APPEAL NO. 92378

On June 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), respondent herein, sustained a compensable injury due to his exposure to ammonia in the course and scope of his employment with his employer, (employer), on (date of injury), and that appellant, the employer's workers' compensation insurance carrier, is liable for compensation under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that the hearing officer erred in: (1) refusing to allow an employer representative to be present during the hearing; (2) admitting into evidence medical reports that had not been exchanged prior to the hearing; (3) finding that respondent was exposed to ammonia while working for the employer; (4) finding that respondent's exposure to ammonia while working for the employer caused, or contributed to the cause of, his pneumonia condition; and, (5) concluding that respondent sustained a compensable injury due to chemical exposure (ammonia) while in the course and scope of his employment with his employer. No response to appellant's request for review was filed.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer did not permit a representative of the employer to remain in the hearing room during the hearing, except for when the representative testified, because respondent invoked "the rule" and the representative intended to testify for appellant. Appellant objected, citing Article 8308-5.10, but was overruled. The hearing officer said that an employer representative could remain in the hearing room provided that the representative did not intend to testify. Since appellant's only two witnesses were the employer's safety director and general manager and both intended to testify, neither of them was permitted to remain in the hearing room. Under "the rule," at the request of a party, or on the hearing officer's own motion, the hearing officer orders witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. *See* Tex. R. Civ. Evid. 614. Article 8308-6.34(e) provides that conformity to legal rules of evidence is not necessary at a contested case hearing. But, we have stated that the hearing officer may look to the rules of evidence for guidance. *See* Texas Workers' Compensation Commission Appeal No. 91065 (Docket No. redacted) decided December 16, 1991. Although there are certain exceptions to "the rule" set forth in Tex. R. Civ. Evid. 614, we find none of them to be applicable under the circumstances presented in this case, particularly in view of the fact that the employer was not a party at the hearing. *See* Texas Workers' Compensation Commission Appeal No. 92110 (Docket No. redacted) decided May 11, 1992. However, Article 8308-5.10(1) gives the employer the right to be present at all administrative proceedings relating to an employee's claim. This statute does not contain an exception which would permit the designated employer representative from being excluded from the hearing on the basis that "the rule" is invoked and the representative

intends to testify. In view of Article 8308-5.10(1), we hold that the hearing officer erred in not permitting an employer representative to remain in the hearing room during the course of the hearing. Appellant contends that disallowing the representative to be present hindered the presentation of the case and amounted to an abuse of discretion. However, appellant does not show how the hearing officer's ruling was reasonably calculated to cause and probably did cause rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ.). While we are of the opinion that the hearing officer erred, we are unable to conclude that she committed reversible error. Appellant was permitted to present its case, including the testimony of both of its witnesses and introduction of documents.

Appellant contends that the hearing officer erred in admitting into evidence over its objection hospital records and reports offered by respondent which were not exchanged until the day of the hearing. A party must show good cause for not having timely disclosed information or documents. Article 8308-6.33(e). The hearing officer found that there was good cause for respondent's failure to timely exchange the documents based on respondent's attorney's representations that he had requested the documents from the hospital several months earlier, that he was finally forced to use a record service company when the documents were not forthcoming, and that he had just received the documents a day or so before the hearing. We are unable to conclude that the hearing officer abused her discretion in finding good cause for not having disclosed the documents and in admitting the documents into evidence. *See* Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. redacted) decided September 4, 1991. However, even if the hearing officer erred in the admission of the documents, it would not amount to reversible error because most of the information provided in the hospital records and reports was summarized in (Dr. C's) letter which appellant submitted into evidence. Thus, the hearing officer would have had much of the same information before her even had the hospital records and reports been excluded. *See* Hernandez, *supra*.

Respondent claimed that he sustained a compensable occupational disease as a result of being exposed to ammonia for a period of three days while working for the employer. The parties stipulated that in (month year), respondent was employed by (employer), and that appellant was the employer's workers' compensation insurance carrier.

On (date of injury), respondent and three of his coworkers were erecting several prefabricated buildings inside of another building at the (Company) plant in (city), Texas. Respondent testified that he smelled ammonia all three days while working in the chemical plant, and that the ammonia smell was stronger on the roofs of the prefabricated buildings where he was working than it was at ground level where his coworkers were working. He did not know where the ammonia smell was coming from. He said there was only about a two and one-half foot clearance between the roofs of the prefabricated buildings and the ceiling of the building in which the prefabricated buildings were being erected, and that he had to come down off the roof to get cleaner air. Respondent testified that he knew it was ammonia he smelled because it smelled like what his wife uses to clean the stove at home.

Respondent said that prior to working at the chemical plant he had never been sick. Respondent testified that he started coughing as he was leaving the plant on the first day, and that on the second and third days he continued to cough and vomited several times at work. The chemical plant job was finished on (date of injury) and respondent worked for the employer at other job sites after that. He said he had steady coughing, spat up dark brown stuff that smelled just like what he smelled at the plant, and started to vomit blood. After about a week and a half he went to a medical clinic and was given shots, pills, and cough medicine, none of which alleviated his symptoms. He said he returned to the clinic several times and that on a doctor's recommendation he stayed off work for three days and then returned to work and worked intermittently until he was admitted into the hospital in September 1991.

Hospital records showed that respondent was initially confined to the hospital for six days, from September 18th through the 23rd, and that he reported to the hospital personnel that the onset of his coughing began in (month year) when he was exposed to ammonia for three days at a job site. He was diagnosed as having "pneumonia, probably tuberculosis," and was given medication and released. Respondent said that the medication did not help him and that he had problems breathing so he went back to the hospital in October 1991. Hospital records showed that respondent was confined to the hospital for a period of seven days, from October 14th through the 20th, and that he again reported to the hospital personnel that the onset of his coughing began with his exposure to ammonia in (month year). A TB skin test and an HIV test were both negative, and a chest x-ray showed a right middle lobe infiltration consistent with pneumonia. Respondent was given tests, diagnosed as having pneumonia, given medication, and discharged to home. After being discharged from the hospital, respondent said he worked off and on for the employer until about January 1992. He obtained another job in March of 1992, but said he must continue to take medication to keep from coughing.

Respondent's foreman at the chemical plant job site stated in a transcribed recorded statement that he recalled some kind of smell that got "pretty strong" at the chemical plant, but did not remember what the smell was. He said he and his crew worked close to tanks that may have contained chemicals, but he did not know what was in the tanks. He said that respondent told him he felt bad while working at the chemical plant and that respondent got sick and vomited. A coworker who had worked at the chemical plant with respondent stated in a transcribed recorded statement that there was no ammonia smell at the plant. He said that respondent got sick while working at the plant and started vomiting blood. He added that respondent continued to be sick after that job and could only work one or two days a week. He said that he and other coworkers told respondent to see a doctor. He did not know of any other workers who had problems while working at the chemical plant. The employers' general manager testified that he was not at the job site on the three days in question, but that he had been told by superintendents at the chemical plant that the plant did not produce ammonia and that there had been no chemical releases at the plant during those days. The employer's safety director testified that he first learned about respondent's claim of an on-the-job injury on November 6, 1991, and that prior to that time he had had no

complaints about the chemical plant job site. This witness said that respondent reported feeling sick on (date of injury), but that respondent did not know what his sickness was about. In response to an inquiry from the employer concerning "air released" at the chemical plant during (date of injury), a representative of the chemical company stated in a letter that:

> There have been no releases of chemicals which required a report to the Environmental Protection Agency or any other regulatory agency during these dates or the 1991 year.

Written opinions of three doctors concerning the cause of respondent's condition were in evidence without objection. (Dr. D), who is associated with the hospital district of which the hospital respondent was treated at in September and October 1991 is a part, stated that:

> [Respondent] was admitted to [hospital] twice for pneumonia; the most recent time was on 10/14/91 for 7 days. Because of the organisms involved and the radiographic picture, it is likely that these infections are a result of his chronic ammonia exposure earlier this year.

(Dr. G), whom respondent went to at appellant's request, noted that the location of the pneumonia suggest aspiration pneumonia and/or anaerobe etiology and stated that:

> It is my professional opinion that the cause of this patient's pneumonia is not related at all to the exposure of ammonia that he alleged because exposure to this chemical has to be in large amounts to produce lung problem and if this happens the presentation is acute with severe respiratory distress and pulmonary edema shortly and within 24 to 72 hours after exposure. The fact that he did not have any of these symptoms and that he presented 3 months after the alleged exposure clearly demonstrates that his lung problem is not related at all to ammonia.

(Dr. C), to whom respondent was referred by appellant for evaluation concerning the relationship between respondent's pneumonia and his employment, summarized information regarding respondent's hospital stays, stated to the same effect as (Dr. G) regarding the necessity for high concentrations of ammonia to cause major lung problems and the acute nature of the illness that results therefrom, and concluded that: "In reasonable medical probability, the workplace environment in (month) of (year) played no causative role in the induction of the patient's pneumonic processes."

An "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. The term includes other diseases or infections that naturally result 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. Article 8308-1.03(36). The claimant has the burden of proving a causal connection between the disease and the employment. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1981). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e).

The evidence was conflicting as to whether respondent was exposed to ammonia, and, if so, whether his exposure to ammonia was a cause of his pneumonia. Respondent testified that he smelled ammonia for three days while working at the chemical plant, respondent's foreman said there was a pretty strong smell at the plant, testimony from respondent and his coworkers indicated that his coughing and vomiting started shortly after he began working at the plant, and (Dr. D) opined that it is likely that respondent's infections are a result of his ammonia exposure. In Stodghill v. Texas Employers Insurance Association, 582 S.W.2d 102 (Tex. 1979), the Supreme Court of Texas stated that the medical expert need not use the exact magic words "reasonable medical probability," but the testimony is sufficient if the circumstances show that this is the substance of what the expert is saying. *See also*, Lucas v. Hartford Insurance & Indemnity Company, 552 S.W.2d 796 (Tex. 1977). Appellant presented evidence contrary to respondent's claim that he was exposed to ammonia and that such exposure was a cause of his pneumonia. Having reviewed all the evidence both in support of and contrary to the complained of findings and conclusion, we conclude that there is sufficient evidence to support the hearing officer's findings that respondent was exposed to ammonia and that such exposure caused or contributed to his pneumonia. We further conclude that those findings are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. The findings support the hearing officer's conclusion that respondent sustained a compensable injury. We believe our decision is supported by those cases which permit recovery for pneumonia which follows as the result of inhalation of noxious gases, dust, metal filings, or other foreign substances which cause damage to the lungs. *See* Maryland Casualty Co. v. Rogers, 86 S.W.2d 867 (Tex. Civ. App.-Amarillo 1935, writ ref'd); Traders & General Ins. Co. v. Wright, 144 S.W.2d 626 (Tex. Civ. App.-Eastland 1940, writ ref'd); American General Ins. Co. v. Ariola, 187 S.W.2d 585 (Tex. Civ. App.-Galveston 1945, writ ref'd w.o.m.); Texas Employers' Ins. Ass'n v. Wade, 197 S.W.2d 203 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.); Texas Employers' Insurance Association v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.). In regard to injuries caused by inhalation of noxious fumes, *see also* Texas Workers' Compensation Commission Appeal No. 92347 (Docket No. redacted) decided September 4, 1992; Texas Workers' Compensation Commission Appeal No. 92200 (Docket No. redacted) decided July 2, 1992; Texas Workers' Compensation Commission Appeal No. 91106 (Docket No. redacted) decided January 10, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92202 (Docket No. redacted) decided July 6, 1992; Texas Workers' Compensation Commission Appeal No. 92187 (Docket No. redacted) decided June 29, 1992.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge