APPEAL NO. 93744

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN § 401.001 *et seq*. (1989 Act) (formerly Article 8308-1.01 *et seq*.). On June 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. On appeal the claimant is the appellant/cross-respondent and the carrier is the respondent/cross-appellant. The claimant claims that her lung cancer was caused by her exposure to secondhand smoke while working for the employer, (employer), for 23 years. The issues at the hearing were: 1) whether the claimant's illness is work related; 2) the date of injury; 3) timely reporting of injury or occupational disease to the employer; 4) whether the claimant has disability; and 5) average weekly wage (AWW). The hearing officer determined that the claimant's illness is not work related and is not a compensable injury; that the date of injury is (date of injury); that the claimant timely reported her "claim;" that the claimant does not have disability as a result of a compensable injury; and that the claimant's AWW is $769.62. The hearing officer decided that the claimant is not entitled to workers' compensation benefits. The claimant disputes certain conclusions of law and the decision of the hearing officer. The claimant asserts that she has proven her case by a preponderance of the evidence and that the hearing officer's decision is contrary to the great weight of the evidence. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier contends that the hearing officer erred in determining that the claimant's date of injury was (date of injury), and in determining that she timely reported her "claim."

DECISION

The decision of the hearing officer is affirmed.

On (date), the claimant was hospitalized. On (date), the claimant, who was 45 years of age, was diagnosed as having inoperable lung cancer. The claimant claims that her lung cancer was caused by secondhand tobacco smoke at her workplace. Secondhand tobacco smoke is referred to as environmental tobacco smoke (ETS) in medical literature. The claimant's videotaped oral deposition was taken on May 20, 1993. The claimant was too ill to attend the hearing held on June 17, 1993. The claimant's attorney advises us in the appeal that the claimant has died.

The claimant testified that she and her husband of 26 years have never smoked, that her parents never smoked, that she has never lived with anyone who smoked, and that no one in her immediate family has had cancer. She estimated that 95% of all the ETS she has been exposed to in her life was at work with her employer.

The claimant worked for the employer from 1968 to 1991. She worked as an assembler for about two years and said she was exposed to secondary smoke in the coffee break room. The claimant then became an administrator for the employer and worked at several locations in the same city. She worked at her last location from about 1980 until 1991 when she was laid off. The claimant testified that each office location in which she

worked consisted of a very large room filled with small cubicles whose walls were about eye-level. She estimated that there were 40 to 50 cubicles in the work area and that 60% of the people in her work area smoked. She said that almost all of the managers and supervisors with whom she worked smoked. Until 1986 when the employer instituted a no smoking policy except in designated areas, the claimant said that employees smoked in the large room where her cubicle was located and that there was nothing to prevent the smoke from going from one cubicle to another. She also said that prior to 1986 employees smoked in conference rooms and managers and supervisors smoked in their offices when the claimant attended conferences or had meetings in offices. The claimant testified at times she could see and smell the smoke and that she breathed the secondary smoke.

The claimant further testified that when the employer made the designated smoking area in 1986 it eliminated the smoke in the area where her cubicle was because employees no longer smoked except in the designated area. However, she said that the designated smoking area did not eliminate her exposure to secondary smoke entirely because the designated smoking area had one open wall facing the hallway and because managers and supervisors often went to the designated smoking area to work so that she would have to also work in that area when she was working with one of those people.

After she was laid off in January of 1991, the claimant worked as a substitute teacher until August 1991, when she obtained a permanent teaching position. The claimant testified that the schools she worked at did not allow smoking and that she was not exposed to secondary smoke at the schools. Concerning other possible sources of secondhand smoke, the claimant testified that she and her husband do not go to clubs or bars and only go to restaurants about three times a year and sit in the no smoking area. As to other possible cancer causing agents, the claimant testified that to her knowledge she has never been exposed to asbestos, Radon, radiation, lead, or benzene.

The claimant said she began to suspect that her cancer was caused by secondhand smoke at her workplace on or about (date of injury), when (Dr. S) and (Dr. K), who treated the claimant, began talking to her about secondhand smoke. The parties agreed that the claimant reported her lung cancer as a work-related injury to her employer on (date of injury). The claimant testified to the effect that she did not actually know that her lung cancer was caused by secondhand smoke at her workplace until (date), when she said Dr. K related to her attorney that that was the probable cause of her cancer. The claimant was hospitalized at least six times for treatment for her cancer between January and May 1993. She was not able to work due to her cancer. The claimant was treated for chronic fatigue syndrome (CFS) for several years prior to June 1992.

One of the claimant's former supervisors testified in an oral deposition that he was a smoker until 1988 and he estimated that 30% of the employees smoked. He further testified that it was not uncommon for people to smoke in the conference rooms during

conferences, and that he did not recall discussing business with the claimant in the designated smoking area, but it was possible that he did. He agreed that before the employer had a designated smoking area, employees smoked in the work area and the cubicles did not prevent the smoke from drifting across cubicles. Another of the claimant's former supervisor's who is a smoker testified in an oral deposition that smoking in conference rooms was banned several years before the employer had a designated smoking area policy; however, he agreed that before that policy went into effect around 1986, employees smoked in cubicles and offices. This witness said that the claimant's 60% estimate of smoking employees sounded high, but he did not give his own estimate. The claimant's last supervisor at work, from 1989 to 1991, who also smokes, testified in an oral deposition that she never had a meeting with the claimant in the designated smoking area, but that she did recall that the claimant would "bring something in or out" of the designated smoking area.

A former coworker of the claimant's who does not smoke and who worked in the general vicinity as the claimant testified in an oral deposition that before the designated smoking area policy, smoking was "pretty much just open" at the workplace, but he could not agree or disagree with the claimant's 60% estimate of smoking employees. This witness also said that as a general rule business was not conducted in the designated smoking area but he had seen discussions going on in the designated smoking area. He agreed that prior to the designated smoking area, the claimant was exposed to secondhand smoke on a daily basis at work. Another nonsmoking employee who worked with the claimant for about 10 years testified in an oral deposition that she did not recall any specific incident when there was a lot of smoke in the air at work, but said it was not unusual to sit next to someone who smoked. She also said that the employer did away with smoking in conference rooms before it had a designated smoking area. She further testified that she did not go to the designated smoking area to transact business with her supervisor who smoked, although at times she had to go to the designated smoking area to find her supervisor. A third nonsmoking coworker and friend of the claimant's testified in an oral deposition that the smoke was thick in the cubicle area before the designated smoking area policy and that after the policy went into effect the smoke was thick near the designated smoking area. This witness said that after the claimant was hospitalized the claimant told her in a telephone conversation that she was making sure that everybody that smoked that she used to work with knew that she had cancer. This witness further stated that at the time of the conversation the claimant didn't know why she had cancer and that the claimant's doctor had told the claimant that "it could be possibly smoke" but that the doctor wasn't definite. This witness said her conversation with the claimant took place two or three days after the claimant was hospitalized in (date), but then testified that she didn't really remember if the conversation occurred during the (date) or January 1993 hospitalization.

Another coworker stated in a recorded interview that during the period between 1977 and 1982, either daily or on an every-other-day basis, the claimant would meet with

managers in an office where anywhere from one to three people would smoke. This witness said the office meetings lasted anywhere from a few minutes to a few hours. This witness also said that monthly meetings attended by 20 to 30 people were held in larger rooms and that 30% of the people in the monthly meeting would smoke. This witness further stated that on occasion, after the designated smoking area policy was in effect, he would meet with his supervisor who smoked in the designated smoking area two or three times a week for two to 15 minutes at a time. A fifth coworker stated in a recorded interview that prior to the no smoking policy, people smoked anywhere in the building, including conference rooms and manager offices. She estimated that 20% of the people at work smoked. She said that after the designated smoking policy was in effect, she would have to meet or find a manager in the designated smoking area almost on a daily basis. All the coworkers and supervisors who testified or gave statements said that the claimant did not smoke or that they had never seen the claimant smoke.

A facility engineer employed by the employer testified in an oral deposition that industry standards for ventilation rates are prescribed by the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) and that the ventilation rates in the two locations of the building where the claimant worked since about 1980 exceeded the ASHRAE standard, one location being 254% of the standard, and the other location being 115% of the standard. He further testified that exhausts installed in the smoking area in 1990 are 250% of the ASHRAE standard for a smoking lounge. An industrial hygienist employed by the employer testified in an oral deposition that the employer's ventilation system, except for the exhausts in the smoking area which vent directly to the outside, mixes the inside air with outside air and the mixture is then filtered through a standard filter and then through a high efficiency particulate filter (also called a pleated filter). He further testified to the effect that the claimant would not have been exposed at work to radiation or "friable asbestos," and that any exposure to radon gas would have been well within EPA guidelines. An industrial hygienist retained by the claimant tested the claimant's home (the claimant lived in the home for 15 years) and work area for the existence of possible cancer-causing agents. He did not detect any cancer-causing agents in the claimant's home or workplace. He also testified that a pleated filter in a ventilation system would not remove all of the particulate matter from ETS. In his opinion, the most likely carcinogen (cancer-producing substance) at the claimant's workplace that would cause the claimant's lung cancer was ETS. The air quality assessment report of the industrial hygienist retained by the claimant was in evidence. The report indicated that in June of 1993, the hygienist conducted air quality assessments at the employer's facility where the claimant had worked and at the claimant's home. The purpose of the assessments was to determine airborne concentrations of selected agents which may promote or cause the development of lung cancer. Concerning his assessment of the workplace, the hygienist stated the evidence did not suggest the existence of known chemical or physical agents, other than tobacco smoke, which are known to cause lung cancer. He noted that smoke from tobacco products was observed in designated smoking areas inside the facility. Concerning his

assessment of the claimant's home, the hygienist stated that the evidence does not suggest the existence of known chemical or physical agents which are known to cause lung cancer.

A 1986 report of the Surgeon General entitled "The Health Consequences of Involuntary Smoking" published by the U.S. Department of Health and Human Services was in evidence. This report represents a detailed review of the health effects resulting from nonsmoker exposure to ETS, which the report defines as the combination of smoke emitted from a burning tobacco product between puffs (sidestream smoke) and the smoke exhaled by the smoker. The report concluded that involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers, and that simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, exposure of nonsmokers to ETS. The report stated that cigarette smoke is well established as a human carcinogen and that: "It is certain that a substantial proportion of the lung cancers that occur in nonsmokers are due to ETS exposure; however, more complete data on the dose and variability of smoke exposure in the nonsmoking U.S. population will be needed before a quantitative estimate of the number of such cancers can be made." The report also stated that: "For many nonsmokers, the quantitative exposure to [ETS] is large enough to expect an increased risk of lung cancer to occur, and epidemiologic studies have demonstrated an increased lung cancer risk with involuntary smoking." In addition, the report said that exposure to ETS has been documented to be common in the United States, but additional data on the extent and determinants of exposure are needed to identify individuals within the population who have the highest exposure and are at greatest risk.

A 1992 report of the U.S. Environmental Protection Agency (EPA) entitled "Respiratory Health Effects of Passive Smoking: Lung Cancer And Other Disorders" concluded that ETS is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in U.S. nonsmokers.

In a letter to the claimant dated April 14, 1993, Dr. S, who initially treated the claimant for her lung cancer, stated:

> [Claimant] is a 45-year-old black female, nonsmoker who carries the diagnosis of poorly differentiated large cell carcinoma of the lung with pleural metastasis and recurrent malignant pleural effusion. The diagnosis was made in [date] on the basis of bronchoscopic lung biopsy and pleural biopsy. She has been on chemotherapy since then.
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> [Claimant] gave a history that she worked for many years with [employer] where she was exposed to environmental tobacco smoke for a total of almost twenty-three years.
>
> [Claimant] denied any history of exposure to cigarette smoke at home and her

husband is a nonsmoker. The patient denied any history of industrial exposure to carcinogens.

In the light of this history, the only identifiable carcinogen in this is environmental tobacco smoke by way of her employment at [employer].

Dr. K, M.D., Ph.D, practices oncology (cancer and cancer-related diseases), hematology, and immunology, and is board certified in immunology. He consulted with the claimant at the request of Dr. S. Dr. K diagnosed the claimant as having: 1. non-small cell anaplastic carcinoma of the lung with malignant pleural effusion and mediastinal metastases, and 2. right adrenal metastases. In a letter to the claimant's attorney dated April 19, 1993, Dr. K stated "[the claimant] suffers from Carcinoma of the lung. In my medical opinion this was probably related to the extensive secondhand cigarette smoke she was exposed to at work." In an oral deposition, Dr. K was asked to base his opinions on reasonable medical probability. Dr. K testified that assuming that the claimant was exposed to smoke and smoking at the workplace, then her lung cancer is related to the smoking at work. He added that from the history given to him by the claimant, there were no other risk factors, other than secondhand smoke, to which the claimant was exposed. Dr. K also testified that the largest single cause of cancer in Americans is smoking and that less than five percent of lung cancer is caused by unknown causes. Dr. K had previously treated the claimant for chronic fatigue syndrome (CFS) in 1991 and 1992. The claimant was initially diagnosed with CFS in 1989. He testified that in his treatment of the claimant's CFS the claimant had tested positive for several viruses; that it has been suggested in medical research that some forms of cancer can be caused by viruses; that viruses could possibly be a cause of cancer; and that he could not exclude or include a virus as the cause of the claimant's cancer because the viral aspect is not well known. Dr. K further testified that the claimant had advanced cancer which was inoperable, that he first discussed with the claimant the possibility of secondhand smoke as a cause of her lung cancer about February 11, 1993, and that cigarette smoke is related as an etiologic agent for both small cell and large cell lung cancer. A February 11, 1993, progress report indicates that the claimant told Dr. K that she was concerned about having been exposed to secondhand smoke at work, that she was always surrounded by smokers, and that there was thick cigarette smoke around her at her workplace.

(Dr. B) is board certified in internal medicine, pulmonary medicine, and in critical care medicine. Since 1975, he has been involved in authoring, editing, and reviewing Surgeon General reports on the health effects of smoking. He was the senior scientific editor of the 1986 Surgeon General report on the health consequences of involuntary smoking. He was also a consultant to the 1992 EPA report on the respiratory health effects of passive smoking. Dr. B did not examine or treat the claimant but did review her medical records and her oral deposition as well as the recorded statement of one of the claimant's coworkers. Dr. B said that it has been known conclusively since 1954 that smoking cigarettes causes

lung cancer, and that in 1985 or 1986 it was definitely determined that ETS can be a cause of lung cancer. Dr. B said that all of the same carcinogens that are present in mainstream smoke are also present in secondhand smoke, the only difference being that the dose of exposure that a person gets from ETS is lower. He testified that there is no difference between the lung cancer that occurs in smokers and the lung cancer that occurs in nonsmokers from ETS. Dr. B further testified that with ETS exposure, the most common form of lung cancer is adeno carcinoma or large cell undifferentiated carcinoma, and from his review of the medical records that is the type of cancer the claimant has. However, when asked whether he could distinguish between lung cancer caused by tobacco smoke or ETS and lung cancer caused by other agents, Dr. B said that "you can't distinguish by cell type. What you do is examine the causative agents that the individual was exposed to during their lifetime." Dr. B said that about 3,000 lung cancer deaths are due to ETS out of about 150,000 lung cancer deaths a year. He added that the risk of developing lung cancer is proportional to how much ETS you have been exposed to over your lifetime and that the relationship between exposure and disease with tobacco smoke is proportional to the dose. Dr. B testified that studies indicate that dosage depends upon a number of things, including the number of cigarettes being burned, the size of the airspace, the proximity of the smokers, and the volume of fresh air brought in to ventilate the room. Dr. B acknowledged that he did not have those dosage "calculations" for the claimant's working environment at the employer.

Dr. B also said that there is no current evidence to establish that viruses play a causative role in the occurrence of lung cancer and that there was no evidence that the presence or absence of CFS influences the occurrence of lung cancer in any way. Dr. B said that in his opinion, which he was asked to give based on reasonable medical probability, the claimant's lung cancer is caused by her ETS exposure, and that the claimant would not have gotten lung cancer absent exposure to ETS. Dr. B stated that the claimant and her coworker described substantial amounts of cigarette smoke being present in the claimant's work environment, that that was consistent with a high and substantial exposure to ETS in the work environment, and was also consistent with ETS being the causative agent of the claimant's lung cancer. Dr. B added:

> So, therefore, in both her home and work environment, the only agent that we've been able to identify that could cause her lung cancer is the environmental tobacco smoke she received at work. Therefore, I've reached the judgment that her lung cancer, which she clearly does have, was caused by the sole agent that is capable of causing lung cancer that she was exposed to, the environmental tobacco smoke she received at work.

Dr. B also testified that in reasonable medical probability the claimant's lung cancer is a disease arising out of her employment with the employer and was caused from exposure to secondhand smoke. Dr. B was also of the opinion that the claimant's exposure to ETS at

work increased her risk well above the risk she would have incurred if she was working in an environment that did not have ETS. While Dr. B agreed that nearly all Americans have been exposed to ETS at some level, he did not agree that cancer from ETS was an ordinary disease of life. He said lung cancer is a disease of exposure to carcinogens. Dr. B stated that lung cancer in nonsmokers is a very infrequent event. He further stated that a causative agent can be identified for almost all of the lung cancer that occurs and that it is very unusual for a person to have lung cancer and not be able to identify why the person developed lung cancer. He said that for all practical purposes, a person does not get lung cancer unless the person has been exposed to an external carcinogenic agent. In a letter to the claimant's attorney dated June 16, 1993, Dr. B reiterated that there is not a substantial fraction of lung cancers that are unexplained in the United States. Additionally, he stated that an unknown exposure would only be postulated when there was no known exposure sufficient to have caused lung cancer and that "her [claimant's] exposure to ETS is clearly large enough to be within the exposures described by the EPA as capable of causing lung cancer."

(Dr. C), who indicates on his letterhead that he is "Eligible, American Board of Internal Medicine" wrote in a letter dated May 7, 1993, to a claims adjustor for the carrier that he had reviewed the claimant's records, including medical records and an interview of Dr. K. Dr. C stated that the claimant developed large cell undifferentiated lung cancer with metastasis and that the claimant alleges that second- hand smoke exposure caused her carcinoma. Dr. C further stated:

> The causes of [claimant's] medical condition are unknown, although it is well known that exposure to smoking, either primarily as a smoker, or secondary environment of smoking is a major contributing cause of this type of lung cancer. There are other genetic predisposing factors that may be involved in this individual developing lung cancer, and there are some cases of lung cancer that absolutely occur apparently with no primary or secondary exposure to smoking. Radiation, and certain chemicals can also play a factor in causing lung cancer. However, the type of lung cancer that this individual has is most frequently associated with smokers. Other causes are unknown, and could certainly still be investigated. Some people even think that viruses can be a factor. Obviously, genetics may play a factor in that certain type of cancers tend to occur in high frequencies in family groups.

Dr. C also stated:

> Yes, smoke could have caused [claimant's] condition. This is certainly a high probability.

It is unknown how long she would have to be exposed to the secondhand smoke,

however, it is generally thought to be for prolonged years.

The concentration that she must be exposed to is again, unknown. The percent of chance that only her exposure to smoke in her job caused her lung cancer is impossible to give an exact percentage, although, the predominant medical evidence would indicate that her exposure to smoke in the job would likely be a major contributing cause.

(Dr. D), is board certified in internal medicine, pulmonary medicine, and critical care medicine. He gave testimony by oral deposition. He said that pulmonary medicine involves the diagnosis and treatment of diseases which involve the lungs and respiratory system. He treats patients with lung cancer on a frequent basis. Dr. D did not examine or treat the claimant. He reviewed her medical records and recorded statement and the deposition of Dr. K and a letter from Dr. C. Dr. D said that active smoking causes 90% of the lung cancer in men and 80% of the lung cancer in women. Dr. D also testified that ETS can contribute to lung cancer. However, he further testified that cancer can occur without an identifiable carcinogen and that cancer can occur due to infectious causes. When asked if in reasonable medical probability ETS at work caused the claimant's lung cancer, Dr. D replied:

I would answer that question by stating that based on the medical literature which I have reviewed and the statistics which are available in the medical literature, that it is more likely that her cancer is unrelated to her environment of tobacco smoke.

Dr. D further testified that "I think the probability is that she has developed lung cancer unrelated to her environmental tobacco smoke." When asked what the claimant's lung cancer would be related to, Dr. D responded "Unidentifiable risk factors which make up the background incidents of lung cancer which occur in this country with no identifiable risk factor. That's what it would be." Dr. D also stated that the general consensus in the medical literature is that viruses are not known to be a cause of lung cancer. Dr. D further stated:

In probability, if you take the statistics, which are available both in the EPA report and in the medical literature, which look at lung cancer, I think that the probability that environmental tobacco smoke or passive smoking caused her cancer is less likely.

Dr. D added that:

I think my opinion is, is that based on medical probability her environmental tobacco smoke is not causing her lung cancer.

CLAIMANT'S APPEAL

The hearing officer decided that the claimant did not establish by a preponderance of the credible evidence that she contracted lung cancer as a result of her job. The claimant contends that the hearing officer's decision is against the great weight of the evidence. The claimant disputes the conclusions of law that the claimant's lung cancer is an ordinary disease of life, and is not a disease incident to a compensable injury; that the claimant's illness is not work related, and is not a compensable injury under the Texas Workers' Compensation Act; and that the claimant does not have disability as a result of a compensable injury. The claimant requests that we find that the claimant's lung cancer was not an ordinary disease of life and was incident to a compensable injury; that the claimant's illness is work related and a compensable injury; and that the claimant has disability.

Section 401.011(34) defines "occupational disease" as follows:

> "Occupational disease" means a disease arising out of and in the course and scope of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

In Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana 1982, no writ), the court stated: "To be compensable as an occupational disease, a disease must be one arising out of and in the course of the claimant's employment, and cannot be an ordinary disease of life to which the general public is exposed outside of employment." The court further stated that: "To establish an occupational disease, there must be probative evidence of a causal connection between the claimant's work and the disease, i.e., the disease must be indigenous to the work, or must be present in an increased degree in that work as compared with employment generally."

In Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.), the court stated as follows concerning expert medical testimony:

> The general rules relating to expert medical testimony are well known. The opinion evidence of expert medical witnesses is but evidentiary, and is never binding on the trier of fact. [citations omitted]. The trier of fact may accept or reject such testimony in whole or in part, and may accept lay testimony over that of medical experts. [citations omitted]. The opinions of a medical expert are not

> conclusive even when they stand uncontradicted by other medical evidence. [citations omitted]. In workmen's compensation cases the issues of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinions of medical experts. [citations omitted].

An exception to these well settled general rules is that, when a subject is one of such

> scientific or technical nature that the jury or court cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in that subject has any probative value. [citations omitted]. It has been held that the cause, progression and aggravation of disease, and particularly of cancer, are such subjects. [citations omitted].

It has been held that in workers' compensation cases expert medical testimony can enable a plaintiff to go to the jury if the evidence establishes "reasonable probability" of a causal connection between employment and the present injury. *See* Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1981); Parker v. Mutual Liability Ins. Co., 440 S.W.2d 43 (Tex. 1969).

Conflicts in the testimony of expert medical witnesses are resolved by the trier of fact. Highlands Underwriters Insurance Company v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); The Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524 (Tex. 1975). Pursuant to Section 410.165, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. It has been held that the trier of fact has several alternatives available when presented with conflicting evidence. The trier of fact may believe one witness and disbelieve others and the trier of fact may resolve inconsistencies in the testimony of any witness. *See* McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987).

To date, we are aware of only one Appeals Panel Decision concerning secondhand smoke. In Texas Workers' Compensation Commission Appeal No. 93094, decided March 19, 1993, the employee claimed that secondhand smoke at work caused her nonspecific bronchitis, breathing problems, tiredness, memory loss, nausea, abdominal pains, and dizzy spells. In that decision we held that expert medical testimony was required due to the uncertain nature of the cause of the complained of condition. In affirming the hearing officer's decision that the employee did not sustain a compensable injury, we held that there was no expert medical testimony that linked the employee's symptoms to her employment or the inhalation of secondary smoke and that the employee failed to prove a causal

connection between her symptoms and any secondhand smoke to which she may have been exposed at work. Without deciding whether exposure to secondhand smoke might constitute an ordinary disease of life to which the general public is exposed, we noted that the hearing officer found that the area where the employee was employed had as its primary industry petrochemical plants and by inference the air in that area may contain noxious fumes and irritants. We stated that health problems caused by such noxious fumes and irritants might well be considered an ordinary disease of life under the court's analysis in Bewley v. Texas Employers Insurance Association, 568 S.W.2d 208 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.) (cold, sore throat, and pneumonia resulting from employment related exposure to water and inclement weather was an ordinary disease of life to which the general public is exposed and not compensable).

Although not cited by the parties, we note three cases from other jurisdictions which concern injury from secondhand smoke at work. In Johannesen v. New York City Department of Housing Preservation and Development, 546 N.Y.S.2d 40 (1989), the New York Supreme Court, Appellate Division, upheld the Workers' Compensation Board's finding of accidental injury as a result of a repeated trauma from exposure to cigarette smoke at work where both the employee's treating physicians and the employer's medical consultant indicated the employee's bronchial asthma condition was aggravated by her repeated exposure to cigarette smoke at work, and where there was uncontroverted testimony concerning the amount of exposure to secondhand smoke at work. In Schober v. Mountain Bell Telephone, 630 P.2d 1231 (1981), the New Mexico Court of Appeals held that substantial evidence supported the trial court's conclusion that the worker's collapse at work was caused by exposure to cigarette smoke at work to which the worker was allergic. In doing so, the court said that it agreed that there was evidence to support a conclusion that the injury did not arise out of the employment, but that there was also evidence that the accident arose out of the employment. The court then observed that it was the function of the trier of fact, and not the appeals court, to weigh the evidence. McCarthy v. The Department of Social and Health Services, 759 P.2d 351 (1988), concerned an action by a former state employee against the State of Washington for negligent failure to provide her a smoke-free environment, causing her disabling pulmonary disease. The Washington Supreme Court held, in part, that the exclusive remedy provision of that state's Industrial Insurance Act would not bar the former employee's common-law action if her disease fell outside the coverage of the Act. Apparently, the employee had filed a claim with the Department of Labor and Industries for workers' compensation benefits contending that her pulmonary disease was an occupational disease contracted during the course of her employment. The Department denied the claim; however, the Department's order was not in evidence. The employee contended that the Department denied her claim on the grounds that her lung disease was not the result of an industrial injury, nor did it constitute an occupational disease within the contemplation of the Act.

In the instant case there was a conflict in the evidence as to the amount of

secondhand smoke the claimant was exposed to while working for the employer. While the claimant indicated that 60% of the workers smoked, other witnesses indicated that between 20% and 30% of the workers smoked. There was also a conflict in the evidence concerning the extent and duration of exposure to secondhand smoke after the employer designated a smoking area around 1986. The claimant indicated that she had to transact business in the designated smoking area on a frequent basis for long periods of time; however, other witnesses indicated that business was transacted in the designated smoking area on a much less frequent basis and for only a few minutes at a time. There was also a conflict in the opinions of expert medical witnesses. In support of claimant's claim, Drs. B and K testified, based on reasonable medical probability, that the claimant's lung cancer was caused by or related to her exposure to ETS or secondhand smoke while working for the employer; Dr. S stated that the only identifiable carcinogen was ETS in the claimant's employment; and Dr. C stated that, while the cause of the claimant's condition is unknown, there is a high probability that smoke could have caused her lung cancer. Dr. D gave a contrary opinion. Dr. D testified that in his opinion, based on reasonable medical probability, that it is more likely that the claimant's cancer is unrelated to ETS, that the claimant developed lung cancer unrelated to ETS, and that ETS is not causing the claimant's lung cancer. As previously noted, the trier of fact, in this case the hearing officer, judges the weight and credibility to be given the evidence and resolves conflicts in the evidence, including conflicts in expert medical testimony. The hearing officer resolved the conflicts in the evidence against the claimant. Having reviewed the record, we are unable to conclude that the evidence is insufficient to support the conclusion that the claimant's illness is not work related or the decision that the claimant did not establish that she contracted lung cancer as a result of her job. Given the conflict in the evidence concerning the extent of the claimant's exposure to ETS, and the conflict in the expert medical testimony concerning whether ETS caused the claimant's lung cancer, we conclude that the hearing officer's conclusion that the claimant's illness is not work related and his decision that the claimant did not contract lung cancer as a result of her job, are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). We have previously observed that a finding of a compensable injury is a threshold issue and a prerequisite to consideration of the issue of disability. *See* Texas Workers' Compensation Commission Appeal No. 92217, decided April 13, 1992. Thus, the hearing officer did not err in concluding that the claimant did not have disability because the claimant must have sustained a compensable injury in order to have disability under the 1989 Act.

We next review the hearing officer's conclusion that the claimant's lung cancer is an ordinary disease of life and is not a disease incident to a compensable injury. In Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), the employee claimed that her asthma was caused by her employment. The

trial court granted an instructed verdict in favor of the carrier. On appeal, the court upheld the instructed verdict holding that there was no expert medical testimony linking the employee's inhalation of lint particles to her developing asthma. The carrier made two principal arguments to justify the rendition of the instructed verdict: (1) that there was no evidence of causation, and (2) the maladies borne by the employee were ordinary diseases of life and, as such, are expressly excluded by the statute from being occupational diseases. The court said that it viewed both contentions to be the same--that of causation. The court noted that an "ordinary disease" is one to which the general public is exposed outside the scope of employment, citing Schaefer, *supra*. The court observed that implicit in this definition is the proposition that all diseases outside the scope of employment are "ordinary diseases," and that in Schaefer, *supra*, the court held that an extremely rare disease, mycobacteriosis intracellular, is an "ordinary disease of life" absent a causal connection between the claimant's affliction and employment. The court stated that, as used in the statute, "ordinary diseases" encompass all diseases, except occupational diseases, which in turn are determined by their relationship to employment. The court said that its analysis revealed the term "ordinary disease of life" to be a term of art having a meaning distinct from the common meaning of words, and that as such, it is not useful for a witness to opine that an affliction is an "ordinary disease of life." The court stated that the test of whether a disease is compensable under workers' compensation is if there exists a causal connection, either direct or indirect, between the disease and the employment. Thus, the court found that it was not necessary to reach a determination of whether the employee's injury was an "ordinary disease;" rather, the court stated, the test is whether there is evidence, either direct or indirect, of a causal connection between the employee's disease and her employment sufficient to withstand a motion for directed verdict. The court then stated that absent evidence of that causal link, the employee's disease is not compensable and is an "ordinary disease of life." Although we are not reviewing an instructed verdict, as the court did in Hernandez, we nevertheless find the court's determination that it was not necessary to determine whether the employee's injury was an ordinary disease of life to be applicable to the case at hand. The test is whether there was a causal connection between the claimant's lung cancer and her employment. After weighing the conflicting evidence, the hearing officer determined that the claimant did not contract lung cancer as a result of her employment. The evidence, although conflicting, is sufficient to support the hearing officer's determination. Since the claimant did not establish the necessary causal link between her disease and her employment, her disease is not compensable and under the court's reasoning in Hernandez, is, in this case, an "ordinary disease of life to which the general public is exposed outside of employment." We observe, as the Supreme Court of Texas did in Schaefer, *supra*, that the claimant's disease has not been shown to be indigenous to the claimant's work or present in an increased degree in that work.

CARRIER'S APPEAL

The carrier contends that the evidence does not support the hearing officer's findings

that the claimant did not realize her condition might be work related until (date of injury), and that the claimant's date of injury for reporting purposes is (date of injury). The carrier further contends that the evidence does not support the hearing officer's conclusions that the claimant "properly and timely reported her claim" as required by Article 8308-5.01 (now TEX. LAB. CODE § 409.001), and that the claimant's date of injury is (date of injury), the date she knew her condition might be work related.

Section 409.001(a) provides that:

(a)An employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which:

(1)the injury occurs; or

(2)if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment.

Section 408.008 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment.

The carrier contends that the evidence clearly indicates that the claimant believed that as early as (date), her disease was related to her employment. The carrier states that a coworker testified that "when she [the coworker] returned the call [from the claimant] on (date), the claimant told her that she was making sure that everybody that smoked that she used to work with was going to know she had cancer." The carrier contends that as a result of this evidence the date of injury should be no later than (date). The carrier further contends that the same evidence shows that the claimant should have known her injury may be related to her employment no later than (date), and since the parties stipulated that the claimant reported her "claim" to the employer on (date of injury), the claimant failed to notify her employer of her injury within 30 days of when she knew or should have known that the injury may be related to the employment. Our review of the coworker's testimony does not reveal such a definite date of the conversation as asserted by the carrier. The coworker first said that the conversation took place two or three days after the claimant was hospitalized in (date), but then testified that she didn't remember if the conversation took place during the (date) or January 1993 hospitalization. The coworker also testified that in addition to what the carrier points out was said, the claimant also didn't know why she had cancer. Given the inconsistencies in the coworker's testimony, there is no basis to conclude that the hearing officer erred in not finding that the claimant should have known her injury may be related to her employment on (date).

Other testimony concerning when the claimant knew or should have known that her injury may be related to her employment was given by the claimant and Dr. K. The claimant testified that it was not until (date of injury), that she began to suspect that her lung cancer was caused by secondhand smoke at work and that it was not until (date), that she knew that that was the cause of her cancer. Dr. K testified that it was about February 11, 1993, when he first discussed with the claimant the possibility of secondhand smoke causing her cancer. The first mention of secondhand smoke in the medical records is February 11, 1993. As previously noted, the parties stipulated that the claimant reported her "claim" to her employer on (date of injury). Given the claimant's testimony that she only suspected secondhand smoke as a cause of her cancer on (date of injury), the stipulation that the claim was reported to the employer on (date of injury), and the claimant's testimony that she "knew" on (date), that secondhand smoke at work caused her cancer, we believe that the hearing officer could appropriately determine that the claimant timely reported her injury and that the date of injury was (date of injury), under the definition provided in Section 408.008. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the Supreme Court of Texas had before it a case involving election of remedies. We believe that what the court said in that case concerning the issue before it applies equally to the timely notice of injury issue in this case, to-wit: "[u]ncertainty in many complex areas of medicine and law is more the rule than the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them."

CLAIMANT'S REQUEST FOR CONSOLIDATION OF CLAIMS

In the claimant's appeal the claimant's attorney has advised us that the claimant is deceased and that the beneficiaries have placed the employer, carrier, and Commission on notice of their intention to file a claim for death benefits. The claimant's attorney further advises us that it is their intent to request that the death benefits aspect of the claim be processed on an expedited basis through the Commission. The claimant's attorney requests that in the interest of judicial economy and time and expense to all parties that the death benefits claim not be treated as a separate claim before the Commission and that all issues that have been joined in this claim be consolidated with the claim for death benefits with the exception of any disputes regarding qualification of beneficiaries under the Texas Workers' Compensation Act.

In our opinion, the Appeals Panel does not have authority to either grant or deny the request to consolidate the present claim, which is on appeal, with a claim for death benefits that is not on appeal. Pursuant to Section 410.204, we have 30 days to issue our decision from the date the response is filed. If we don't issue it in 30 days, the decision of the hearing officer becomes final and is the final decision of the Appeals Panel. Pursuant to Section 410.203, we may (1) affirm the decision of the hearing officer, (2) reverse that decision and render a new decision, or (3) reverse that decision and remand the case to the hearing

officer for further consideration and development of evidence.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge