APPEAL NO. 93983

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01, *et seq*.) On September 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) was not intoxicated when injured on (date of injury). Appellant (carrier) asserts that the great weight of the evidence shows that claimant was intoxicated in that experts testified that claimant had a .053% blood alcohol level at approximately the time of the accident rendering him intoxicated. Claimant replied that the hearing officer's decision should be upheld.

DECISION

We affirm.

Claimant worked for (employer) and had travelled to (city) County to deliver a bid. A number of bids were opened at a 2:00 p.m. meeting with the local school district. He had eaten a bag of potato chips before the meeting and testified that he left at approximately 2:45 p.m.; he then observed that it could have been as late as 3:00 p.m. He proceeded back to his office in (city), but stopped after crossing the (city) County line and bought a six pack of cold beer. He testified that a single beer was not available so he bought a six pack. He then proceeded down Highway 90 to (city) and ran into the back end of a flat bed truck sustaining multiple fractures, many to the head. He does not recall the accident itself, but states that he only had one beer and that he was not impaired in his driving.

Upon being taken to the hospital, he was found to have a percent plasma ethanol level of .027%. This level according to the evidence was drawn at approximately one and one-half hours after the accident, said to be at about 3:35 p.m. (Dr. C) testified for the carrier that such a finding would indicate approximately .053% level of alcohol at the time of the accident. He added that such a level would cause claimant not to have the normal use of his mental or physical faculties, which by definition meant that he was intoxicated. He added that there is scientific backing for concluding that impairment occurs when the subject is found to have .05% blood alcohol.

(Dr. J), an accident reconstruction expert, testified for the carrier that claimant's inattention, "most probably promulgated by alcohol" caused the accident. There were no visibility problems, no braking, and the evidence showed no appreciable steering attempt to avoid the accident. He believed that reaction time would be increased by one-third with a .05% level of alcohol in the blood. The collision was straight on with the front of claimant's car hitting the rear end of a flat bed truck. Claimant was estimated to have been traveling 65 to 70 miles per hour.

(Dr. F) testified for the claimant. He testified that a normal rate for "disappearance" of alcohol from the blood would include 20 mg/dl/hr (milligrams per deciliter per hour), but added that the range for disappearance includes the rate of 15 mg/dl/hr. If claimant's blood disappearance occurred at the rate of 15, then the level of .027% would not amount to as much as .053% at the time of the accident. In addition, the .027% could vary by as much

as .005% in either direction because of the variability of the test itself, so that the reading of .027% could actually be .032%, or .022%. If the reading were .022%, this too would reduce the level of .053% that had been extrapolated as the probable level at the time of the accident. Dr. F also discussed a person's cycle of alertness during the day and opined that a person at a low cycle would have been impaired more than would a person at a high cycle. Dr. F thought that the facts supported claimant's assertion of having had only one beer. He concluded that the alcohol level indicated that claimant was in the normal range of his ability to drive.

Dr. C stated that the disappearance rate could take place in an individual at the rate of 15 to 25 mg/dl/hr and that he had used 20 in arriving at his opinion of .053% at the time of the accident. He agreed that the test itself could vary by .005% to indicate a possible .022% to .032%, when reported as .027%.

The statement of (RG) indicates that he drove the flat bed truck that claimant hit. At some point he saw a beer in claimant's hand that was thrown out of the car. After the accident, he came back to claimant's car to assist him; he added that he saw five more beers on the floorboard. When asked if they were "open or closed", he replied that they were closed. RG had entered the highway going in the same direction as claimant on the right side; he then moved over to the left lane in a short period of time to exit. He was traveling approximately 45 to 30 miles per hour (decreasing his speed) when hit. In reply to the question, "(h)e was behind the witness and then he came around the . . . the guy came around him, around the witness and came into the left hand lane?", claimant answered, "uh huh. Yes ma'am."

No issue was raised as to whether claimant was in the course and scope of his employment when driving to (city), except for the issue of intoxication. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She could choose to believe RG when he said that other containers of beer in claimant's vehicle were unopened. She could give weight to claimant's testimony when he said his faculties were not impaired. She could believe the opinion of Dr. F as opposed to the opinions of Dr. J and Dr. C in concluding that claimant was not intoxicated. *See* Atkinson v. U.S. Fidelity Guaranty Company, 235 S.W.2d 509 (Tex. Civ. App. -San Antonio 1950, writ ref'd n.r.e.). Dr. C and Dr. F did not disagree with each other in the way the blood alcohol test was done, the possible variation in testing, the arithmetic, the fact that disappearance rate could vary in an individual with no one knowing claimant's disappearance rate, or even that eating greasy food prior to drinking can slow the entry of alcohol into the blood. Dr. C and Dr. F varied in their conclusions as to how much was consumed with Dr. F saying one beer and Dr. C saying that if only one beer had been consumed there would be no showing of alcohol at the time of the sample. In addition, Dr. C was emphatic in saying that claimant would not have the normal use of his mental or physical faculties with a .053% level of blood alcohol, whereas Dr. F said that claimant had use of his faculties within their normal range.

Section 401.013 of the 1989 Act provides, in part, that intoxication means:

(1)having an alcohol concentration as defined by Article 6701l-1, Revised Statutes, of 0.10 or more; or

(2)not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of:

(a)an alcoholic beverage, as defined by Section 1.04, Alcoholic Beverage Code;

The evidence of RG, claimant, and Dr. F sufficiently supports the findings of fact that claimant had consumed one beer and that claimant had the normal use of his mental and physical faculties. The findings of fact sufficiently supported the conclusion of law that claimant was not intoxicated at the time of the accident on (date of injury). Having determined that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge