APPEAL NO. 93679

On July 7, 1993, a contested case hearing was held in (city), Texas, with (Hearing officer) of presiding. The issue determined at the contested case hearing was whether appellant (claimant) sustained a compensable heart attack in the course and scope of his employment with (employer). The hearing officer determined that the claimant had not sustained a compensable heart attack according to the criteria set forth in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.15 (Vernon Supp. 1993) (now recodified as TEX. LAB. CODE ANN. § 408.008) (1989 Act).

The claimant has appealed, arguing seven points of error where he contends that the evidence varied from or did not support the hearing officer's findings of fact or conclusions of law. The claimant asks for reversal or remand to be given the opportunity to depose claimant's treating doctor on written questions. The respondent (carrier) responds with its own assignments of error to findings of fact which conclude that claimant was exposed to harmful vapors while working, or which conclude that claimant's pre-existing heart condition and disease were not substantial contributing factors to his attack. The carrier appeals a conclusion of law which appears to contradict other conclusions that the heart attack was not compensable. Each side responds to the other's appeal.

DECISION

We affirm the hearing officer's decision as reformed.

The claimant, who was 27 years old at the time of his heart attack on (date of injury), testified that he worked very long hours for(employer), performing cleaning jobs. He stated that he worked from 60-90 hours a week. From his testimony and that of a coworker, (Mr. O), it was clear that much of this work took place during the early morning hours.

Claimant testified that around midnight and the early morning hours of (date of injury), he was on a crew working at (employer). A task that he and Mr. O did that night was to clean and polish a vent hood. The polishing substance was something that his supervisor had recently acquired and told him to use when the regular cleaner was used up. Claimant said that the employer did not furnish respirators, and indicated that they had paper respirators such as those used to protect one from breathing in dust.

There was no testimony from anyone about what, if any, reaction or feelings the claimant had while polishing the vent hood. The claimant said that he then went outside and cleaned a large parking lot for about three hours, which involved the use of a caustic substance, a broom, a scrapper, and a high pressure hose.

Claimant testified that when he was driving to the next job, he began to feel shaky, went into a spasm, and ended up on the median of the highway feeling disoriented. He called his office, reported that he was sick, and returned there and was taken from there to the hospital.

Claimant denied that he had ever had heart problems before or been told he had any heart disease. Hospital records of an angiograph reported that claimant had a myocardial infarction and had only a 30% occlusion; the report ultimately concluded that claimant had "mild coronary atherosclerotic obstruction with positive ergovine provocation consistent with a vasospastic component."

Claimant's medical history indicated past cocaine use, recent amphetamine use, and heavy smoking. His admission record also noted "[h]e smoked a joint the night before." While claimant did not specifically address this statement, he generally testified that the history was not accurate as to statements concerning recreational drug use and extent of smoking. Claimant's coworker Mr. O testified that claimant smoked around a pack to a pack and a half of cigarettes per day during the time they worked together. Although it was noted on a hospital record that claimant's father had a heart attack in his 50s, no other significant family history was noted. Claimant did not have high blood pressure. His treating doctor at the hospital was (Dr. E).

A June 30, 1993, letter to claimant's attorney from Dr. E, of Cardiac Consultants, P.A., stated in pertinent part that:

> As you are aware, the circumstances of his employment required his constant exposure for long periods of time to substances which have been associated with hypoxia and cardiac arrhythmias. This was done evidently in such a demanding way as to require a great deal of sleep deprivation. . . . [i]n essence, I believe Mr. M's acute myocardial infarction was directly related to the circumstances of his employment on the morning of June 30, 1993.

Dr. E also noted that he believed the cause of the myocardial infarction was indicated as "a very strong vasospastic component," as indicated by a very positive ergovine provocation. The evidence also indicated that claimant had a syncope episode in November 1992, for which he was being consulted by a neurologist. Dr. E speculates that "it well may be that this problem is also related to his exposure to the toxic chemicals involved in his work." The carrier objected to Dr. E's June 30th letter on the basis that it did not outline the basis for the doctor's opinion or information regarding claimant's work conditions, and was not a medical report.

A Material Safety Data Sheet for the substance that claimant testified was used for the vent hood polish was Misty Stainless Steel Cleaner. The substances contained in this are listed as petroleum distillates, methyl chloroform, and isobutane/propane blend. Health Hazard Data states:

Excessive inhalation of vapors can be harmful and may cause headache, dizziness,

asphyxia, anesthetic effects and possible unconsciousness.

Chronic effects are noted as "[e]ffects due to excessive exposure to the raw materials of this mixture" and also "[m]ay cause cardiac abnormality, liver abnormalities, lung and kidney damage."

WHETHER CLAIMANT PROVED A CONNECTION BETWEEN CHEMICAL EXPOSURE AND HIS HEART ATTACK

This case, notwithstanding the fact that the injury is also a heart attack, can initially be analyzed as can any claim where it is argued that injury results from the exposure to toxic chemicals. We have stated before that the causal connection between inhalation of a work place chemical and an injury must be established by medical evidence where it is beyond common experience or knowledge. Texas Workers' Compensation Commission Appeal No. 92427, decided September 23, 1992. The evidence must rise to a level of reasonable medical probability, as opposed to possibility, speculation, or guess. Schaefer v. Texas Employers' Insurance Ass'n, 612 S.W.2d 199 (Tex. 1990).

The hearing officer discussed the fact that Dr. E's June 30, 1993, letter "did not rise to the level of expert testimony" but the considerations outlined by the hearing officer for rejecting the letter as persuasive go to the failure of the evidence as a whole to demonstrate, first, that the chemical in question could have effects that could cause a heart attack, and, second, that it was probable that such inhalation (even given the three hour break in time between exposure and heart attack) did cause the heart attack.

For these same reasons, we tend to agree with the claimant's point of error that the hearing officer has no basis for her factual finding that any effects of claimant's exposure to the cleaner was negated by cleaning the driveway and exposure to fresh air because the negation of any ill effects seem to be outside the ambit of common experience as well. This is harmless error, however, in light of the failure of the evidence to prove the threshold proposition that the specific injury was likely caused by exposure to the chemical in the first place.[1]

[1]The hearing officer's finding, appealed by the carrier, that claimant was exposed to vapors "which, if inhaled, are harmful" is, as a generic observation only, supported by the Material Safety Data Sheet. However, as is clear in light of our discussion of the need for probative medical evidence and the hearings officer's decision as a whole, this cannot be interpreted as a finding that claimant was, in fact, harmed by such inhalation.

WHETHER THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT DID NOT SUSTAIN A COMPENSABLE HEART ATTACK WAS ERROR

We have noted and discussed before the stricter standards that the 1989 Act imposes for compensability of heart attacks. *See* Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991. Section 408.008 (formerly Article 8308-4.15) provides that a heart attack is a compensable injury only if:

(1)the attack can be identified as:

(A)occurring at a definite time and place; and

(B)caused by a specific event occurring in the course and scope of employment;

(2)the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and

(3)the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

When the heart attack statute is juxtaposed with the failure of claimant to prove a causal connection between the inhalation and his heart attack, the hearing officer's conclusion that claimant failed to prove a specific event at work caused the heart attack is sufficiently supported by the evidence. Hard work and stress will not, in and of themselves, support compensability of a heart attack. *See* Texas Workers' Compensation Commission Appeal No. 92212, decided July 6, 1992.

Under the 1989 Act, the claimant must prove all elements set forth in Section 408.008 (formerly Article 8308-4.15) before a heart attack will be compensable. Separate and apart from analysis of work compared to any pre-existing heart disease (of which there is frankly scant evidence here[2]), the hearing officer's decision may be affirmed because there is sufficient evidence to support her finding that claimant failed to prove a specific event occurring in the course and scope of employment. The hearing officer evidently concluded that the claimant failed to prove that the inhalation of vapor was even a factor, let alone a substantial contributing factor, of his heart attack.

[2]We agree with claimant that there is no support in the record for the hearing officer's Finding of Fact No. 8 that claimant had experienced chest pains for several weeks. However, this is harmless error in light of the hearing officer's specific finding that claimant's heart attack was not caused by a pre-existing heart condition.

CONCLUSION OF LAW NO. 4

The carrier has appealed Conclusion of Law No. 4, which states:

> The claimant established by a preponderance of the evidence that: he sustained a heart attack which was an injury, as defined in Art. 8308-1.03(27) and Art. 8308-4.15 V.T.C.S. while in the course and scope of his employment, as defined in Art. 8308-1.03(12) V.T.C.S.

This conclusion would, on its face, appear to establish compensability. In light of the decision as a whole, however, it is no more than inartful. We therefore reform the conclusion to be consistent with the rest of the decision, striking the portion of the phrase beginning with "and Art. 8308-4.15 V.T.C.S. . ." to the end of the conclusion.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Article 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer's findings relating to claimant's smoking or recreational use of drugs are supported by the evidence, as is her finding that claimant did not experience a stressful situation (which we opine is directed at the conclusion of law relating to the lack of an emotional or mental stimulus as a factor in the heart attack). The hearing officer's conclusion that claimant's pre-existing heart condition and disease was not a substantial contributing factor to his attack is also supported by the evidence.

For these reasons, we affirm the hearing officer's decision, having reformed Conclusion of Law No. 4 as stated above.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge