APPEAL NO. 92640

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on August 11, 1992, in (city), Texas, with (hearing officer) presiding, to determine four disputed issues, to wit: (a) did the appellant (claimant) sustain an injury and/or an occupational disease in the course and scope of his employment; (2) did the respondent, a self-insured governmental entity (carrier), waive the right to contest the compensability of the injury because the Notice of Refused or Disputed Claim (TWCC-21) was not filed within 60 days; (3) is the carrier allowed to reopen the issue of compensability due to evidence that could not have been reasonably discovered at an earlier date; and (4) has the claimant had disability as a result of an injury or an occupational disease. The hearing officer determined these issues against the claimant who challenges the legal and factual sufficiency of the evidence to support certain of the hearing officer's findings and conclusions, and who further attacks the admissibility of one of carrier's exhibits. The carrier, in its response, points to the evidence supporting the challenged findings and urges our affirmance.

DECISION

Finding no reversible error and sufficient evidence to support the challenged findings and conclusions, we affirm.

Claimant testified he had been employed by carrier since December 1978 as a mechanic who performed maintenance on turbines, pumps, vessels and other items at the (county) power plant, both outdoors on site and in a machine shop, depending on the size of the item being maintained. His work on such items involved disassembly, cleaning, inspection of the components with replacement or fabrication as necessary, and reassembly. He used various solvents daily to clean parts, as well as his tools, by wiping them with the solvents in buckets. He said that masks or respirators were available and that the vessels on which he worked, and apparently the shop, were ventilated with fans. Most of his contact with the solvents came from inhalation and skin contact and he did not know the nature or effects of the chemicals to which he was exposed. Claimant recalled no major chemical spill or his ever being overcome by solvents. He said he began to "feel bad" in 1987, saw (Dr. K) for chest and stomach pain, and was told he had ulcers related to stress. He has continued to take medicine for his ulcers since 1987 and continues to take medicine for high blood pressure as well. Claimant said he also experienced fatigue, shortness of breath, sore joints, and disequilibrium or balance problems. He said he also suffered from insomnia and agreed such could account for his fatigue. In the summer of 1990 claimant was treated for a sore right knee, which he had bumped, and was found to have a heel spur; however, he said he was not contending that those particular health problems were caused by workplace chemicals. The records of (Dr. O), who treated claimant's knee, indicated claimant then had ulcers. Claimant also said that sometime in 1990 while at work, he thought he had a heart attack, was taken to an emergency room and later taken to another hospital where he underwent an arteriography. He said he was told

his arteries were not blocked but was not advised of the cardiac diagnosis. No records from the emergency room visit or the hospital where he underwent the arteriography were introduced.

On (date of injury), claimant, then 45 years of age, was seen by (Dr. L), at the (ADC) for evaluation of chest pain, back pain, abdominal pain, and extremity pain. According to Dr. L's record of this visit, claimant mentioned his recent arteriography and reported he continued to experience vague, nonspecific chest pain. The record of this visit stated that claimant had had a recent physical examination at work, together with an extensive work-up which was normal except for slight hyperlipidemia and hyperglycemia, and a thickening of the pleura on the left side of his chest. Claimant testified he had had pneumonia in 1990. Imaging exams obtained by Dr. L revealed a negative chest, a normal upper GI series, negative paranasal sinuses, and spondylosis of the lumbar spine but an otherwise negative lumbosacral spine. Dr. L's impression on (date of injury), included anxiety, reflux with possible esophagitis, and low back pain with slight sciatica. Dr. L's record of May 20, 1991, stated that "[i]n view of diffuseness of symptoms and apparently exaggerated response to body signals, I believe we are dealing with a potentially serious psychosomatic problem with anxiety and I have asked [claimant] to see [another doctor]." Dr. L's impression on May 20th included multiple somatic symptoms, probably anxiety related, and obesity with slight fasting hyperglycemia, hyperlipidemia, and slight elevation of SGPT. On June 24, 1991, claimant returned to Dr. L complaining of bilateral knee and feet pain and indicated he was very concerned about the possibility of Lyme disease. Dr. L's impression was polyarthalgias, and he planned a Lyme serology to allay claimant's anxiety.

Claimant indicated that, apparently at sometime in 1991, he had also seen (Dr. Y), his family doctor, (Dr. M) for his equilibrium problems, and (Dr. F). However, no records of those doctors were introduced. Claimant also testified that sometime in 1991 he had a "nervous breakdown" at work. He said the last few months he worked he was fatigued, irritable and confused, and suffered from headaches, dizziness, and disequilibrium, in addition to his sore joints, lower back pain and stomach problems.

On June 17, 1991, claimant was seen by (Dr. H), a psychiatrist at the ADC, to whom he reported multiple medical problems including ulcers, GI problems, chest pain (with a normal cardiac catheter and EKG), pneumonia, inner ear infection, and multiple somatic complaints for which he received multiple medications without relief. Claimant also reported work stressors, panic attacks, "and acknowledges multiple neurovegetative symptoms of major depression, beginning in approximately November 1990 including insomnia, tearfulness and irritability, difficulty in concentrating and memory impairment, fatigue, hopelessness, anhedonia, guilt, and vague, intermittent suicidal ideation. Dr. H felt claimant's history was significant for a severe hearing deficit, left inner ear infection with loss of balance, arthritis, GI upset (with normal studies), and pneumonia. Dr. H felt claimant's symptoms were most consistent with major depression. He also felt that panic disorder was a diagnostic consideration. Claimant said he has been and remains under the continuous treatment of Dr. H which has included medications.

Apparently sometime in 1991 Claimant also saw (Dr. F) who in December 1991 talked to (Dr. WR), of the (Clinic) about chemicals and referred claimant. Claimant testified that none of the doctors he had seen previously had inquired about his exposure to chemicals. On January 21, 1992, when claimant went to that clinic, he was seen by (Dr. J), who initiated a course of treatment which claimant described as including saunas, and who ordered a fat tissue biopsy and blood tests to check on chemical levels. A January 29, 1992 record, apparently that of Dr. J, stated claimant's diagnosis as "chemical sensitivity" and depression, and recommended taking claimant off work, changing medications, and considering a detoxification program for three to four weeks. Dr. J's March 2, 1992 report noted claimant's complaints of fatigue, chest pains, joint aches, and yeast infections, his nervous breakdown in (month year), and his exposure to "various solvents" while cleaning vessels at work. This report stated that a volatile aromatic and chlorinated hydrocarbon panel revealed "abnormal" amounts of trimethylbenzenes and 1,1,1-trichloroethane; that a volatile aliphatic panel revealed "abnormal" levels of 2-methylpentane, 3-methylpentane, and n-hexane; that other blood work and a fat biopsy were pending; that a SPECT scan (single photon emission computed tomography) of claimant's brain revealed a diffuse pattern of defects throughout the cerebral cortex which said findings "have been associated with the scintigraphic pattern encountered after exposures to neurotoxic substances." Dr. J's diagnosis was stated as "exposure to solvent," toxic brain syndrome--central nervous system dysfunction, allergic rhinosinusitis, and gastritis. He recommended skin testing of chemicals, foods, and inhalants, deep heat depuration and detoxification, and chemical booth testing.

Claimant testified that he last worked for carrier on January 23 or 24, 1992, when he was sent home by the foreman because of high blood pressure. On February 7, 1992, Dr. J took claimant off work for an indeterminate period due to his need for further medical treatment and evaluation for toxic exposure to solvents. Dr. J's March 2nd report stated that claimant was "medically disabled at this time." Claimant said he continues under the care of Drs. J, H, and F.

(Lab) reports were introduced which reflected the results of chemical analyses of claimant's blood specimens and fat biopsy specimen collected during the period from December 23, 1991, through April 2, 1992. These reports reflected the presence of numerous volatile aromatic and chlorinated hydrocarbon compounds and volatile aliphatic compounds, and showed for each compound the detection limits, the laboratory's population averages, and claimant's results, in parts per billion (ppb). The parties limited their evidence to five compounds and the following answer by claimant to carrier's interrogatory No. 12 was read into the record: "I was exposed to numerous volatile aromatic and chlorinated hydrocarbon chemicals including trimethybenzenes and 1,1,1-trichloroethane. I was also exposed to numerous volatile aliphatic chemicals including 2-methylpentane, 3-methylpentane, and n-hexane. I believe that each of these chemicals caused or contributed to my condition." Claimant's December 23rd blood specimen contained 3.1 ppb of trimethylbenzenes compared with the lab's population average of less than 1.0 ppb,

and 3.1 ppb of 1,1,1-trichloroethane compared with a population average of 1.0 ppb. Claimant's blood specimen collected on March 10, 1992, revealed decreases to 1.4 ppb of trimethylbenzenes and 1.2 ppb of 1,1,1-trichloroethane. However, claimant's April 2, 1992 blood specimen showed increases to 2.6 ppb of trimethylbenzenes and 1.5 ppb of 1,1,1-trichloroethane. Claimant's December 23rd blood specimen contained 4.0 ppb of 2-methylpentane compared with 9.6 ppb for the general population, 15.4 ppb of 3-methylpentane compared with 17.4 ppb for the general population, and 2.4 ppb of n-hexane compared with 8.3 ppb for the general population. Claimant's March 10th blood specimen contained 6.0 ppb of 2-methylpentane, 11.6 ppb of 3-methylpentane, and less than 1.0 ppb of n-hexane. (Presumably because of these results, claimant did not focus his evidence and arguments on the methypentanes and hexane.) Claimant's adipose tissue specimen, collected on January 28, 1992, contained less than 20.0 ppb of all five compounds compared with detectable limits of 20.0 ppb, with no comparison to population averages. Dr. J's March 2nd report described the lab results for all five compounds as "abnormal."

Dr. J prepared another report on June 5, 1992, which claimant said he requested because the carrier stopped paying for the sauna treatments he was receiving from Dr. J. "to sweat out the toxins." Dr. J's June 5th report stated that claimant's complaints of fatigue, chest pain, joint aches, mental confusion, dizziness, and nervousness "result from an exposure to multiple solvents including Trimethylbenzenes at his work place;" that claimant has undergone deep heat depuration physical therapy which has mobilized trimethylbenzenes from his fat stores, as shown by the rise in his trimethylbenzenes levels; and that claimant needed to continue with his sauna treatments. Dr. H's records indicated that on February 27, 1992, when claimant asked whether his depression and anxiety could be related to chemical exposure, Dr. H told him that "anything is possible," but that those disorders could also be a response to his workplace and family stressors, previously noted by Dr. H, and the effects of his impaired equilibrium and memory. Dr. H's record of April 2, 1992 stated that when claimant discussed with him Dr. J's treatment, including the exercise and saunas to "sweat out toxins," Dr. H explained he was unfamiliar with such treatment and referred claimant to (Dr. D) in occupational medicine. Claimant said he never pursued an appointment with Dr. D because of the costs.

(Mr. C), carrier's manager of safety and health, described his past and continuing education and testified that in 1985 he was board certified as a safety professional, was experienced in the handling of solvents and hazardous materials, and had some training in toxicology, including toxin blood levels and neurotoxic effects. He said that while claimant's work would bring him into contact with solvents, except for intentional abuse claimant would not be exposed to harmful levels of chlorinated hydrocarbons if using a mask or respirator and considering the proper ventilation to which claimant had testified. In his opinion, claimant's blood levels of the five compounds, as reflected in the lab reports, were "insignificant" considering that the results were expressed in parts per billion (ppb) and not per million (ppm), and further considering the expressed general population averages. He agreed there is support in the research literature for the attribution of medical problems such as claimant's to chlorinated hydrocarbons, but only in extremely high levels of exposure.

(Mr. C) was not familiar with studies concerning the effects of chronic low level exposure. He said he obtained information from claimant's foreman about the solvents used and also checked carrier's records and material safety data sheets. His investigation revealed that for the past five years trimethylbenzene was not present in claimant's workplace, and 1,1,1-trichloroethane was present in solvents claimant used but not in quantities which would cause health problems.

Carrier offered the report of (Dr. G), a toxicologist, dated April 30, 1992. Claimant objected to its admission on the sole ground that Article 8308-6.34(e) (1989 Act) provides that "[t]he hearing officer may accept written statements signed by a witness and shall accept all written reports signed by a health care provider," and that since Dr. G was not a health care provider, his report was hearsay evidence which should be excluded. The document was admitted and therein Dr. G opined that claimant's chemical levels, as found in the fat tissue biopsy and the blood specimen of March 10, 1992, were normal. Nor did Dr. G find abnormality in the December 23rd blood specimen since the comparisons given are population averages only. He stated that the 1,1,1-trichloroethane level, suggested as abnormal at 3.4 ppb, was also not necessarily above that found in general population ranges, and that concentrations of 1000 ppb and higher are not considered to be associated with toxicity. Trichloroethane does not accumulate and store in body tissue but rapidly metabolizes and excretes. Dr. G further did not believe that any of claimant's symptoms were consistent with exposure to trimethylbenzenes which he said act principally as an eye, nose, and throat irritant and, at high concentrations, cause respiratory depression. He did not believe that claimant's complaints were causally related to exposure to trimethylbenzenes. He said there is a paucity of literature on the toxicity of trimethylbenzenes, which are "considered relatively nontoxic," and that "[t]hey are not even listed in the NIOSH/OSHA Guidelines, nor in standard references on commercial product toxicity." A Merck Index excerpt in evidence described 1,1,1-trichloroethane as one of the least toxic of the liquid chlorinated hydrocarbons and a widely used solvent found in a variety of consumer products, including aerosol formulations. The OSHA standard for eight-hour industrial exposure was described as 350 ppm. Dr. G's report contained the following:

> In summary, [claimant] appears to be suffering from some neurological or other undiagnosed disorder. There is no documentation presented that he has suffered an untoward exposure to trimethylbenzenes or to other chemicals. The blood and fat tissue analyses are either perfectly normal or, in the range of low background exposure, and do not relate to toxic effects of chemicals, nor are the symptoms typical of exposure to these chemicals.

Claimant said he was ordered by the Texas Workers' Compensation Commission (Commission) to be seen by (Dr. WG), at the request of carrier, and he introduced Dr. WG's report of August 5, 1992. Claimant testified that Dr. WG did not conduct a physical exam or request any tests but rather conducted an interview of claimant in the presence of an attorney claimant had asked to accompany him. Dr. WG's report stated that he interviewed claimant for 45 minutes in the presence of claimant's wife, attorney, and another doctor, and

reviewed the records forwarded by carrier. There was no evidence as to which records Dr. WG reviewed. The report said Dr. WG did not conduct a physical exam or obtain any lab tests or x-rays, and felt no further tests were necessary to reach his conclusions. Dr. WG thought it very important that in November 1990, claimant was treated by an internist for an irregular heartbeat following pneumonia, as reported by claimant, and noted that cardiac arrhythmias have been often produced by inhaled hydrocarbons. It was Dr. WG's opinion, based upon reasonable medical probability, that claimant has an organic brain syndrome more than likely caused by the inhalation of solvents while at work for carrier. Dr. WG's report further stated that 1,1,1-trichloroethane and trichloroethylene are well known for causing fatal cardiac arrhythmias, and he intended to obtain the records of claimant's treatment for an episode of cardiac arrhythmia. Such records, however, were not offered into evidence.

An employee claiming workers' compensation benefits for a work-related injury has the burden of proving that the injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91049, decided November 8, 1991. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Respecting the issue as to whether claimant sustained a compensable injury (Article 8308-1.03(27)) or occupational disease (Article 8308-1.03 (36)), the hearing officer concluded he did not and based such conclusion upon a number of factual findings, certain of which are challenged by claimant for legal and factual insufficiency. In determining a "no evidence" point, we consider only the evidence and inferences which tend to support the finding, disregard all evidence and inferences to the contrary, and we should uphold the finding if any evidence of probative force supports it. An "insufficient evidence" point requires our review of all the evidence which supports and contradicts the finding, and we should uphold the finding unless we conclude it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

Claimant produced no evidence of a discrete, particular exposure or accidental injury from workplace chemicals, as such, and seemed to proceed on the theory he sustained an occupational disease from his exposure to solvents over the period of his employment with carrier. Indeed the hearing officer found, and claimant does not challenge, that claimant was not involved in a particular incident of serious exposure to toxic chemicals in the workplace. We have had occasion to discuss both the definition and construction of the term occupational disease under the 1989 Act. We have also discussed the principles concerning the proof of causation of occupational diseases. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92604, decided December 30, 1992. Claimant asserts error in the following findings:

6.The levels of toxic chemicals in the Claimant's tests in this case were normal.

7.The symptoms of the Claimant are not typical of exposure to these chemicals.

8.The Claimant's problems do not arise out of any exposure to chemicals in the workplace.

We view the evidence consisting of Dr. G's report, (Mr. C's) testimony, and the Merck Index excerpt, as well as the (lab) reports themselves as amply supportive of Finding of Fact No. 6. *Compare* Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992, where we reversed and rendered due to the complete lack of evidence of the existence of "noxious" fumes in the claimant's workplace to provide the necessary linkage to her fatigue, dizziness, and balance problems. Finding of Fact No. 7 finds sufficient support in Dr. G's report and the Merck Index excerpt, as well as the other medical records in evidence. We believe the totality of the evidence, exhaustively summarized above, sufficient to support Finding of Fact No. 8, and that the factual findings bearing on this issue sufficiently support the legal conclusion. It would appear that the hearing officer found the report of Dr. G, the testimony of (Mr. C), the Merck Index excerpt and the information in the medical records of Drs. L and H more credible than the opinions of Drs. J and WG. The hearing officer could consider that Dr. WG's report did not indicate just what records he reviewed, along with his interview of claimant, and that Dr. WG placed great importance on an episode of cardiac arrhythmia, as related by claimant, but no medical records relating to the diagnosis and treatment of claimant's cardiac event were adduced. The hearing officer could further consider Dr. J's description of all five chemical levels as "abnormal" in contrast to the content of the lab reports and Dr. G's opinion. Conflicts in the evidence, including the medical evidence, are for the hearing officer to resolve. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Amarillo 1973, no writ); Texas Employers Insurance Association v. Campos, 666 S.W. 2d 286, 289-290 (Tex. App.-Houston [14th dist.] 1984, no writ). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ.) *Compare* Texas Workers' Compensation Commission Appeal No 91002, decided August 7, 1991, where we affirmed the hearing officer's determination that the claimant's repeated, chronic, low level exposure to toxic "heavy metals" in the workplace caused his occupational disease; and Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992, where, in remanding on another issue, we did not disturb the hearing officer's determination that the evidence adequately proved that claimant's exposure to chemicals in foam used in his job as a roofer caused his lung disease. *And see* Texas Workers' Compensation Commission Appeal No. 92644, decided January 11, 1993, where we affirmed the hearing officer's determination that the claimant failed to meet his burden of proving his GI and emotional disorders were caused by the liquid which the evidence established splashed on him at the workplace. In Texas Workers' Compensation Commission Appeal No. 92178, decided June 17, 1992, the hearing officer found that the claimant failed to meet his burden of proving he sustained or aggravated a lung condition by inhaling chemical fumes or particles in the workplace. We found no appropriate basis to disturb the findings in that case, nor do we here.

Article 8308-5.21(a) provides that if the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date the carrier is notified of the injury, the carrier waives its right to contest compensability. That statute further provides, however, that a carrier shall be allowed to reopen the issue of compensability if there is a finding of evidence that could not have been reasonably discovered earlier. Though finding that carrier did not contest the compensability of claimant's injury within 60 days of the date it was notified of the injury, the hearing officer nevertheless concluded that carrier did not waive its right to contest compensability, and that carrier was entitled to reopen the compensability issue because of evidence that could not have been reasonably discovered earlier. Claimant asserts error in these conclusions as well as the findings that carrier worked claimant's file in good faith and due diligence, that carrier made its final determination within a reasonable time after receiving the report from (subcontractor), and that carrier reopened the compensability issue based on evidence it could not reasonably have discovered earlier.

(Mr. M), the director of workers' compensation services for (contractor), the carrier's servicing contractor (contractor), testified that contractor's first written notice of the claim was the Employer's First Report of Injury or Illness (TWCC-1), signed on February 11th and sent to contractor on February 13, 1992. Contractor's first TWCC-21 reflected that claimant's lost time began on January 29, 1992, and that the payment of temporary income benefits (TIBS) to claimant commenced effective 2-5-92. (Mr. M) testified that TIBS were still being paid. The evidence showed that contractor requested claimant's medical records from Dr. J on February 21, 1992, did not receive them, and requested them again on February 28th. On March 12, 1992, contractor requested subcontractor to review the records. Subcontractor's report to contractor, dated May 7, 1992, indicated among other things that claimant's symptoms were not consistent with either acute or long term exposure to trimethylbenzenes, that his blood samples and fat biopsy contained no abnormalities, and so on. The subcontractor report appeared to be based on Dr. G's report of April 30, 1992, which was addressed to (Dr. H) at subcontractor's address, and apparently a copy of Dr. G's report was attached to the subcontractor's report that went to the contractor. On May 27, 1992, contractor filed the second TWCC-21 which disputed the claim and indicated its dispute was based on the "attached medical," apparently referring to the report of subcontractor accompanied by Dr. G's report to (Dr. H).

(Mr. M) also testified that although contractor certainly questioned the claim earlier, it did not contest the claim until it had medical substantiation from subcontractor. Asked about the delay from May 7th (the date of the subcontractor report) to May 27th when the second TWCC-21 was filed, (Mr. M) explained that simply because the subcontractor report was dated May 7th did not mean it was received by contractor on that date. He also explained that because the claim was very involved, it had to be reviewed by several persons to make a decision on whether it should be contested. He also said the decision to dispute the claim was based not only on the subcontractor's report but also that of Dr. G. We are satisfied the evidence is sufficient to support the challenged findings and conclusions

on this issue. After receiving written notice of the claim, carrier's contractor encountered some delay in getting the medical records from Dr. J, then engaged subcontractor to review the records. Subcontractor, in turn, apparently engaged Dr. G, a toxicologist, to review the records, analyze the data, review the literature, and formulate an opinion on the relationship between claimant's symptoms and the quantities of the several chemical compounds found in claimant's blood and fat tissue specimens. *Compare* Texas Workers' Compensation Commission Appeal No. 91035, decided November 7, 1991, where the carrier had the medical evidence two weeks before the 60 day period expired and failed to act to dispute the claim; and Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992, where we agreed with the hearing officer that the carrier waived its right to contest the claim on certain additional grounds because the "newly discovered evidence" (medical records) could have been earlier discovered with reasonable diligence. Though the carrier in that case was provided with the name of the treating doctor in claimant's notice of injury, there was no evidence the carrier ever inquired or made any attempt to obtain the doctor's records prior to the benefit review conference where it was provided with the records and was apparently then surprised by some of the entries. We found those circumstances to support the hearing officer's determination of the waiver issue against the carrier and observed that such was a matter for the hearing officer's sound discretion, similar to the discretion reposed in a trial judge in granting a new trial based upon newly discovered evidence. *See* Moffett v. Texas Employers' Insurance Association, 217 S.W.2d 142 (Tex. Civ. App.-El Paso 1948, writ ref'd n.r.e.). We said "[i]t must be shown, among other things, that the evidence was unknown and that failure to discover was not due to want of diligence. (Citations omitted.)" *And see* Texas Workers' Compensation Commission Appeal No. 92060, decided April 1, 1992, where the hearing officer found no waiver by the carrier based on newly discovered evidence and we agreed.

We have carefully examined the chronology of the carrier's and its contractor's and subcontractor's actions upon receiving the written notice of the injury and agree with the hearing officer there appears no want of diligence and that the evidence could not have been reasonably discovered earlier. We do not find the hearing officer's determination of this matter to have violated a clear legal right nor to be a manifest abuse of his discretion. Texas Employers Insurance Association v. Waldon, 392 S.W.2d 509 (Tex. Civ. App.-Tyler 1965, writ ref'd n.r.e.).

Claimant challenged the hearing officer's conclusion that he "did not have disability as a result of a claimed injury and/or an occupational disease as a result of his employment with [carrier]," with the sole contention that carrier provided no evidence of a health care provider to support the hearing officer's findings. Claimant did not, however, challenge Finding of Fact No. 9 that he "was not unable to obtain or retain employment at wages equivalent to his pre-injury wages as a result of an alleged occupational disease."

Disability is defined by Article 8308-1.03(16) as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." It was the claimant, not the carrier, who had the burden to prove the disputed issue of

disability. Texas Workers' Compensation Commission Appeal No. 91022, decided October 3, 1991. Claimant testified he had not worked since January 23 or 24, 1992 when he was sent home due to his high blood pressure, and that he was still receiving treatment from Drs. H and F, and possibly others. He did not testify, however, that he was presently unable to work. The evidence showed that Dr. J took claimant off work on January 29, 1992 for testing and treatment, and again on February 7th for further treatment and evaluation for an indeterminate time period. In his March 2nd report, Dr. J stated that claimant was "medically disabled at this time." There was no evidence that claimant had been released to return to work by Dr. J. Notwithstanding such evidence, however, claimant failed to prove he sustained a compensable injury and thus failed to prove he had disability under the 1989 Act. We have previously observed that a finding of compensable injury is a threshold issue and a prerequisite to consideration of the issue of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992.

We find no merit in claimant's hearsay objection to the admission of Dr. G's report. While Article 8308-6.34(e) provides the hearing officer "shall" accept all written reports signed by a health care provider, it also provides the hearing officer "may accept all written statements signed by a witness." This sentence can hardly be read, as claimant argued, to mean that Dr. G's signed statement cannot be accepted merely because he was a toxicologist and not a health care provider. Even were Dr. G's report to be considered as hearsay evidence, contested case hearings are not required to conform to the legal rules of evidence. Article 8308-6.34 (e). We have previously discussed hearsay rule objections. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1991, and Texas Workers' Compensation Commission Appeal No. 92144, decided May 28, 1992.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge