APPEAL NO. 92680

A contested case hearing (CCH) was held on October 5, 1992 and continued to November 9, 1992 with the record being closed on receipt of the transcript. The CCH was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent, claimant herein, was not intoxicated at the time of his injury on (date of injury) and benefits were to be paid under the Texas Workers' Compensation Commission Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act).

Appellant, carrier herein, contends the claimant failed to meet his burden of proof and that the hearing officer's decision and order are against the great weight and preponderance of the evidence and asks that the decision and order be reversed. Claimant did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The sole issue that was not resolved at the benefit review conference and framed and agreed to by the parties at the CCH was: "Whether claimant's (date of injury) injury occurred while he was in a state of intoxication."

Claimant was employed as a "loader" by (employer), employer, on (date of injury). While carrying a bag of soil, claimant tripped over an empty pallet and fell backwards. Claimant testified he suffered a fractured vertebrae and pain in his head as a result of the fall. The circumstances surrounding the fall and disability, if any, are not at issue in this case, the only issue being as stated above.

Claimant testified he had asked off work on (date of injury) because his daughter was in the hospital. At the employer's request, however, claimant reported for work at 4:30 p.m., clocked in and went to the "corral" to assist customers in loading merchandise into their cars. Claimant's testimony was he assisted at least 20 customers from 4:45 p.m. to 6:30 p.m. before he tripped and fell.

Three of carrier's witnesses testified that they smelled alcohol on claimant's breath immediately after he fell and that claimant became uncharacteristically agitated and aggressive while being interviewed after his fall. Claimant denied the use of alcohol on (date of injury), offered to take a breathalyzer or blood test and stated he mistakenly thought the employer's store manager had called him a "fool" (the manager stated he was talking about the paging system) and was unduly insensitive and lacking in concern for claimant's injury. The testimony was that when the store manager's remark was explained, claimant apologized. One of carrier's witnesses who drove claimant home on (date of injury) testified that although he smelled alcohol on claimant's breath, claimant did not appear to be intoxicated and had the normal use of his physical and mental faculties. Claimant testified,

and it was undisputed, that there had been no complaints about claimant from any of the customers or coworkers regarding claimant on the day of the injury. The carrier argued at the CCH, and on appeal, that claimant was intoxicated on the day in question and that carrier should be relieved of liability for this injury. Carrier, in support of its position, cited Texas Workers' Compensation Commission Appeal No. 92018, decided September 19, 1992.

Article 8308-3.02(1) establishes as an exception that the carrier is not liable for compensation if "the injury occurred while the employee was in a state of intoxication." Intoxication is defined in Article 8308-1.03(30)(A) as "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of: (i) an alcoholic beverage, as that term is defined . . ." Carrier relies, as its evidence of intoxication, on three witnesses who smelled alcohol on claimant's breath immediately after the injury and the uncharacteristically different "agitated and aggressive" behavior of claimant as circumstantial evidence of claimant's intoxication. The hearing officer pointed out at the CCH, and carrier argues on appeal, that the claimant has the burden of proof, by a preponderance of the evidence, that claimant was not intoxicated at the time of his injury.

The 1989 Act (Article 8308-6.34(e)) provides, and we have repeatedly held, that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The hearing officer in the instant case could consider claimant's denial of the use of alcohol on the day in question, his offer to take a breathalyzer or blood test, and claimant's misunderstanding of employer's reference to "fool" as applying to him, as grounds for claimant's "loud," "aggressive," "irate," and "defensive" temperament. Further, one of carrier's own witnesses testified that he did not believe claimant was intoxicated and in response to the hearing officer's question, using the terminology of the 1989 Act, stated that claimant had "the normal use of his mental and physical faculties." Consequently there is sufficient evidence to support the hearing officer's determination that claimant was not in a state of intoxication on (date of injury) when the injury occurred.

Carrier cites Appeal No. 92018, *supra*, as authority that it should prevail in this case. We note in Appeal No. 92018, the carrier had laboratory proof from the employee's urine test that the employee had used an intoxicant, and had unobjected to expert testimony involving the employee's drug intoxication. In that case we stated, "[r]ecognizing the generally accepted proposition that a person under the influence of alcohol can be observed and detected with little or no particular scientific knowledge, the same is not necessarily true in drug situations." In the instant case no breathalyzer or blood test was taken and no scientific proof of intoxication was presented. Recognizing that after the carrier had presented circumstantial evidence of intoxication the burden of proof had shifted to claimant to prove he was not intoxicated within the definition of the 1989 Act, it still remains within the province of the hearing officer, having heard and observed the testimony and demeanor of the witnesses, to decide if claimant had met the burden of proof. The hearing officer had all the testimony carrier cites in its appeal available at the CCH. As discussed above, the

hearing officer found the claimant not to have been intoxicated as defined by the 1989 Act at the time of his injury. Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb the decision. Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, would we be warranted in setting aside her decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge