APPEAL NO. 93002

At a contested case hearing held in (city), Texas, on November 9, 1992, the hearing officer, found that respondent (claimant) was not intoxicated on or about (date of injury), and that his injury on or about that date (falling from mezzanine to floor below) was in the course and scope of his employment with employer). Appellant (carrier) requests our review urging that the hearing officer's finding on intoxication was against the great weight and preponderance of the evidence in that he disregarded the unrebutted opinion of a toxicologist on claimant's blood alcohol level at the time of the job-related accident. Claimant filed no response.

DECISION

Finding the evidence sufficient to support the challenged finding, we affirm.

Claimant testified that on the evening before the accident, which occurred on (date of injury), he attended a friend's birthday party and between 7:00 p.m. and 9:30 p.m. consumed ten to twelve beers. He returned to his residence and went to bed at around 10:00 p.m.. He arose at 6:00 a.m. the next morning, showered, and at around 7:00 a.m. met his foreman, Mr A, who drove him to the job site. He denied having used any marijuana the evening before and denied being hungover or using any alcohol or marijuana on the morning of the accident. At the job site, Mr. A assigned claimant the job of drilling holes through a steel plate and into a solid cinder block wall around a door on the mezzanine floor of a building for the placement of reinforcement steel bars. In order to drill the holes at the top of the doorway, claimant had to stand on his toes and drill over his head reaching through some scaffolding. He described the drill as weighing between 30 and 40 pounds and the area he was standing on as "around a foot." While drilling a hole, the bit suddenly became stuck but the drill continued to rotate throwing claimant off the mezzanine floor. He fell approximately 17 feet to the floor below and suffered serious injuries including several teeth being knocked out, a broken jaw, a comminuted fracture of an elbow, and a cranial subdural hematoma which required surgery. He said he had no recollection of events after falling until he woke up in the hospital and that he could barely talk because of his pain and later because of his jaw being wired.

Mr. A testified over the telephone that claimant was an excellent worker, that on the morning of the accident he drove claimant to work in a small truck and would have smelled alcohol on claimant's breath but smelled none, and that he saw no sign of claimant's being intoxicated. According to Mr. A, claimant appeared perfectly normal, and he said, "I would never let any employee work if I thought that they were under the influence of any drug or alcohol." In his opinion, claimant was not intoxicated. He also said, "I would never have let him up there if I thought he had any alcohol in his system." He described the drill as having a lot of horsepower and said that if a worker were off balance when the drill bit got stuck, it would pull the worker down, and that a worker would have to release the drill immediately when the bit became stuck to avoid being pulled down. He said that in the area claimant was working there was only about twelve inches to the drop off to the floor

below. When claimant fell, Mr. A went over to him and took his vital signs. He said he was close to claimant's face and smelled no alcohol. He also said that claimant could barely talk because of the pain.

Apparently claimant was taken first by ambulance to the emergency room (ER) of the (BAMC) in (city) and later to the (Hospital) where his operations were performed. The medical records introduced by carrier to raise the defense of intoxication indicated that claimant arrived at the BAMC by ambulance at 9:45 a.m. and a handwritten history stated, in part, "+ history of ETOH and marijuana use this a.m." According to the carrier's toxicologist's report, ETOH is the abbreviation for ethyl alcohol, the "beverage" alcohol. Claimant could not account for that entry, insisting he had consumed only the ten to twelve beers the preceding evening as he had earlier testified to. He conceded that while he would have honestly responded to doctors in view of his very serious condition, he had no recall of talking to anyone before he awoke in the hospital in the presence of his girlfriend and that at that point his jaw was wired and he was in a great deal of pain and could barely talk. The medical records indicate that while claimant was initially awake and alert upon arrival at the ER, he was there observed to have unequal and unresponsive pupils, multiple episodes of bradycardia, and decreasing mental status while in the ER. On another page of the medical records introduced by carrier, apparently from the BAMC but in obviously different handwriting, there appears a notation that "pt denies recent ETOH before" and the balance of the note is illegible. The parties did not specifically mention that entry at the hearing. On another page of the BAMC records are the entries, "+ETOH - level .73 in ER," and "+drug use -admits to smoking marijuana this am." On another page of the BAMC records are notations referencing certain lab test results including what appears to be "ETOH 7.3."

Based upon these records, carrier's toxicologist, Mr M, rendered a report which stated that because claimant arrived at the emergency room at 9:45 a.m., his blood sample was "probably drawn at 10:00 a.m. or later" because the procedure would never take less than 15 minutes after arrival, normally takes 30 to 45 minutes, and in a hospital could take "an hour or so." The report then states the following:

> If the sample was drawn at 10:00AM, which is 1 1/2 hours after the accident, the subject would have burned 0.03% alcohol from his blood after the accident. If this is added back it shows that his blood alcohol was approximately 0.103% at the time of the accident.
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> . . .
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> If [claimant] had cannibinols (from marijuana) in his blood at the time of the accident the marijuana would enhance the alcoholic intoxication in an additive way, certainly would contribute significantly to the impairment of [claimant] and the loss of the normal use of his mental and physical faculties.

Based upon my review of the medical records indicating alcohol use, it is my opinion that [claimant] was intoxicated to a point of not having the normal use of his mental or physical faculties at the time of the accident.

The hearing officer discussed his view of carrier's evidence as follows:

There is no doubt that the emergency room report shows Claimant's blood alcohol level to be .73. This is highly suspect. Mr. M, in his report, does not provide the level from which he made his computation. He determines Claimant burned 0.03% alcohol from his blood after the accident and that his blood alcohol was approximately 0.103% at the time of the accident. In addition to this being an approximate figure, based upon an estimate of time, it means Mr. M was using .073% as the basis for his computation. Although this figure favors Claimant, the facts are too indefinite to be relied upon. Also, considering Claimant's condition upon arrival at the emergency room, and without additional facts, little weight is given to his admission to using marijuana.

Article 8308-3.02 provides that a carrier is not liable for compensation if:

(1)the injury occurred while the employee was in a state of intoxication; . . . .

The definition of intoxication in Article 8308-1.03(30), for purposes of this case, is:

(A)the state of having an alcohol concentration of 0.10 or more, where "alcohol concentration" has the meaning assigned to it in Article 6701*l*-1, Revised Statutes; or 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 in Section 1.04, Alcoholic Beverage Code;

(ii)a controlled substance or controlled substance analogue, as those terms are defined by the Texas Controlled Substances Act (Chapter 481, Health and Safety Code); . . . .

We have previously observed that in the absence of evidence to the contrary courts will presume sobriety, but once the intoxication is sufficiently raised by the evidence, the burden shifts back to the claimant to prove sobriety. Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992; Texas Workers' Compensation Commission Appeal No. 92148, decided May 29, 1992. We have also recognized that

scientific reports and expert testimony can raise the issue of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991.

In this case, the hearing officer obviously determined that while the intoxication defense was raised by the toxicology report, the only evidence offered by the carrier, the claimant nonetheless met his burden of proving he was not intoxicated through his testimony and that of his foreman, when considered along with what he considered to be the dubious validity of the carrier's toxicology report. Although the toxicology report referenced and had attached eight pages of medical records, which contained a clear notation on one page that the ETOH was ".73" and a notation on another page that the ETOH was what appeared to be "7.3," those records did not appear to indicate whether those alcohol levels were measured in claimant's blood, urine, or breath. TEX. REV. CIV. STAT. ANN. art. 6701*l*-1 defines "alcohol concentration" in terms of grams of alcohol in milliliters of blood and urine, and in liters of breath. However, the toxicologist and the parties treated the evidence as if it was understood that the ETOH measurements referred to blood levels. As the hearing officer noted, to opine that claimant's blood alcohol level at the time of the accident was 0.103%, the toxicologist would have had to extrapolate that percentage from a blood alcohol level of 0.073% in the specimen drawn from claimant at some unknown time in the ER. However, the medical records clearly indicate a blood alcohol level of ".73," which the hearing officer aptly noted as "highly suspect," and on another page less clearly indicate a level of "7.3," and the toxicology report does not state the level used as the basis for the extrapolation.

In our view, there is sufficient evidence to support the hearing officer's finding that claimant was not intoxicated from the effects of either alcohol, marijuana, or both, at the time of his injury. And, the evidence contrary thereto is not the great weight and preponderance of evidence which would render the finding clearly wrong or unjust. The only evidence regarding marijuana use was claimant's denial of its use and indications in the medical records that claimant may have apparently conceded its use in the ER. Certainly, no evidence of an amount used, nor of blood or urine levels of marijuana metabolites, was adduced. As the fact finder, the hearing officer could and did view the toxicology report as inconclusive, and could consider and credit claimant's testimony and that of his foreman that claimant manifested no impairment of his mental or physical faculties at the time of the accident. *See* Texas Workers' Compensation Commission

Appeal No. 92148, *supra*. We do not substitute our judgment for that of the hearing officer where, as here, the challenged finding is supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged finding is not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge