APPEAL NO. 93267

A contested case hearing was held in (city), Texas, on March 9, 1993, (hearing officer) presiding, pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), to determine whether the appellant (claimant) was injured in the course and scope of his employment on (date of injury), whether he had disability from such injury, and his periods of disability, if any. The hearing officer determined that claimant did not sustain a compensable injury on (date of injury) and did not have disability. Claimant challenges the sufficiency of the evidence to support certain factual findings and legal conclusions while respondent (carrier) urges the sufficiency of the evidence and our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

The parties stipulated that claimant was working the evening shift as a machine operator for (employer) on (date of injury), when he became sick. Claimant testified he worked from 1963 to 1968 for a former employer where he cleaned and cut cast iron, breathed "steel dust," developed silicosis, and quit because of the silicosis. From 1968 to 1972 claimant said he worked as a tire salesman and did not have respiratory problems on the job. In March 1972, claimant commenced employment as a machine operator with employer, who printed business forms. He acknowledged having breathing problems "off and on" since 1966, and said they became worse in 1981 and he began to use inhalers. He was hospitalized with pneumonia in May 1990 but did not associate that illness with his employment. He said he was later hospitalized again with pneumonia after some machines and the plant floor had been cleaned, and from that time on he had respiratory problems, including pneumonia, on several occasions.

On (date of injury), the date of his injury, claimant worked the evening shift, commencing at 3:00 p.m., and said he was not immediately assigned to a machine. He said some coworkers were stripping some yellow paint lines off the concrete floor with a stripping solution later identified as "Formula X." However, it was not clear whether he was among them. He did not contend that any portion of the plant floor was being sealed, as distinguished from stripped, at that time. Shortly later, he was given a job order and began to operate a collator machine with coworker (Mr. MH). When he began his shift, several coworkers were cleaning another machine nearby with a solution which contained ammonia. At sometime after starting to operate the machine, claimant said he began to feel dizzy and complained to his foreman, (Mr. RT), of the odor of a chemical he said was being used to clean the machine and he was moved to another machine further away. When dinner break time arrived at around 7:30 p.m., claimant said he stopped working because he was out of breath, told Mr. RT he was going to go to the hospital to get a shot, left the plant, and never returned there to work.

Though claimant testified to also smelling ammonia from the machine cleaning operation, the particular chemical which claimant maintained caused his injury that evening by aggravating his prior respiratory condition was toluene diisocyanate (toluene) contained in a product called "Tennant 440" occasionally used in the plant to seal the concrete floors. While claimant did not contend that any floor areas were actually sealed on his shift that evening, he did assert that "Tennant 440" had been used on the earlier shift that day to seal a walkway near the machine area. Though not entirely clear, claimant also appeared to assert that "Tennant 440" was used during his shift by having been mixed with the floor stripper solution, as well as with the water, soap and ammonia solution used to clean the machine, because he said he smelled the odor, which is strong and distinctive, and saw the "Tennant 440" can out on the opposite side of the room. Claimant said "Tennant 440" had a very strong, unmistakable odor, a point upon which all the witnesses seemed to agree. Others, including Mr. RT, testified that "Tennant 440" had not been used for any purpose on that shift, that it was stored in a locked storage area, that it was neither a stripping nor cleaning agent but rather a sealing agent which left a film on the concrete surface to which it was applied, and that it would not be used to clean a machine or to strip paint. The signed interview statements, dated November 20, 1991, of the coworkers who actually cleaned the machine were in evidence. (Mr. MT) said he mixed a solution of water, soap detergent, and pine oil in a five gallon bucket. He did not know for sure whether any Formula X floor stripper had been added and described the odor as a slight odor which did not bother him. According to the November 20, 1991, interview of (Mr. JR), he helped clean the machine with a solution of soap and ammonia which he described as similar to what we would use at home to mop the floors. Claimant maintained he smelled "Tennant 440" on his (date of injury) shift, and was thus exposed to its vapors. He maintained such exposure caused the respiratory difficulties he experienced on that shift which resulted in his having to stop work and seek treatment. Claimant introduced a "Tennant 440" label which stated in part: "Individuals with chronic respiratory problems or prior respiratory reaction to isocyanates must not be exposed to vapors."

Claimant said he himself had only used "Tennant 440" once and could not recall the year. Claimant also testified that he had been exposed to "Tennant 440" on several occasions in 1987 or 1988 when employer began to use the product to seal floors during regular working hours, that there was inadequate ventilation, that no masks or protective equipment was provided, that he and many other employees complained of sore throats and headaches at that time, and that employer then performed floor sealing on weekends using volunteers. He also complained of smelling the chemical on several subsequent occasions after the floors had been sealed on weekends by volunteers. However, he appeared to be proceeding on the theory that it was his exposure on (date of injury) that resulted in his injury. Indeed, most of his evidence and argument was directed towards establishing the (date of injury) exposure and injury date and claimant challenges on appeal the findings, among others, that he was not exposed to toluene on (date of injury), while working for employer and that he did not have an injury on that date while working for

employer.

According to a (hospital) emergency room record of (date of injury), claimant had known emphysema and recent pneumonia with intermittent episodes over the past two months and presented with complaints of a tight chest, difficulty in breathing, and wheezing. The assessment was that he was in no respiratory distress and he was referred to his treating doctor, (Dr. H), for further evaluation. Claimant stated he continued to have respiratory problems after quitting his job on (date of injury), that he was hospitalized in December 1992 for a tight chest and breathing problems which he said "felt like when I used to get chest pains at work," and that he continues to see a doctor weekly. He stated that just about any chemical, including household cleaners, will bring on his symptoms, as will cutting the grass. He maintained he has been unable to work since (date of injury). Claimant also introduced a letter to him of January 29, 1992, from the Occupational Safety and Health Administration (OSHA) advising him of the results of an investigation of his complaints including the use of "Tennant 440" "to clean walls, floors, and machinery without protective equipment."

According to the medical records in evidence, claimant had a most unfortunate record of lung problems over a period of many years. He was diagnosed upon biopsy with silicosis, apparently in 1968. In 1979 claimant underwent a thoracotomy for a spontaneous pneumothorax and the records reflected his longstanding bilateral silicosis. He was admitted to the hospital on March 9, 1980, with acute bronchitis and suspect bronchial pneumonia. The record at that time noted claimant had severe and chronic silicosis and obstructive airway disease. He was hospitalized on July 5, 1984, for sinusitis superimposed on silicosis, obstructive airway disease, and asthmatic bronchitis; on April 3, 1990, for pneumonia and chronic obstructive pulmonary disease (COPD); on May 10, 1990, for pneumonia; and on December 28, 1992, for chronic bronchitis and pulmonary silicosis.

Dr. H's report of December 6, 1991, stated he had treated claimant for 10 years and that claimant reported exposure to toluene fumes on several occasions including January 21, 1990, and (date of injury). In his report of September 9, 1992, Dr. H stated that there were no laboratory or diagnostic tests which could determine whether claimant was exposed to toluene. He opined that claimant had been exposed to some inhalant which greatly exacerbated his symptoms on two occasions. The carrier introduced a report from (Dr. FS), dated February 27, 1992, which referenced claimant's statement to the effect he was overexposed to chemical vapors resulting from coworkers spraying of a machine with a cleaning solution composed of aqueous ammonia, and a floor finish remover (Formula X) which contained 2 - butoxy - ethanol and 2 - amino - ethanol, all diluted in water. The report reviewed the health effects of these substances. It also went on to note that no coworkers suffered any ill effects and that the concentrations of ammonia and 2 - amino - ethanol in the air would have to be at an "intolerable level" to cause lung tissue damage. The report went on to state that claimant was under a misconception that a floor sealer with toluene

had been mixed with the machine cleaning solution.

Claimant was seen by (Dr. P) on July 24, 1992, and his report stated that claimant had interstitial lung disease of longstanding secondary to biopsy documented silicosis, as well as obstructive airway disease which Dr. P regarded as "reversible." Dr. P disagreed with Dr. FS's report stating that claimant's exposure to aqueous ammonia, 2 - amino - ethanol, and 2 - butoxy - ethanol aggravated his prior lung condition. Dr. P also stated that it was not clear whether claimant was significantly exposed to toluene but that if he was, the persistence of claimant's obstructive airway disease "may well be secondary to such exposure." Also in evidence was a report from (Dr. S) dated September 9, 1992, which said that claimant had significant COPD which could have been exacerbated by exposure to ammonia. Dr. S said he could not disagree with Dr. FS's report to carrier indicating claimant did not seem to have been exposed to toluene.

Coworker Mr B testified that on two occasions after 1989 he smelled fumes on Monday after a weekend cleaning of the floors, and that several people complained of headaches. He said that occasionally some "spot cleaning" was done on weekdays and doors would be opened and fans used to vent the fumes. He did not know what chemicals were used to clean the floors or the machines.

Mr. MH testified that he recalled that he and claimant began working together on the collator machine from the beginning of their shift on (date of injury), and that he did not see claimant doing any stripping of floor paint. He had never seen "Tennant 440" used for any purpose other than to seal the floors. He said that "Tennant 440" gave him headaches and smelled strong within 100 feet. After employees, himself included, complained of headaches and sore throats from the fumes, employer began to provide protective equipment and that after 1987, the floor sealing was "pretty much" done on the weekends by volunteers, rather than during regular working hours. Mr. MH could recall that "Tennant 440" was used during regular working hours only once after 1987 and that was after claimant left the plant on (date of injury). He recalled the machine being cleaned across the room from where he and claimant were working and did not know the nature of the cleaning solution being used, though it did contain ammonia. To his knowledge, a "Tennant 440" can was not in that location. "Tennant 440" is used only as a floor sealant and is never used on machines. While claimant had complained to him of "Tennant 440" fumes in 1987, he could recall only one complaint from claimant after that year. Mr. MH said "Tennant 440" has a distinct and strong odor and that he did not smell it on (date of injury).

(Mr. ID) testified that "Tennant 440" was used about three times in 1987 and that no protective equipment was provided. He said he has asthma and still suffers from breathing "that stuff." He also stated that "Tennant 440" is a floor sealer, is not used to clean machines, was not so used on (date of injury), and that he did not see the can out. However, he said it had been used five or six hours earlier that day because he smelled it

and saw a floor area sealed in the office area near the main entrance. He also stated the chemical had been used both one month and six months previously during regular work hours.

(Mr. DH) testified that "Tennant 440" had been used only once since 1987 and that occasion involved a 10 minute use a few days after claimant left the plant on (date of injury). He worked the same shift as claimant on (date of injury) and was unaware of its having been used on that shift or on the earlier shift that day. He smelled ammonia but did not smell "Tennant 440" on (date of injury). He would have smelled "Tennant 440" had it been used. He agreed that "Tennant 440"had been used several times in 1987 and there had been numerous complaints of headaches and sore throats. He also said that after claimant left his job, the plant was visited by OSHA and that "Tennant 440 " has not been used since.

Mr C, a forklift driver who worked the same shift as claimant on (date of injury), testified, variously, that he could recall smelling "Tennant 440" in the walkway area next to the machines on that date, and that he was unsure of the dates.

Mr. RT testified he was the foreman on claimant's (date of injury) shift, that "Tennant 440" was not used on that shift and, that as far as he knew, it had not been used earlier that day. The chemical has a powerful smell and he did not smell it on (date of injury). Had it been applied to seal the walkway floor, he would have smelled it. About 5:30 p.m. that day, claimant advised Mr. RT the smell was bothering him so he moved claimant and Mr. MH to another machine further away from the machine being cleaned with a solution of water, soap, and ammonia. Sometime later, Mr. RT asked claimant if he could still smell it and claimant responded he could no longer smell it but that "it was still in the air." At supper time, claimant told Mr. RT he was feeling bad, having problems, and was "going to go the hospital and get a shot or something."

(Mr. JB), employer's production manager, testified that his duties included being responsible for the sealing of floors. He said the floors were last sealed in 1987, except for an occasion in 1991 when some sealing was done after some machines were turned around. He also stated that "Tennant 440" is used only as a floor sealer.

Whether claimant was injured in the course and scope of his employment on (date of injury), was a question of fact to be determined by the hearing officer and claimant had the burden to prove he sustained such an injury. 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. While claimant and Mr. ID asserted that "Tennant 440" had been used on an earlier shift to seal floors in the walkway area or in the administrative area, there was substantial evidence to the contrary. Similarly, aside from claimant's testimony, there was a dearth of evidence that "Tennant 440" had been either added to the solution used to clean the machine or used

to strip paint from the floor on that date. The medical evidence to the effect that toluene could aggravate claimant's preexisting lung diseases depended upon his first establishing, as he maintained, that he was indeed exposed to such chemical on that occasion. 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. 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). We will not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289-290 (Tex. App.-Texarkana 1989, no writ). *Compare* Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991, and Texas Workers' Compensation Commission Appeal No. 92178, decided July 17, 1992, both cases involving claims for lung injuries from workplace substances.

Regarding the issues of disability and the periods of disability, an employee is entitled to income benefits to compensate the employee for a compensable injury. Article 8308-4.21. The 1989 Act defines "compensable injury" as one that "arises out of the course and scope of employment for which compensation is payable under the Act." Article 8308-1.03(10). An employee is entitled to temporary income benefits where he has sustained disability and has not reached maximum medical improvement. Article 8308-4.23. "Disability" is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). 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. Claimant also complains on appeal of a finding to the effect that his medical history indicated he had medical problems to which the general public was exposed. Since this finding is unnecessary to support the conclusion that claimant did not sustain a compensable injury on (date of injury), we need not further address such finding. *See* Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992. Except for such finding, the other challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge