APPEAL NO. 94247

This appeal arises under the Texas Workers Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on February 7, 1994, (hearing officer) presiding. The issues in the case were whether the claimant's injury was sustained in the course and scope of her employment, and whether her injury occurred while the claimant was in a state of intoxication. (A third issue, claimant's average weekly wage, was stipulated by the parties.) The hearing officer determined that the claimant's injury occurred in the course and scope of her employment, but that it occurred while she was intoxicated, thereby relieving the carrier for liability for compensation.

The claimant appeals the latter determination, contending that the test upon which a finding of intoxication was made was taken approximately one and one half hours after the accident and was a blood serum test as opposed to a whole blood test, which she contends is more accurate. She also notes the testimony of witnesses that she was not visibly intoxicated at the time of the accident. A later filed supplemental brief in support of claimant's request for review was untimely and will not be considered. *See* Section 410.202(a). In addition, to the extent that the carrier's response challenges the hearing officer's determination of the issue of injury in the course and scope of employment, it is untimely as an appeal and will not be considered as such. Texas Workers' Compensation Commission Appeal No. 92109, decided May 4, 1992. The response itself was timely and will be considered.

DECISION

We affirm the hearing officer's decision and order.

The facts of this case are thoroughly set out in the hearing officer's statement of evidence and will only be briefly summarized here. The claimant was an account executive for the (employer). It was undisputed that a sales meeting of account executives was held every other Wednesday. The meeting scheduled for the afternoon of (date of injury), was to be held on a houseboat on (city); by written announcement the managers involved asked staff to bring items of food and drink, for which they would be reimbursed by employer. Although no friends or spouses were invited to attend, it was conceded that the purpose of the gathering was more in the nature of a social event than a meeting, and that no business was transacted.

The boat on which the event was held went out on the water and the attendees swam, sunbathed, jet skied, ate, and drank. According to claimant and her supervisor, (Ms. B), there were no instructions issued by employer against diving off the top of the houseboat. Claimant participated in diving and swimming, as well as jet skiing.

After the houseboat returned to port that evening, around 6:30 or 7:00 p.m., the claimant dived from the top of the boat into the water, striking her head. She was airflighted

to Hospital and ultimately diagnosed with fractures at C6 and C5. She is now a quadriplegic, with only limited movement in her fingers and her upper extremities.

The claimant testified that during the afternoon she drank probably one glass of wine and ten beers, although she stated that she never felt intoxicated. Ms. B also testified, and two other co-workers gave statements to this effect, that claimant did not appear intoxicated. (The two co-workers noted claimant's expertly jetskiing during the day.) In addition, (Dr. N), the emergency room physician who treated claimant, stated in response to a deposition question that claimant did not appear to be intoxicated. At the hospital claimant's blood was drawn and the result of an alcohol serum test taken at approximately 8:30 p.m. was 183 mg/dl.

(Dr. E), chief of pathology at Hospital, testified that 183 mg/dl, equates to .183 g/ml, an amount that is greater than .10 g/ml. He also acknowledged that an alcohol serum test is different from a whole blood test and that the results of the former have been shown to produce results which are between eight to twelve percent higher. He opined, however, that unless claimant consumed additional alcohol between the time of her accident and 8:30 p.m. (which she did not, according to her testimony), her blood alcohol level could only have decreased and at the time of the accident was probably .183 or greater. In answer to a question on cross examination he said that it was "extremely unlikely if not impossible" for someone to have had a .09 whole blood alcohol level and a .183 level one and one-half hours later.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The hearing officer found that the claimant was intoxicated at the time of her injury, citing Section 401.013. That portion of the 1989 Act provides in pertinent 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 . . .

Article 6701l-1 defines alcohol concentration as the number of grams of alcohol per 100 milliliters of blood.

This panel has noted that under the new standard articulated in the 1989 Act, an alcohol concentration of 0.10, standing alone, is dispositive of the issue of intoxication and that other indicia, such as inability to function normally, need not be proven. Texas Workers' Compensation Commission Appeal No. 91012, decided September 11, 1991.

Claimant contends in her appeal, however, that the only evidence of intoxication was a blood test administered at least one and one half hours after the accident; that carrier's expert acknowledged that the time lag would and could affect the test results; and that he stated that the type of test administered to claimant would show a higher blood alcohol

content than the more accurate whole blood test which was not given. Claimant states that there was no evidence presented to show that at the time of the accident she was intoxicated.

A claimant need not prove he or she 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 judgm't correct). However, when a carrier presents evidence of intoxication, raising a question of fact, then the claimant has the burden to prove that he or she was not intoxicated at the time of the injury. March v. Victoria Lloyds Insurance Co., 773 S.W.2d 785 (Tex. Civ. App-Fort Worth 1989, writ denied).

We cannot agree that the carrier provided no evidence of claimant's intoxication. By her own admission, claimant had consumed one glass of wine and ten beers during the five or six hours prior to the accident. In addition, a blood test showed an alcohol concentration of 183 mg/dl, or .183 g/ml. It is true that this test was administered some time after the accident and that it was a test of serum alcohol level rather than a whole blood alcohol test. However, carrier's expert testified that the difference between the two does not "bear substantially on the results of blood-alcohol concentration," and that claimant's levels would have in all probability been higher at the time of the accident; most importantly, he testified that in his opinion claimant's levels were greater than 0.10 at the time of the accident.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). He is entitled to resolve conflicts and inconsistencies in the evidence before him, and is equally entitled to judge the weight to be given expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Our review of the record below does not convince us that the hearing officer's determination is not supported by the evidence, nor that it is clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Finally, the claimant argues that public policy should prevent the employer's insurance carrier from using intoxication as a defense in this case, where the employer provided the alcohol and condoned its use. No such public policy exception is contained in the law, which provides that intoxication is an absolute defense to liability under workers' compensation. Further, in enacting the 1989 Act, the legislature chose to include for the first time a quantitative standard by which alcohol intoxication could be established. *See* Appeal No. 91012, *supra*. We find no merit in this point of error.

Based upon the foregoing, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge