APPEAL NO. 93058

On October 19, 1992, 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. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the appellant (claimant) did not suffer an injury from her exposure to formaldehyde while working for her employer, from (date) through (date), and further determined that the claimant does not have disability. The hearing officer decided that the respondent (carrier) is not liable to the claimant for workers' compensation benefits. The claimant disputes certain findings of fact and requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responds that the hearing officer's decision is supported by the evidence and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant claims that she suffered physical harm and damage to her body as a result of being exposed to formaldehyde while working for her employer as a secretary inside a new mobile trailer office from (date) to (date). She said that she was the only employee who worked in the office on a full time basis. She said that there was a very strong burning odor in the trailer during the time she worked in it, and that her eyes burned and watered, she sneezed and coughed, her nose ran, and she was drowsy. She said she passed out in the trailer on one occasion. She attributed her sore throat, ear problem, swollen glands in her neck, respiratory problem, and several other diagnosed conditions to her exposure to formaldehyde. She said she had not been sick prior to working in the trailer and pointed out that her preemployment physical examination, the results of which were in evidence, did not indicate any abnormalities except for obesity.

According to a report in evidence, the OSHA Permissible Exposure Limit (PEL) for formaldehyde is 1 part per million (ppm). There was testimony that the limit may have been reduced to .75 ppm. In attempting to show that she was exposed to excessive levels of formaldehyde at work, the claimant relied on an air monitoring test performed by (NWE) in March 1992 at the request of the employer. The test results showed that the average concentration of formaldehyde outside the trailer was .24 ppm and that the average concentration of formaldehyde inside the trailer ranged from 2.69 ppm to 9.73 ppm depending on where inside the trailer the air sample was taken. The highest concentration was said to be in the center of the trailer where the claimant had worked. Based on the results of the test, the employer took the trailer out of service.

To rebut the findings of the NWE test, the carrier presented the testimony of Dr. A who is a professor of chemical engineering and a professor of fiber and polymer science. Dr. A testified that the results of the NWE test were not reliable and that the levels shown in the report were off by a factor of ten. He testified that he suspected the test results were

flawed when he saw the .24 ppm level reported for the outside air because he would expect to find between .02 ppm and .05 ppm of formaldehyde in the outside air in the (city) area. He said the highest reported outside air level of formaldehyde in the United States was recorded in Los Angeles at .16 ppm. He also said that he had obtained the actual analytical numbers from NWE and that based on his review of that information, he found that NWE had made a simple mistake by failing to divide by 2 in arriving at a reported average concentration inside the trailer. In his opinion, the making of such a simple error called into question the test results. He also testified that he had talked with Dr. D, who developed the sampling protocol used in the test and who is employed by NWE, and that Dr. D did not consider the analysis to be reliable and did not trust the values given in the report. Dr. A opined that any opinion that was predicated on the NWE test would not be a valid opinion.

Dr. A said that formaldehyde is a basic building block of the universe and that it is literally everywhere. He gave as examples of the presence of formaldehyde that spinach has 25 ppm, milk has 1.5 ppm, beer has .5 ppm, beef has 1 ppm. He said that ceiling tiles, carpet, paper, growing plants, and rotting leaves all emit formaldehyde to a certain extent, and that it is a product of all combustion processes. He further stated that formaldehyde is in the human blood to the level of 2.7 ppm. He also indicated that smoking cigarettes emits 30 to 40 ppm of formaldehyde and that a person sitting next to a person smoking is subjected to a substantial level of formaldehyde. The claimant's husband smokes cigarettes.

Dr. A further testified that studies by the United States Consumer Product Safety Commission have shown the range of concentration of formaldehyde in mobile homes to be between .1 and .62 ppm. The highest concentration of formaldehyde he has found in a mobile home was slightly over 1 ppm. He explained that the cause of formaldehyde levels in mobile homes is the "offgassing" of formaldehyde from particle board, and to a lesser extent from carpeting and ceiling tile.

Also in evidence was an air monitoring report from (M) dated April 30, 1992. Dr A said that he thought that the owner of M had told him that mobile home number 19677 had been tested. Later in the hearing, Mr. L, the human resources manager for the employer, testified that NWE had tested mobile home number 119677. The carrier was obviously attempting to compare the results of the M test, which showed a concentration of .13 ppm in the mobile home tested, with the results of the NWE test. The claimant did not urge at the hearing that the mobile home tested by (M) was different than that tested by NWE. Dr. Allan said that the M esults were reasonably reliable and that in his opinion the claimant was exposed to between .15 ppm and .2 ppm of formaldehyde during the period July through (date). He also testified that the claimant, who has lived in a mobile home since 1990, would have been exposed to the same level of formaldehyde in the mobile home she lived in as she was exposed to at the mobile trailer office. The claimant said that the mobile home she lived in had sheetrock and not particle board, implying that the level of formaldehyde would be less in the mobile home she lived in than in the trailer at work. Dr.

A said that the federal government has established a target standard of .4 ppm for exposure to formaldehyde in the housing industry. Dr. A opined that the claimant was never exposed to an excessive level of formaldehyde and consequently could not suffer any health effects from that exposure. He also opined that the claimant was not exposed to an amount of formaldehyde in excess of those exposures experienced by the general public.

The claimant also attempted to establish that she was exposed to an excessive amount of formaldehyde at work through the report of Dr. B., who had his laboratory perform "formaldehyde antibody tests" on blood specimens supplied by the claimant. After testing and being advised of the claimant's history and of the NWE test, Dr. B was of the opinion that the claimant was exposed to a high level of formaldehyde for six months and that she sustained pulmonary damage to, and became sensitive to formaldehyde as a result of an occupational exposure.

In order to impeach Dr. B, the carrier introduced into evidence, over the claimant's objection as to relevancy, excerpts from a federal district court case, a joint affidavit from eight doctors given in another federal district court case, and a letter to the Health Department all of which called into question the usefulness of Dr. B antibody testing. The eight doctors who gave the joint affidavit all specialize in clinical immunology and concluded as follows:

> The laboratory tests performed by Dr. B are not accepted by immunologists as useful tools in the clinical detection of disease or illness. The formaldehyde antibody tests, for example, can only be used as a research tool and have not even proved to be a valid predictor of exposure to gaseous formaldehyde. Similarly, many individuals may have autoantibodies or Tal cells, yet they may be immunologically normal. For these reasons, these tests are not used by immunologists in the clinical diagnosis of disease or illness. Consequently, immunologists could not rely on Dr. Bs laboratory results in diagnosing disease or illness in any of the tested individuals.

The claimant was examined by Dr. H., on (date). In a report of the same date he wrote "? multi-chemical sensitivity - exogenous obesity - anxiety." In a later report, Dr. H said that it was his impression at the time of examination that the claimant had moderate anxiety and exogenous obesity. In a May 1, 1992 report, Dr. B., stated that in all reasonable medical probability, the claimant's diagnosis is chemical pneumonitis. His report indicates that in making his diagnosis he relied in substantial part on the high levels of formaldehyde shown in the NWE air monitoring report.

Dr. C, who is a board certified psychiatrist, testified for the claimant. He first examined the claimant on July 20, 1992. He diagnosed the claimant as having an "organic defective disorder," and said that every indication is that the claimant has an underlying

organic brain problem. In his opinion, the claimant was exposed to formaldehyde at her work place and that within reasonable medical probability the cause of her organic brain disorder is exposure to formaldehyde. His opinion that the claimant was exposed to formaldehyde at work was based on the claimant's history, the NWE test, immunological studies done by Dr. S., and the psychological testing that he performed on the claimant. He said that his diagnosis did not preclude Dr. S diagnosis of chronic fatigue syndrome (CFS), and he opined that formaldehyde can cause CFS. Dr. C said that the claimant's weight problem was significant in that it affected her sense of well-being, but that it did not explain the problems he diagnosed. In a report of October 1992, Dr. S., who practices internal medicine, diagnosed the claimant as having CFS and stated that it is a reasonable probability that the claimant's CFS was caused from toxic substance exposure.

Dr. P, who specializes in clinical psychology and neuropsychology, testified for the carrier. He did not examine the claimant, but reviewed her medical records and reports. He said it was not possible to diagnose a neurotoxic disorder without proper historical data and that it was not possible for Dr. Ct to make the diagnosis of organic defective disorder because Dr. C did not obtain a complete medical and psychosocial history of the claimant. He also testified that Dr. C recommended that the claimant have neuropsychological testing that had not been done and that without that testing Dr. C did not have an adequate basis for making his diagnosis. In addition, Dr. P opined that it was not appropriate for Dr. to base his conclusions in substantial part on the S test, which he said was a rather broad assessment of intellectual functioning, because one cannot make the conclusion that the patient has an organic impairment based on that test. Dr. P also opined that Dr. C reached a conclusion that the claimant was experiencing symptoms of a thought disorder based on misstated results of the Minnesota Multiphasic Personality Inventory and the Clinical Multiaxial Inventory. He said that the claimant's weight problem is probably a "psychological stressor" in her life and he found it surprising that Dr. Ct did not attribute any significance to that problem in his report. Dr. P concluded that the conclusion of Dr. C that the claimant has an organic defective disorder is not warranted by the test data, or by the history and complaints of the claimant.

Dr. C, M.D., also testified for the carrier. His medical practice has been limited to toxicology for over 20 years, and he has been involved in about 40 incidents where formaldehyde exposure either occurred or was suspected to have occurred. He examined the claimant in June 1992 and reviewed her medical records and reports. His diagnoses were:

1. Transient acute bronchitis and respiratory tract irritation, chemically induced. 2. Morbid obesity, progressive, related to inactivity. 3. Rule out allergic reactions to drugs as a basis for the skin reactions. 4. Fatigue

secondary to Epstein-Barr virus infection and contributed to by excessive centrally active psychotropic and sedative drugs.

Dr. C said that the claimant did not exhibit symptoms of eye, nose, or throat irritation when he examined her. Dr. C said that his 2nd, 3rd, and 4th diagnoses would explain many of the claimant's complaints, but would not explain her complaints of respiratory tract irritation. However, he said he based his diagnosis of bronchitis and respiratory tract irritation being chemically induced on the history given by the claimant and on the NWE test results, and said that he would change that diagnosis if the claimant had not been exposed to formaldehyde at the levels shown in the NWE report and would look elsewhere for an explanation for those conditions. He testified that another explanation for the claimant's respiratory discomfort could be her Epstein-Barr virus. Dr. C testified that there was no objective indication of any injury to the claimant that is related to her work place. He said that the claimant's complaints of feeling tired, having no energy, and feet swelling would be explained by her Epstein-Barr virus and her obesity. He also said that CFS is caused by the Epstein-Barr virus, and that the Epstein-Barr virus is a common virus that is not related to the claimant's work place and is not caused by exposure to formaldehyde. He further testified that another virus the claimant was diagnosed as having, cytomegalovirus, causes a "failure to thrive kind of reaction," and was potentially an additional explanation for the claimant's problems. He said that cytomegalovirus is not caused by formaldehyde exposure. Dr. C further testified that the claimant's symptoms could be explained totally by her weight problem and the presence of the Epstein-Barr virus and cytomegalovirus. In his opinion, the Epstein-Barr virus and the cytomegalovirus were ordinary diseases of life.

In regard to Dr. B autoimmune antibody testing for formaldehyde, Dr. C opined that such testing is unreliable because we are all exposed to formaldehyde and formaldehyde is a natural product of the human body's metabolism. He also testified that Dr. B test could not determine whether the claimant had a disease nor predict whether she might get a disease.

The claimant disputes the following findings of fact:

FINDINGS OF FACT

7. From 1 (date) through 13 (date) [the claimant] was not exposed to concentrations of formaldehyde in excess of exposure that members of the general public have to formaldehyde.

8.The exposure to formaldehyde at the work place of [the employer] was an exposure to which [the] ordinary public would normally be expected to have received, and was not a specific hazard of employment at [the employer].

10.[The claimant's] upper respiratory infection was an ordinary disease of life to which the general public would be exposed.

11.In July 1992 Dr. C diagnosed [the claimant] as having organic brain disfunction. [The claimant's] exposure to formaldehyde during 13 (date) through 13 (date) [at the employer] was not the cause of her symptoms which led to Dr. C diagnosis of organic brain disfunction.

13.The claimant's exposure to formaldehyde at [the employer] did not cause her to be unable to obtain and retain employment at wages she earned prior to 13 (date) after 13 February 1992.

14.[The claimant's] exposure to formaldehyde from 1 (date) through 13 (date) while working for [the employer] did not cause an injury, or cause the illnesses diagnosed by Dr. S or Dr. C.

The hearing officer concluded that the claimant did not suffer a compensable injury and that the claimant did not have disability.

The term "injury" includes "occupational diseases." Article 8308-1.03(27). An occupational disease means a disease arising out of and in the course 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 incident to a compensable injury or occupational disease. The term includes repetitive trauma injuries. Article 8308-1.03(36). The Supreme Court of Texas has held that in a workers' compensation case, the claimant must prove that his injury arose out of his employment. Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). This requires evidence of causal connection between the employment and the claimant's injury. Parker, *supra*. In Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App. - Corpus Christi 1989, no writ), the court said that the fact that symptoms occurred during the period of employment did not mandate the conclusion that the employee's employment was the cause of her ailments. The court further stated that it viewed the carrier's contentions of no evidence of causation and ordinary disease of life to be the same - that of causation. The court observed that, 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.

Pursuant to Article 8308-6.34(e), 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. The expert evidence in this case concerning the level of formaldehyde to which the claimant was exposed at work and whether her diagnosed conditions were related to exposure to formaldehyde at work was sharply conflicting. As the trier of fact the hearing officer resolves conflicts and inconsistencies in the testimony of expert witnesses, and judges the weight and credibility to be given their testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App. - (city) [14th Dist.] 1984, no writ). We do not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App. -Texarkana 1989, no writ); Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. Having reviewed the evidence, we hold that Findings of Fact Nos. 7, 8, 11, and 14 are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. Finding of Fact No. 10 that the claimant's upper respiratory infection was an ordinary disease of life is not of pivotal importance and is not necessary to the conclusion that the claimant did not sustain a compensable injury in light of Finding of Fact No. 14 that the claimant's exposure to formaldehyde at work did not cause an injury. *See* Hernandez, *supra*; Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993. The critical question was that of causation between the injury and the employment which the hearing officer resolved against the claimant and which finding is supported by sufficient evidence.

"Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Since we have upheld the hearing officer's finding that the claimant's employment did not cause an injury, which finding supports the conclusion that the claimant did not sustain a compensable injury, it follows that Finding of Fact No. 13 that the claimant's exposure to formaldehyde at work did not cause her to be unable to obtain and retain employment at wages she earned prior to December 13, 1991, and the conclusion that she did not have disability are supported by the evidence, because in order to have disability, as defined by the 1989 Act, the claimant must have a compensable injury.

In addition to disputing the above referenced findings of fact, the claimant contends that the hearing officer erred in overruling its objection to the entire testimony of Dr. A, erred in failing to issue a posthearing subpoena, and erred in admitting into evidence Carrier's Exhibits E, F, and H.

The claimant objects to the consideration of any evidence by Dr. A because the carrier failed to exchange any report or information of Dr. A prior to the hearing. Dr. said he prepared a report the evening before the hearing. The carrier represented that it had timely disclosed Dr. A as a witness and there was no objection based on failure to timely

disclose Dr. A as a witness. The carrier did not attempt to introduce Dr. A report into evidence, but chose to rely on his testimony. The hearing officer overruled the claimant's objection to Dr. A testimony at the hearing. Article 8308-6.33(d)(1) provides that within a time to be prescribed by rule of the Texas Workers' Compensation Commission, the parties shall exchange reports of expert witnesses who will be called to testify at the hearing, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) requires that the exchange shall take place no later than 15 days after the benefit review conference. Thereafter, parties must exchange additional documentary evidence as it becomes available. Rule 142.13(c)(2). Rule 142.13(c)(3) provides that the hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. In this case, the claimant complains that since the carrier failed to exchange Dr. A report prior to the hearing, Dr. A should not have been allowed to testify absent a showing of good cause for failure to exchange the report prior to the hearing. Since we do not have a copy of the report on appeal, we do not know whether Dr. A testified about information that was in the report, but for purpose of this appeal we assume that he did. It is clear that under the provisions of Article 8308-6.33(d) and Rule 142.13(c)(1) the carrier was required to exchange Dr. A report with the claimant, and that under Rule 142.13(c)(3) a showing of good cause was needed in order to allow Dr. A to testify about information that was in the report, because the report was not exchanged prior to the hearing. While the hearing officer did not make an express finding of good cause, he apparently determined that good cause was shown as Dr. A testimony was considered. *See* Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991, and Texas Workers' Compensation Commission Appeal No. 92225, decided July 15, 1992. In the limited circumstances presented in this case, we infer that the hearing officer, in overruling the claimant's objection, made a finding of good cause on the basis that the report was not prepared until the evening before the hearing. Accordingly, we find no reversible error in the ruling of the hearing officer. Appeal No. 91009; Appeal No. 92225, *supra.* We implore hearing officers to make an express determination of whether good cause exists on the record.

The claimant contends that the hearing officer erred in refusing to issue a posthearing subpoena for a corrected air monitoring study done by NWE. In its response, the carrier states that neither it nor the employer has ever seen this report. At the hearing, Dr. A said that Dr. D told him that he wanted to do a second test, but a second test had not been done. Rule 142.12(b)(2) provides that the Commission may issue a subpoena at the request of a party, if the hearing officer determines the party has good cause. The determination of good cause is within the sound discretion of the hearing officer and that determination can only be set aside if that discretion was abused. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The good cause asserted by the claimant for the issuance of the subpoena is that the corrected report, which the carrier denies any knowledge of, shows corrected levels of formaldehyde inside and outside the trailer which would invalidate the criticism of Dr. A

regarding the NWE report introduced into evidence at the hearing. We observe that the definition of "subpoena" in Rule 142.12(a)(3) is a Commission order issued by the hearing officer requiring a person to attend or to produce evidence at a deposition (deposition subpoena) or at a hearing (hearing subpoena). In this instance, the request for a subpoena was neither for a deposition subpoena nor for a hearing subpoena, but was for a post hearing subpoena which the definition of subpoena does not appear to authorize. However, presupposing that the hearing officer had the authority to issue a posthearing subpoena, we cannot conclude that he abused his discretion in failing to find good cause for the issuance of the subpoena in light of the testimony of Dr. A that Dr. D had told him a second test had not been performed.

Carrier's Exhibits E, F, and H related directly to the usefulness of Dr. B antibody testing, and were clearly relevant to the matter of whether the claimant had been exposed to formaldehyde at work in sufficient levels to cause her diagnosed conditions, which the claimant attempted to prove through the results of Dr. B test. Consequently, we find no merit in the claimant's assertion of error in the admission of those exhibits over its objection as to relevancy. We observe that Carrier's Exhibit H which was the joint affidavit of eight doctors concerning the usefulness of Dr. B antibody testing for formaldehyde, was clearly admissible under Article 8308-6.34(e) which permits the presentation of evidence by affidavit.

The claimant also urges on appeal that the mobile trailer tested by M was said to be No. 19677 at the hearing, whereas Mr. L testified that the mobile trailer tested by NWE was No. 119677 and was the trailer the claimant worked in. The claimant concludes that M tested a different trailer than NWE, and, therefore, is immaterial. We think that it is a little late in the day to be urging this discrepancy in the trailer numbers. The claimant did not object to the introduction into evidence of the M report at the hearing nor did she specifically object to questions asked of Dr. A regarding that report, although she did object to all of Dr. A testimony based on a failure to exchange Dr. A report prior to the hearing. It was clear from Dr. A answers that he considered that (M) had tested the same trailer as NWE and nothing was said by the claimant throughout the hearing that would have led the hearing officer to conclude other than that NWE and M tested the same trailer that the claimant had worked in. We find no basis for disturbing the hearing officer's decision on the ground urged by the claimant. We observe that Dr. A testimony concerning the unreliability of the NWE report could be given weight independent of the M report.

The claimant submitted, with her appeal, a number of documents, some of which were made a part of the hearing record and some of which were not made a part of the hearing record. Article 8308-6.42(a)(1) limits our review of the evidence to the record developed at the contested case hearing. Consequently, we do not consider on appeal

those documents which were not made a part of the hearing record. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge