APPEAL NO. 92200

A contested case hearing was held at (city), Texas on April 15, 1992, (hearing officer) presiding as hearing officer. He determined that respondent sustained a work related injury on (date of injury), and was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq* (Vernon Supp 1992) (1989 Act). Appellant urges that the respondent has not sustained his burden of proof that his injuries resulted from an on the job exposure to chemicals and further, that the hearing officer's finding of fact and his conclusions regarding disability are erroneous. Appellant asks that we reverse and render a new decision denying any benefits.

DECISION

We find the evidence sufficient to support the decision of the hearing officer with regard to the issue of the respondent's sustaining a compensable injury; however, we determine that the evidence requires further development with regard to the issue involving disability. Accordingly, we reverse and remand.

The respondent worked for (employer), a roofing company who carried workers' compensation coverage with the appellant. The respondent testified, through an interpreter, that on (date of injury), he was working as a roofing helper with the employer and that his job was to hold a hose that sprayed a chemical foam on a roof. He states that on (date of injury), he was holding the hose as he and another worker were spraying foam when he got sick, experienced difficulty breathing, and started coughing. He stated that he never had these symptoms before he worked for the employer. He went to see a (Dr.A) on (date), whose medical report indicates an impression/diagnosis of "(1) Reactive airway disease, (2) Emphysema, (3) Tobacco dependence." Dr.A prescribed medication and provided that the respondent wear a mask at work. The respondent returned to work on (date)h with the return to work slip requiring him to wear a mask and was notified he was terminated. The respondent testified that he has worked for several days since (date) and indicated he could work now if not exposed to chemicals. One of the jobs he had for a couple of days involved working with tar on roofs but he could not stand this. The respondent testified on cross-examination that he has smoked for some thirty-odd years, about a half pack a day.

The respondent subsequently saw a (Dr. T) who told him not to work where there are chemicals. Dr.T's medical report provides in part that:

> By chest x-ray, physical examination, clinical history and pulmonary function testing, the patient clearly has a respiratory problem that falls into the general category of obstructive lung disease. He also has clearly been exposed to a chemical agent which can induce bronchospasm. I cannot in good faith tell you what exact portion of his disease was caused by exposure to isocyanate in the work place versus his history of tobacco use.

(Mr. C), who owns the employer company, testified that the respondent has been coughing and wheezing over the several years he worked for the employer. He stated the respondent had never held the end of the hose in a spraying operation and that they always stayed upwind of the fumes. Although Mr. C stated he was told by another employee that the respondent had gone to the doctor on (date), the respondent did not personally tell him . He testified he terminated the respondent when he came to work on (date) because the respondent did not let him know where he was on (date) and because the respondent was smoking on the job. He stated that he had worked around the foam in question for 18 years and never had a problem nor had any other employee complained about any chemical problem. He stated that the foam had a strong odor and that if you could smell it you're supposed to get a mask on.

A material safety data sheet on "stepanfoam" (the apparent product being sprayed on the date in issue) was accepted into evidence. It shows as hazardous ingredients "methylene bisphenyl (sic) isocyanate" and "polymeric diphenyl isocyanate" and indicates in pertinent part:

Inhalation: May cause respiratory sensitization and irritate skin, eyes and respiratory tract with possible permanent decrease in lung function. May aggravate asthma or other preexisting respiratory conditions.

The issues before the hearing office were: (1) whether the respondent suffered a compensable injury and, (2) whether, if a compensable injury was suffered, it resulted in disability. The hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e), 1989 Act. Here, there was evidence that the respondent worked around potentially hazardous chemicals and that he became ill, experienced breathing difficulties and coughing at the time he was in the vicinity of the chemicals. He testified that he had not had these symptoms prior to being exposed to the chemicals. Although the respondent is an interested witness, his testimony merely places an issue of fact before the fact finder and his testimony may be believed to the exclusion of other evidence. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.- Eastland 1980, no writ). While a case involving chemical fumes and the effect it may have on the body may require expert testimony or evidence of a scientific or technical nature (Texas Workers' Compensation Commission Appeal No. 92187 (Docket No.) decided June 29, 1992), here the record contains evidence of the specific chemical the respondent was exposed to, a manufacturer's statement of the hazardous ingredients in the particular product and the adverse effects it can have on the body, and a doctor's medical report identifying the chemical involved and stating that it can cause the problems exhibited by the respondent. While there is also evidence that the respondent is an acknowledged long-time smoker and that there may be some indications of prior respiratory problems, this is not, standing alone, a sufficient basis to deny him recovery for the current injury. First, it is well settled that an employer takes an employee as he finds him, that is, in his then existing physical condition. Gill v.

Transamerica Insurance Co., 417 S.W.2d 720 (Tex. Civ. App.-Dallas 1967, no writ); Texas Workers' Compensation Commission Appeal No. 91106 (Docket No. BU-00034-91-CC-1) decided January 10, 1992. Second, an injury includes an aggravation of a preexisting condition, whether or not that condition was job related. Texas Workers' Compensation Commission Appeal No. 91094 (Docket No. SG-A123649-01-CC-AB31) decided January 17, 1992. Third, where a carrier asserts that a preexisting condition is the sole cause of a claimant's current medical problem, the burden is on the carrier to establish that fact. Appeal No. 91094, supra; Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). The evidence in this case falls short of establishing that the respondent's current condition was solely caused by some preexisting condition.

Regarding the disability issue, the appellant urges error in the hearing officer's Finding of Fact No.5 and his Conclusions of Law Nos. 3 and 4. They are:

FINDINGS OF FACT

5.Claimant (claimant) began losing wages on (date of injury), due exposure (sic) to chemicals while working for the Employer (employer)., and has received no wages except for approximately three days.

CONCLUSIONS OF LAW

3.Claimant (claimant) sustained a disability on (date of injury), as a result of the injury on (date of injury), which has been continuous since (date of injury), except for approximately three days.

4.Claimant (claimant) is entitled to receive Temporary Income Benefits from Carrier Liberty Mutual Fire Insurance Company commencing (date of injury).

The evidence in the record on the issue of disability is confusing and it was not well developed at the hearing. Consequently, we cannot adequately address this issue without further development of the evidence. Article 8308-6.42(b)(3), 1989 Act. The hearing officer is, of course, provided with the responsibility and authority to ensure "...the full development of facts required for the determinations to be made." Article 8308-6.34(b), 1989 Act. While it is recognized that there may be difficulties encountered in evidentiary development where translation is necessitated because of limited or nonexistent English language skills, it is nonetheless necessary that pertinent information be understandable and supportive of essential factual findings and the conclusions based thereon.

With regard to the matter of disability, the respondent testified that he had only worked for several days at odd jobs since his injury and subsequent termination by the employer. He stated that when he went back to his employer with a work release requiring a mask he was told they could not give him a job. The respondent also stated that he worked for two days with a roofer who used tar but that he had to get out, apparently

because of the odor or fumes. He further indicated he worked for two days the week of the hearing for a roofer who used shingles, and that it was okay because there was no tar, fumes, or odor. Whether he is still working for this roofer or the reason that he no longer works for him is not answered in the record. The respondent also testified that Dr. T told him not to work where there are chemicals. This would appear to preclude him from working in positions which he had previously performed involving spraying chemicals or using tar. Also, there was evidence that the reason the respondent was terminated from his employment with the employer was because of not letting them know he was going to the doctor and because he had smoked on the job. The effect of this termination and his ability to procure new employment given the medically imposed restrictions and the relationship of the compensable injury is confusing from the evidence before us and is not clearly developed in the record.

As we have previously observed, determining the end of disability is somewhat difficult in the situation where an injured employee is precluded, for other reasons, from working for the preinjury employer. Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. AU-00055-91-CC-1) decided November 21, 1991. In that decision, we set out some of the considerations appropriately considered in reaching a determination of an end to disability. Disability is defined in Article 8308-1.03, 1989 Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." We note that while the reason for termination may be a factor to evaluate, the focus of an inquiry as to disability is on the inability to "obtain and retain" employment at equivalent wages. In this regard, the fact that a termination may have been for cause does not, in and of itself, foreclose the existence of disability. We cannot, from the somewhat unclear state of the evidence on this issue, determine the

correctness of the hearing officer's decision. Accordingly, we remand for further consideration and development of evidence.

The decision is reversed and remanded for an expedited hearing. Pending resolution of the remand, a final decision is not rendered in this case.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge