

## APPEAL NO. 950299

On January 24, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (claimant) appeals the hearing officer's decision that he was not injured in the course and scope of his employment by exposure to dust or fumes. The respondent (carrier) requests affirmance.

### DECISION

Affirmed.

From 1972 to 1986 the claimant worked as a plant operator in the employer's asphalt plant and in 1987 he began working as a security officer for the employer. He testified that he was exposed to dust and fumes at work. He claims his current lung condition resulted from exposure to dust and fumes at work. Medical records indicate that the claimant smoked about two packs of cigarettes per day for over twenty years. He said he quit smoking in 1986 on the advice of (Dr. H). The claimant had lung biopsies performed in December 1993.

There is much conflicting medical evidence as to the cause of the claimant's lung condition. Dr. H initially reported that the claimant has bronchiolitis obliterans which was caused by his exposure to dust at work. However, in a subsequent report Dr. H stated that he was not sure what the claimant has. Dr. H referred the claimant to (Dr. A) who reported that the lung biopsies showed focal interstitial fibrosis and bronchiolitis which are work related. Dr. A stated that he is convinced that the claimant has an occupational lung disease and that he does not have emphysema secondary to smoking. Dr. H also referred the claimant to (Dr. C) who stated that it appeared that the claimant has more of an interstitial fibrosis process than bronchiolitis and that "[i]t's not clear whether his exposure to fumes from fuel oil, diesel oil and asphalt caused his current problem." (Dr. W) reviewed medical records and tests and stated "[b]ased on the pathology findings, certainly the most probable etiology of these changes is his history of cigarette smoking. I do not see any convincing evidence that his work environment played any substantial role in the production of this condition." (Dr. Ca) reviewed the claimant's medical records and tests at the request of the carrier and he reported that "[w]ithin reasonable medical probability, all the changes in this man's lungs are due to his long history of cigarette smoking." He also stated "[w]ithin reasonable medical probability, there are no histopathologic changes in this man's lungs characteristic of exposure to fumes, toxins or inorganic particles." (Dr. Wo) also reviewed the claimant's medical records and tests at the request of the carrier and he testified at the hearing that the claimant has obstructive lung disease and that the pathological changes the claimant experienced characteristically occur as a result of prolonged smoking of cigarettes and are not the result of dust or hydrocarbon exposure. He reported that the claimant has "no evidence of bronchiolitis obliterans or any other type of toxic fume or pneumoconiosis induced disease process."

The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer concluded that the claimant was not injured in the course and scope of his employment by exposure to dust or fumes. Here, there is conflicting evidence on what the claimant's lung condition is and what caused it. The hearing officer is the trier of fact and is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Gary L. Kilgore  
Appeals Judge