APPEAL NO. 92148
FILED MAY 29, 1992

On March 13, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. Mr. R determined that the claimant, WC, the respondent herein, sustained an injury on (date of injury), in the course and scope of his employment as a maintenance worker for. (employer), and that he was not intoxicated at time of injury within the meaning of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.03(30)(A) (Vernon Supp. 1992) (1989 Act). He ordered that the appellant insurance carrier provide workers' compensation benefits in accordance with the 1989 Act and associated rules of the Texas Workers' Compensation Commission.

The appellant raises several points of error. Appellant argues that there is no evidence to support certain findings of fact and conclusions of law, as well as the order, of the hearing officer, or that such findings, conclusions, and order are against the great weight and preponderance of the evidence. The appellant further complains that the hearing officer, in finding that respondent sustained an "injury" on (date of injury), adjudicated a matter that was not in issue at the benefit review conference and therefore not before the hearing officer. The appellant argues that certain findings and conclusions, and the decision and order, of the hearing officer are arbitrary and capricious in that they are not supported by substantial evidence. The appellant argues that the hearing officer abused his discretion because there was no credible evidence that respondent was not intoxicated at the time of his injury. Finally, the appellant argues that the hearing officer applied the wrong burden of proof.

DECISION

Finding no error in the findings and conclusions of the hearing officer, we affirm his decision.

Respondent worked as a maintenance man for the employer, and on (date of injury), around 9:30 a.m., left his work location in a company car to get some keys made for the employer. At around 10:15 a.m., he was involved in an auto accident. A police report of the accident indicates that the investigating officer was unable to determine the facts contributing to the accident due to the different accounts given by the parties. There is nothing in the report to indicate that the officer suspected that respondent had been drinking or was impaired in any way. Respondent testified that he has filed a lawsuit against the other driver, who he states ran a red light, while on a car telephone, and broadsided his vehicle.

Following the accident, respondent called another employee, (BR), to pick him up. She eventually picked him up and returned him to work. Respondent then reported to the employer and was taken to a clinic the employer recommended. A supervisor, (Mr. J), told respondent he smelled alcohol on his breath and directed that blood be drawn to test for alcohol. Respondent expressed concern both to a coworker, (AK), and to a nurse at the clinic, that the test might be affected by some social drinking he had done the night before,

when he drank about five to six beers, concluding around 9:00 p.m. Respondent stated that he had not been drinking on July 11th at all, and that his parents did not allow drinking in their home, where he lived.

A blood sample was drawn from respondent at around 2:15 p.m. on (date of injury). According to a report of the results, it indicated an ethanol level of 57 mg/dl. was found.

Mr. J, the human resources director for employer, stated that when respondent was in his office reporting the accident, he smelled alcohol on his breath, and sent him to the clinic for medical treatment and collection of a blood sample, because he suspected he had been drinking. He stated that respondent was generally about six feet away from him.

BR testified at the hearing by telephone, and stated that she initially was unable to find respondent and returned to the office. Respondent called again and she picked him up. She stated that his speech was normal, and he did not stumble. She stated that she did not notice anything unusual about him, although he seemed shocked and nervous relating to the accident. She stated that she did not know whether respondent was impaired or intoxicated.

AK, who was acting supervisor of respondent on July 11th, had limited opportunity to observe respondent. Based upon this, he noted nothing unusual about respondent's behavior. He stated that respondent told him he had five beers and five mixed drinks the night before.

(Dr. S) testified through deposition on written questions. Dr. S is medical director of the laboratory that analyzed respondent's blood sample. He stated that he has interpreted thousands of blood samples of all kinds. Based upon respondent's test, he stated that 57 mg/dl would be a mild level of intoxication. Dr. S was asked to assume that respondent had consumed an unknown quantity of alcohol the night before, had been involved in a car accident at 10:30 a.m. on the day the sample was taken, and had nothing to drink the date of the accident, and then asked to conclude whether respondent would have been intoxicated[1] at the time of the accident. Dr. S replied that "assuming no ingestion of alcohol after 10:30 a.m., normal liver function, a weight of 155 lbs., I believe he was intoxicated." When asked to opine about respondent's blood alcohol level at 10:30 a.m., Dr. S answered "assuming a volume distribution of 0.54 l/kg and an average metabolic rate of 124 mg/kg hr., I believe his blood alcohol concentration exceeded 100 mg/dl."

Respondent stated that he weighed 170 pounds on the date of the accident. A medical report in the record dated August 14, 1991, indicates that he weighed 148 pounds on that date.

[1] Using the definition of "intoxication" set forth in Art. 8308-1.03 (30)

Appellant's contention that the hearing officer's findings that an "injury" occurred are beyond the scope of the benefit review conference, because the existence of an injury was not in issue, are not well taken. The issue of intoxication as a defense to appellant's liability applies only to absolve a carrier of liability for an "injury." Art. 8308-3.02(1). The contested case hearing is not a forum for determining traffic violations or matters not related to workers' compensation claims. *See* Art. 8308-6.01(b), 6.02(a). Further, the issue set forth in the benefit review conference report is "whether or not [respondent] was impaired by use of alcohol at the time of injury?" The attorney for appellant generally agreed with the issue, but additionally noted that "the issue in full is whether or not he was intoxicated and/or impaired as defined under the Texas Workers' Compensation Act." Evidence in the record, most of it admitted without objection from appellant[2], clearly establishes that the respondent was on a work-related errand at the time of the automobile accident and incurred damage to his body as a result.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. art. 8308-6.34(e) (Vernon Supp. 1992) (1989 Act). As such, he has considerable latitude and sole discretion to find facts from the evidence. His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In reviewing a "no evidence" point of appeal, we will consider only the evidence and inferences tending to support the determinations of the trier of fact, and disregard contrary evidence and inferences. Larson v. Cook Consultants, Inc., 690 S.W.2d 567 (Tex. 1985). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, no writ). We do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). 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 claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred within the course and scope of employment. Reed v. Aetna

[2] Appellant did object to one doctor's report because it pertained to alleged disability, which appellant argued was not in issue at the hearing. The objection was overruled. "Disability" and "injury" are not synonymous under the 1989 Act. See Art. 8308-1.03 (10), (16) and (27).

Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). When evidence is presented that raises an issue that an employee was intoxicated at the time of his injury, the claimant then has the burden of proving that he was not intoxicated. March v. Victoria Lloyd's Insurance Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied); Texas Employers' Insurance Ass'n v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1948, writ ref'd n.r.e.). In other words, the burden shifts back to the claimant, but only after the insurance carrier presents sufficient evidence to raise a defense under Art. 8038-3.02. The discussion contained within the hearing officer's decision clearly indicates that he applied the burden of proof set forth in the case law, and that he shifted it back to claimant, contrary to what appellant asserts. The hearing officer was not required to accept medical evidence as conclusive, but was entitled to weigh the opinion of Dr. S in determining whether, in fact, an alcohol blood level of 57 mg/dl. four hours after the accident meant that respondent had a level in excess of 100 mg/dl. at the time of injury, and, as finder of fact, could determine that respondent did not. *See* Texas Employers' Insurance Ass'n v. Washington, 437 S.W.2d 340, 346 (Tex. Civ. App.-Dallas 1969, writ ref'd n.r.e). In the absence of a blood test that established as fact (not opinion) that, at the time of the injury, the respondent actually had a "state of having an alcohol concentration of 0.10 or more," the hearing officer properly analyzed the intoxication issue in terms of whether respondent did, or did not, have "the normal use of mental or physical faculties." Notwithstanding appellant's assertion that the hearing officer should not be concerned with the extent to which Dr. S explained his formula, that is precisely what a trier of fact must evaluate, when asked to analyze an expert opinion of what might have been four hours prior to the data from blood test.

After reviewing the record, we are of the opinion that there is sufficient probative evidence to support the findings and conclusions of the hearing officer relating to the issues before him. The testimony of the respondent, that he had the normal use of his physical and mental faculties at the time of the accident, and his statement that he had nothing to drink since the evening before, are enough to defeat the appellant's contention that there was "no" evidence to support the hearing officer's findings, conclusions, and order. In addition, the hearing officer considered the fact that a police officer on the scene of the accident failed to cite respondent for an offense related to alcohol, as well as the fact that two coworkers did not detect slurring of speech or abnormal conduct on the part of the respondent. Other than opinion based on the blood test, and the contention of Mr. J that he smelled alcohol, the appellant offered no other evidence to show that, at the time of the accident, the respondent did not have normal use of his mental or physical faculties.

We would note that the Administrative Procedures and Texas Register Act, TEX. REV. CIV. STAT. ANN. Art. 6252-13a (APTRA), does not apply to contested case hearings and judicial review of those hearings. Art. 8308-6.01, 6.32, 6.62. Consequently, the hearing officer's decision is not subject to scrutiny under the "arbitrary and capricious" or "abuse of discretion" standards set forth in APTRA, § 19(e). Even were we to apply such a review, we would observe that the hearing officer did not abuse his discretion as finder of fact, nor was his decision (and findings and conclusions complained of) arbitrary and

capricious, as there was substantial evidence from which he could conclude, as he did, that the respondent was not intoxicated as that term is defined by the 1989 Act.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge