimant's prolonged, daily exposure to "multiple chemicals" led to the development of his leukemia. Dr. W further stated that there is medical literature to the effect that one or more of the chemicals to which claimant was exposed, such as methylbenzene, could lead to the development of leukemia and that the mechanism which results in some people contracting leukemia after exposure to chemicals and others not contracting the disease is not understood but may relate to genetic predisposition. Dr. W also stated that he disagrees with the opinions in the report of Dr. S, introduced by the self-insured, and agrees with the opinions in the reports of Dr. L and Dr. B. Dr. W also stated that without literature to support him, he could not dispute the statements in the reports of Dr. S and Dr. KU to the effect that the latency period for contracting leukemia from chemical exposure is 15 to 20 years.

In addition to the dispositive conclusions of law on the injury and disability issues, claimant challenges factual findings that the mechanism by which leukemia is developed is unknown; that the level and duration of claimant's exposure to benzene and other chemicals has not been determined; that a preponderance of the credible evidence does not indicate that claimant's job activities at the courthouse caused him to develop leukemia;

and that claimant has not been unable to obtain and retain employment at his preinjury wage because of a compensable injury.

Claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). Further, in cases such as this where the nature of the injury is not a matter of common knowledge, expert evidence is required to prove the cause of the injury. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Section 410.165(a).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel 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). It was within the hearing officer's province to weigh the credibility of the expert evidence and to be persuaded by the reports of Dr. KU and Dr. S.

Claimant's letter of January 25, 2000, to the hearing officer states that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12 (Rule 142.12), claimant requests permission to subpoena six named individuals on Tuesday, February 8, 2000, at 1:15 p.m. No information was provided in addition to the names and addresses of the six individuals and the hearing officer's order of January 26, 2000, denied the request because no reason was provided as to why these persons needed to be present at the hearing. Claimant's letter of January 27, 2000, requested subpoenas of the same individuals but this time also stated a reason for the request beside each of the six names. The hearing officer's order of February 2, 2000, denied the request, stating that "there is not good cause shown, because the testimony may be adequately obtained by deposition or written affidavit." Claimant's request for review asserts error concerning the denial of subpoenas for of the individuals, namely, Mr. H, the district attorney; Ms. O, the self-insured's treasurer; Ms. S at the self-insured's courthouse; and Ms. B also at the self-insured's courthouse. Claimant

stated in his request for these individuals that Mr. H, claimant's former supervisor, would have knowledge of hazardous chemicals stored at the courthouse; that Ms. O would have knowledge of complaints from other employees about the chemicals; that Ms. S was subjected to the chemicals and suffered from her exposures; and that Ms. B may also be a victim of exposure to the chemicals.

Rule 142.12(b)(2) provides that the Texas Workers' Compensation Commission (Commission) may issue a subpoena at the request of a party if the hearing officer determines that the party has good cause. Rule 142.12(c)(1)(B) provides (if the party is represented) that the request shall identify the evidence to be produced and explain why it is relevant to a disputed issue. Rule 142.12(d) requires that a request for a hearing subpoena be sent to the Commission and delivered to the parties not later than 10 days before the hearing. That rule further provides that the hearing officer may deny a request for a hearing subpoena "upon a determination that the testimony may be adequately obtained by deposition or written affidavit." At the hearing, claimant's request for these subpoenas was not renewed nor did claimant request a continuance. Claimant did not further develop the record concerning the good cause for these four subpoenas and why the information sought from these persons could not be adequately obtained by depositions or written affidavits.

In Texas Workers' Compensation Commission Appeal No. 94569, decided June 21, 1994 (Unpublished), the Appeals Panel stated that "[w]hile the facts need to be fully developed in a case, we note that the 1989 Act and implementing rules permit, if not indeed encourage, the use of witnesses' statements to assist in expediting proceedings. *See generally* Section 410.163(b); [Rule 142.8]." We also observed that "the hearing officer is given a level of discretion in deciding procedural and substantive matters, and in absence of an abuse of that discretion we do not disturb his rulings. [Citations omitted.]" Given the complete absence of information from claimant as to why depositions or written affidavits would not suffice for these witnesses, we are satisfied that the hearing officer did not abuse his discretion in this ruling. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge