APPEAL NO. 94206

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 18, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was whether the respondent (claimant herein) was in a state of intoxication at the time the injury took place, thereby relieving the appellant which was stipulated to have been certified as self-insured (self-insured) from liability. The hearing officer, finding that at the time of the injury the claimant had the normal use of her mental and physical faculties, concluded that the claimant was not intoxicated at the time of the injury. The self-insured contends that it presented sufficient evidence of intoxication to shift the burden of proof to the claimant to prove sobriety and that the claimant failed to meet her burden. The self-insured requests that we reverse the decision of the hearing officer and render a decision that the self-insured is relieved of liability in regard to this claim because the claimant was intoxicated. The claimant argues the decision of the hearing officer was supported by sufficient evidence and that the claimant presented sufficient evidence to establish that she was not intoxicated at the time of her injury.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The claimant had worked for the self-insured, a retail outlet chain, for 15 years and was an electronics department manager at the time of her injury. On (date of injury),the claimant was injured when she and (Ms. F), another employee, were moving a television from the stockroom to the sales floor, and the claimant slipped in some infant formula which had spilled from a baby's bottle which was lying on the floor. The claimant testified that she fell backwards hitting her head on the floor.

Apparently, a customer in the store, (Ms. P), began to assist the claimant. About this time (Mr. S), the store operation's manager, and (Mr. W), the stores's loss control manager, came to the scene of the accident. Mr. S left to call an ambulance and to get a flashlight for Mr. P. When the ambulance arrived Mr. W testified that he followed it to the hospital and stayed with the claimant, as the store's representative, until a friend of the claimant's arrived at the hospital.

The claimant testified that on the evening of October 8, 1993, she ate between 5:00 and 6:00 p.m. The claimant stated that she did not eat again before she began her shift the next day at 1:30 p.m. The claimant did testify that between 11:00 p.m. and 3:00 a.m. on the evening of October 8 and into the morning of (date of injury) she drank with friends. The claimant testified that during this period she consumed three to four mixed drinks composed of brandy and coca-cola. The claimant testified that she went to bed around 4:00 a.m. and arose between 10:30 and 11:00 a.m. The claimant testified that she arrived to work around 1:30 p.m., and was scheduled to work from 1:30 to 10:30 p.m. The claimant

testified that she performed her normal duties without incident until she fell in the spilled formula as described earlier.

Ms. F testified that on (date of injury), the claimant, who was her supervisor, arrived at the store and performed her normal routine. Ms. F testified that she had sold a television to a customer, but needed to get the television from the storeroom. Ms. F testified that she and the claimant went to storeroom, moved televisions around to get to the proper one, and loaded the television onto a cart. Ms. F testified while they were moving the cart back to the electronics department, the claimant slipped and fell in the baby formula.

Ms. P testified that she was in the store having pictures taken for her daughter when she was told that someone had fallen and was dead. Ms. P testified that she was an "ECA." Exactly what this involves is unclear, although Ms. P insisted it requires a state license and allows a person to work in an ambulance and to render first aid.[1] In any case, Ms. P testified that she rushed to the location where the claimant was lying on the floor and began to render first aid, including questioning the claimant, advising her to remain still, looking into her eyes with a flashlight, taking the claimant's blood pressure, and performing a "hand squeeze" test. Ms. P testified that she smelled alcohol on the claimant and believed that she was intoxicated. Ms. P also expressed the opinions that the claimant could not have fallen head first, should not have slipped in the formula on the floor due to its position vis-a-vis the claimant, did not have a concussion, was exaggerating her complaints or "faking," and could not have lost consciousness during her fall. Ms. P's opinion as to intoxication appears to have been based on three factors--the smell of alcohol, claimant's bloodshot eyes, and Ms. P's experience at the scenes of automobile accidents and domestic violence.

Mr. S stated that he also smelled alcohol on the claimant's breath after the accident, and had in fact smelled alcohol on the claimant's breath earlier in the day before the accident, but had been too busy to report her for alcohol use. Mr. S did state that on two prior occasions he had smelled alcohol on the claimant's breath and had reported her to the store manager. Mr. S expressed the opinion that the claimant was intoxicated. He based his opinion on the smell of alcohol, his perception that she moved her arms more slowly than normally and the fact her eyes looked different or "dilated."

Mr. W also stated that he smelled alcohol on the claimant's breath. The medical reports of the claimant's hospital visit indicate that she had the odor of alcohol on her breath and that she reported "drinking last night."

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[1]Apparently to become an "ECA", Ms. P had attended a course or courses at a community college and had taken some sort of state examination. Ms. P's description of an "ECA" was that it was "below an EMT," which itself is below a paramedic (who according to her testimony can administer drugs). Ms. P testified that she had no degree and further testified that at the time of the accident and of her testimony was employed as a social worker, but had previously been employed by at least two hospitals, working in the emergency room and as a cardiac x-ray technician.

Section 406.032(1)(A) provides that an insurance carrier (which would include self-insured) is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Section 401.013 provides in relevant part as follows:

(a)In this subtitle, "intoxication" means the state of:

(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 . . .

A claimant need not prove he was not intoxicated as the courts will presume sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex Civ. App.-Eastland 1939, writ dism'd jugm't correct). However, when the carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove that he was not intoxicated at the time of injury. March v. Victoria Lloyds Insurance Co., 773 S.W.2d 785 (Tex. App.-Ft. Worth 1989, writ denied). In the present case, it is not clear from the hearing officer's opinion whether or not she found the self-insured presented sufficient evidence of intoxication to shift the burden of proving sobriety to the claimant. Even assuming that she did, we believe that there is sufficient evidence to support her finding that the claimant had normal use of her mental and physical faculties.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case the testimony of the claimant and Ms. F included evidence showing that the claimant had the normal use of her mental and physical faculties in that they both testified that on the day of the accident that she was performing her normal duties in a routine manner. The self-insured's evidence primarily consists of evidence from a number of witnesses that the claimant had the odor of alcohol about her person. To reverse the hearing officer on that type of evidence alone would be tantamount to finding that the odor of alcohol alone established intoxication as a matter of law. We decline to do so. Nor do we find the hearing officer bound to accept the opinions of Mr. S or Ms. P. The only reasons that Mr. S gives, besides the odor of alcohol, is that the claimant moved slow and her eyes looked different. Ms. P states a number of strong opinions concerning the claimant's intoxication as well as other matters, but does not articulate the underlying facts supporting such opinions to provide the great weight and preponderance of the evidence. Nor do we believe that the hearing officer was bound to accept the opinion of Ms. P as that of an expert, as the strength of her credentials failed to match the strength of her opinions.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge