APPEAL NO. 001890

Following a contested case hearing held on June 30, 2000, with the record closing on July 14, 2000, 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 determining that the appellant (claimant) did not sustain a compensable injury on or about _____, and that he has "sustained no disability." The claimant has requested our review of these determinations for evidentiary sufficiency, asserting that the hearing officer erred in relying on and in misinterpreting Texas Workers' Compensation Commission Appeal No. 970504, decided May 2, 1997; that the claimant met his burden to prove by a preponderance of the evidence that he sustained a compensable inhalation injury; and that the hearing officer erred in applying the case of Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) to a workers' compensation hearing. The respondent (carrier) contends in its response that the evidence is sufficient to support the hearing officer's determinations and that the hearing officer only used the decisions in Appeal No. 970504 and Havner as guides in her evaluation of the evidence and did not impose on the claimant an erroneous burden of proof.

DECISION

Affirmed.

The claimant testified that on _____ (all dates are in 1999 unless otherwise stated), while employed as a painter by (employer), and working at a petrochemical plant, he was assigned to paint stripes in a unit of the plant which was shut down; that he was driven to that unit by foreman Mr. B and that, when they arrived, there was a strong odor of ammonia; that Mr. B then left to get the claimant's tools and respirator and did not return with this equipment for about two hours; that the ammonia odor was so strong it "took [his] breath away" and made him feel nauseated; and that he subsequently did his painting at the unit for the rest of that shift. The claimant further testified that the ammonia odor was strong again on December 8 when he again painted at that unit and that he saw ammonia vapors or mist in the area on that day; that he had chest pains in addition to his other symptoms; and that, as he had on the previous day, he mentioned his symptoms to Mr. B. The claimant said that on December 15 he saw Dr. V, his family doctor, for his symptoms. He further stated that Mr. B told him he cannot return to work until he is able to wear a respirator and that Dr. V recently told him he should not return to work until he again sees Dr. D, a specialist. The claimant asserted that prior to December 7 he did not have medical problems and bronchitis. He did acknowledge having smoked cigarettes since the age of 20 and being age 35 at the time. The claimant also acknowledged that the plant had issued a work permit for the unit he worked on, which "was supposed to mean" that the area was safe for working; that the units have sensors which will trigger alarms if there is a discharge of an excessive amount of chemicals in the area; that no alarms sounded while he worked on the unit; and that it is common to smell strange odors at petrochemical plants.

Mr. FM, the employer's site superintendent at the plant, testified that his office is in the approximate center of the plant; that he visits the units several times a week; that the claimant was authorized to leave a unit whenever he felt himself to be in danger; and that, had the claimant reported a chemical exposure injury, he, Mr. FM, would have taken him to a first aid station. He also said that it is common to smell ammonia at petrochemical plants but that the presence of the odor does not mean that permissible OSHA levels have been exceeded. Mr. FM further stated that the plant's units, including the unit in which the claimant was painting, have sensors to detect excessive levels of chemicals; that the sensors will trigger alarms; that the plant is monitored both from the air and on the ground; and that, to the best of his knowledge, there was no discharge of ammonia in the unit where the claimant was working. Mr. FM further stated that he first learned of the claimed injury when the claimant asked him if Mr. B had told him about it and that he said he had been "belching ammonia all week." Mr. FM also said that prior to reporting the claimed injury, the claimant had been written up for the third time for unexcused absences from work and that the claimant has filed a lawsuit against the plant's owner.

Mr. B's written statement of December 17 states that the building where the claimant was painting on December 7 and 8 was never closed due to leaks or alarms; that the claimant stated on December 8 that he had been belching that day but did not say from what; and that the claimant did not report any injury, exposure, or leak to him. Mr. B further wrote that he first heard of the claimed injury when told about it by Mr. FM on December 16.

In his affidavit, Mr. CM, an employee of another contractor at the plant, stated that on November 29 he had worked near the area where the claimant worked on December 7, and that the smell of ammonia was so strong the work had to be discontinued.

Dr. F, who performed an independent medical examination of the claimant, reported on April 13, 2000, that the claimant's pulmonary function and spirometry tests were normal; that his review of the claimant's medical records of December 15 reflect no indication of any complaints of chest pain, shortness of breath, or respiratory symptoms; that the first noted report of possible exposure to ammonia occurred on December 20 but that the lungs were reported clear; that a diagnosis of acute sinusitis was rendered; and that impressions of exposure to ammonia and rule out upper respiratory infection were rendered. Dr. F further reported that Dr. D's February 2, 2000, report stated that the claimant's symptoms were consistent with a diagnosis of chemical bronchitis and that Dr. D also reported a normal chest x-ray; that the claimant had a clear chest; and that the results of a methacholine challenge test only suggested, in Dr. F's opinion, slight evidence of reactive airway disease.

The hearing officer found that the claimant did not sustain damage or harm to the physical structure of his body while engaged in the exercise of his job duties with the employer on or about December 7 and that his inability to obtain and retain employment at wages equivalent to the wages he earned prior to December 7 is not the result of an injury for which workers' compensation benefits are payable.

The 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 a case of this nature, proof of the nexus between the workplace and the injury must be established by expert medical evidence to a reasonable medical probability. 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).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), 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).

The hearing officer's discussion of the evidence makes clear that she was not persuaded that the claimant's evidence established that he was exposed to a harmful level of ammonia if, indeed, he was exposed at all. We find no error whatsoever in the hearing officer's following the guidance in our decision in Appeal No. 970504, *supra*, where we reversed the hearing officer's determination that the employee sustained occupational asthma as a result of inhaling various chemicals at work. We agree with the carrier that the context of the hearing officer's mention of the Havner, *supra*, decision does not reflect that she held the claimant to an erroneous legal standard of proof. Rather, the hearing officer's discussion indicates her awareness of the guidance in that decision in terms of the evaluation of the weight and credibility of the expert evidence. Given the conflicts and inconsistencies in the evidence, the hearing officer could conclude that the claimant was not exposed to any harmful level of ammonia fumes as he claimed. Disability must be based upon a compensable injury.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge