APPEAL NO. 950049
FILED FEBRUARY 22, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on September 26, 1994 to consider the following two disputed issues: (1) Did the claimed injury occur while the respondent (claimant) was in a state of intoxication; and (2) Did the claimant have disability as a result of the claimed injury of _____. At the request of the appellant (self-insured), Hearing Officer I added an issue of "ordinary disease of life" (seizure disorder). The hearing adjourned after claimant's evidence was presented. On October 20, 1994, after hearing the parties' respective arguments, Hearing Officer I denied claimant's motion that he recuse himself because he had indicated to claimant he had doubts about the credibility of a witness, a co-worker, listed by claimant. On December 9, 1994, (Hearing Officer II), convened a hearing announcing that Hearing Officer I was recused and that the disputed issues were not only the intoxication and disability issues (reported from the June 28, 1994, benefit review conference) but also another issue requested by the self-insured, namely, whether the claimed injury "included a blackout." The record contained no discussion concerning the reason for the recusal nor was any objection taken to proceeding with Hearing Officer II. Also, there was no mention of the self-insured's "ordinary disease of life" issue added at the prior session. Following the hearing, Hearing Officer II made certain findings of fact and concluded that claimant's injury did not occur while he was in a state of intoxication as defined in Section 401.013, the defense asserted by the self-insured, and that claimant's injury did not include a blackout. The parties resolved an issue on the average weekly wage by stipulation and also stipulated that the period of disability from the claimed injury (should the self-insured's intoxication defense fail) was from April 1 to October 6, 1994.

On appeal the self-insured asserts error in the recusal of Hearing Officer I and also contends that Hearing Officer II could not judge the claimant's credibility and that the tape-recorded record of the September 26th session was defective and did not contain all of claimant's cross-examination. The self-insured further asserts that Hearing Officer II made certain comments before taking evidence at the December 9th session, and prior to his review of the record of the preceding session, which indicated he had already decided the disputed issues. The self-insured also challenges the dispositive factual findings contending that the claimant, a bus driver for the self-insured, was intoxicated from prescription drugs when he had an accident driving a bus on _____, for the reason that his prescriptions included a directive not to drive and, therefore, he was not taking the drugs as prescribed. The self-insured asks that we reverse the decision and enter an order for its recoupment of all benefits paid pursuant to an interlocutory order. Claimant filed a response which essentially argues the sufficiency of the evidence to support the challenged findings of fact.

DECISION

Affirmed.

The 1989 Act provides that an insurance carrier is not liable for compensation if the injury "occurred while the employee was in a state of intoxication." Section 406.032(1)(a). Intoxication is defined in part as "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002, Health and Safety Code." Section 401.013(a)(2)(B). The definition goes on to provide that the term "does not include the loss of normal use of mental or physical faculties resulting from the introduction into the body of a substance taken under and in accordance with a prescription written for the employee by the employee's doctor." Section 401.013(b)(1). Claimant's position was that he was not intoxicated (as defined by the 1989 Act) when he passed out while driving a bus at about 7:30 p.m. on _____. The self-insured's position was that the prescriptions for certain medications prescribed for claimant included instructions not to drive while taking them, that claimant had taken these medications on the day of the accident and had nevertheless driven a bus, and, therefore, since he did not take his medications "in accordance with" the prescriptions, he was intoxicated and the self-insured is not liable for his claim.

On the appealed intoxication issue, the dispositive findings challenged by the self-insured stated:

FINDINGS OF FACT

7. At the time he was injured the evidence does not establish he had used any controlled substances except at dosages properly prescribed.

8. The evidence does not establish that at the time of the accident Claimant was not to drive due to taking PROSOM, FIORINAL and the cortisone based drug alone or in combination.

Claimant testified that he had had a prior injury in 1991, that he was under the care of (Dr. S), and that he was prescribed ProSom for sleeping, Fiorinal for headaches and Tylenol #3 for pain. According to his testimony, claimant on (day before date of injury) worked his regular split shift, driving his route for a number of hours in the morning, breaking during the mid-day hours, and resuming driving during the afternoon. He took his prescribed dosages of Fiorinal and ProSom at approximately 9:00 p.m. that evening and went to bed after the news. He said he awoke in pain at about 2:00 a.m. the next morning and again took the prescribed dosages of Fiorinal and ProSom. He recollected the prescriptions saying "every four hours." Claimant did not mention taking Tylenol #3 at either time. He said he knew these medications caused drowsiness and that the container labels warned against operating motor vehicles when taking them. Claimant related that

he never really got back to sleep that night, and that he arose and went to work at 5:00 a.m. for a 5:35 a.m. run. He said he did not eat breakfast but did have coffee and donuts.

After completing his early morning runs, claimant kept his 10:15 a.m. appointment with Dr. S who gave him an injection and two sample pills of DayPro. Dr. S also gave him a certificate stating that claimant had been under his care since "8-7-91," that claimant could return to work on "4-5-94 due to medical disability," and that claimant's restrictions were as follows: "Patient should not drive while taking Tylenol #3, Fiorinal, ProSom 2 mg." Claimant said that Dr.S gave him the off-work slip because he was normally drowsy after receiving the injections. He said that after leaving Dr. S's office he returned to work because his supervisor, (Mr. C), had instructed him the day before when he was arranging for the appointment that when it was over he was to return and perform his regular duties and that if he failed to do so he would be charged with an "occurrence." Claimant said he had already accumulated four "occurrences" and did not want a fifth one, which would be in writing. He said he made an effort to give Dr. S's certificate to both Mr. C and to his assistant, (Ms. H), so they would know he was not supposed to drive when taking those medications, that both were then unavailable, and that he left a copy for Mr. C with the latter's assistant and commenced driving his afternoon runs. Claimant also testified that he had taken Tylenol #3 at some unspecified time on _____, that he had not eaten lunch, that the last time he had taken Fiorinal and ProSom was at 2:00 a.m. that morning, that he had taken no medications after leaving Dr. S's office and before the accident, which occurred at about 7:30 p.m., and that he had not consumed alcohol during the 24 hour period before the accident.

Claimant said he left the garage at about 1:15 p.m. feeling "somewhat drowsy" and commenced driving his afternoon runs. His shift was to end at 7:15 p.m. and he was scheduled to return to the garage at about 7:25 p.m. Claimant stated that after finishing his last run and while en route to the garage he made a left turn, "blacked out or fell asleep," and next recalled waking up in a hospital. He said he was not feeling drowsy when he passed out and had no warning of an impending loss of consciousness. When asked about a hospital record indicating he had taken Tylenol, Fiorinal, and ProSom at 1:00 p.m., claimant denied giving that history and insisted he last took those medications at 2:00 a.m. that day, approximately 17 hours before the accident. The hospital records indicated claimant was examined and released. His diagnosis included an "acute syncopal episode while driving, possibly related to medications," acute exacerbation of cervical, lumbar and shoulder pains, and no apparent new injury.

In two recorded telephone interviews by the self-insured's adjuster, one taken after the September 26th hearing, Dr. S stated that the ACTH (steroid) injection on _____ does not produce drowsiness or any side effects, that the Daypro claimant was given is a nonsteroidal, anti-inflammatory drug which does not produce drowsiness, that patients do not usually get drowsy from Fiorinal because it contains caffeine and that it can be taken while driving, that ProSom is a sleeping pill with "a duration action of exactly eight hours and absolutely no hangover" and should not be taken within eight hours of driving, and that Tylenol #3 could produce drowsiness because of the codeine but that the

codeine metabolizes rapidly and may be taken every four hours. Dr. S further stated that claimant had called him to advise that he had had an accident while driving, that Dr. S had asked claimant about having taken medications, and that claimant had indicated having taken a Tylenol #3 "quite some time prior to the driving so it should have been out of his system in four hours." Given that claimant took the medications in the morning and was able to drive his morning shift without any problem, Dr. S stated that the medications would not suddenly kick in eight hours later, "wouldn't have been a factor at all," and "so if he went to work at 6 in the morning, it was all out of his system and so it was no problem." Asked if it would have been alright for claimant to drive at 1:00 p.m. if he had taken ProSom and Fiorinal at 2:00 a.m. Dr. S responded, "oh, certainly," and went on to state that while claimant may have become drowsy from lack of sleep, "there's no way you can tie the use of that medication if the last time he took it was 2 a.m. to his becoming drowsy." Dr. S further stated: "The medication had no effect whatsoever on him blacking out. Its more likely due to hypoglycemia from having a donut and a cup of coffee and not binding it with protein . . . ."

(Dr. E), a psychiatrist certified in neurology and psychiatry, was called by the carrier and testified that he had reviewed claimant's records and confirmed claimant's having prescriptions for ProSom, Fiorinal and Tylenol #3. Dr. E prepared charts showing the times of peak concentrations and the half lives of Fiorinal, ProSom, Tylenol #3, and Daypro. He also stated that the prescriptions for Fiorinal and ProSom include instructions not to operate motor vehicles or heavy machinery, that such instructions are part of the prescriptions, and that doctors commonly advise patients similarly with regard to Tylenol #3. He further stated that while lack of sleep would not change the blood levels, it would affect "the impact capacity." When asked how long a person would need to wait to drive after taking those medications, Dr. E responded that a person would need to use their own judgment. He agreed that claimant's steroid injection on _____ should have no effect on his driving. In his opinion, if claimant took all three medications at 8:00 p.m. on (day before date of injury), and again at 2:00 a.m. and 1:00 p.m. on _____, claimant would suffer drowsiness. Dr. E further opined that the medications claimant took caused his blackout and that the blackout caused the loss of claimant's mental and physical faculties. Dr. E conceded that his opinions assumed claimant also took his prescribed dosages at 1:00 p.m. on _____ and further that while he felt that claimant passed out from the drugs in his system, he could not say claimant was intoxicated at the time.

We are satisfied the evidence is sufficiently supportive of the challenged factual findings and of the legal conclusion that "[c]laimant's injury did not occur while Claimant was in a state of intoxication as defined in [Section 401.103]." The hearing officer could credit claimant's testimony that he took only his prescribed dosages of Fiorinal and ProSom at about 9:00 p.m. on (day before date of injury) and at about 2:00 a.m. on _____, and that he took Tylenol #3 at some unspecified time on _____ but not after seeing Dr. S late that morning. The hearing officer could further consider the results of the "drug screens" of claimant's blood and urine taken at the hospital as well as Dr. E's charts and testimony and regard them as consistent with claimant's testimony and

that of Dr. S. The hearing officer is the sole judge of the materiality and relevance of the evidence as well as the weight and credibility it is to be given. As the trier of fact, it is for the hearing officer to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

We find no merit to the carrier's appealed issue regarding the recusal of Hearing Officer I. While the carrier did oppose claimant's motion for recusal on October 20, 1994, the hearing officer denied that motion. That motion dealt with the allegation that Hearing Officer I advised claimant sometime after the September 24th hearing that he had doubts about the credibility of a coworker claimant had listed as a witness. As it turned out, claimant did not call that witness. The record does not explain why Hearing Officer I did not preside over the hearing held on December 9, 1994; however, at that session the carrier did not inquire into the matter nor object to Hearing Officer II presiding over the hearing. Since no record was developed at the December 9th hearing which could be reviewed for abuse of discretion, and since no objection was made to the change in hearing officer at that hearing, we have no basis to find error.

The carrier also asserts as error that the hearing officer's decision fails to reflect that the transcript of the September 24th hearing was made a part of the record and further fails to mention the "discrepancy" regarding whether claimant took his prescribed medications at 1:00 p.m. on _____. We also find these assertions of error to lack merit. The hearing officer did state on the record that he was taking official notice of the written transcript of the prior proceeding and the parties stipulated that the written transcript was accurate and correct. Further, the Appeals Panel has previously stated that the hearing officer's decision need not detail all of the evidence adduced. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93955, decided December 8, 1993.

The carrier also states that since Hearing Officer II was not present for the claimant's testimony, he could not judge claimant's credibility. The disputed factual matter involving claimant's testimony that the carrier seemed to focus on, both at the hearing and on appeal, was whether claimant took Fiorinal, ProSom and Tylenol #3 at 1:00 p.m. on _____, as reflected in the hospital records. Claimant denied giving that history and the hospital records indicate his uncertainty about his medications as well as his sleepiness while in the emergency room that night. The record shows that claimant was present for the proceedings on December 9th and was available to be called by the carrier had the carrier desired to make a record for Hearing Officer II concerning claimant's credibility. Under the particular circumstances of this case, we do not find error. *Compare* Texas Workers' Compensation Commission Appeal No. 941549, decided January 21, 1995, where the Appeals Panel remanded a case under circumstances indicating the case turned on the credibility of the claimant and the hearing officer decided the case without having been present for any portion of the hearing.

The carrier also asserts that Hearing Officer II "erred in preventing the admission of testimony which specifically dealt with the credibility of [claimant]." We have reviewed the portions of the record cited by the carrier and find this assertion of error to be without merit. The carrier has reference to a lengthy colloquy between the hearing officer and both counsel concerning the relevance of evidence adduced on September 24th and anticipated to be adduced on December 9th regarding claimant's efforts to give a copy of Dr. S's note of _____ to Mr. C and Ms. H when he returned from Dr. S's office during the lunch period that day. We view the record as showing that the hearing officer regarded such evidence as not relevant to the intoxication defense and that both parties were in accord. The hearing officer at one point stated that "the parties agree that these matters have absolutely no - - no relevance, ..." At another point the carrier stated that the parties "stipulated" that the evidence concerning the note has been determined not to be relevant to the issue. Later the hearing officer stated, "unless there is an objection from the parties," whereupon the carrier responded: "And I don't object to that, except to the extent that the record which will be going up, if necessary, on appeal, has much testimony on those issues."

Finally, the carrier asserts that Hearing Officer II had decided the issues before having taken the evidence adduced on December 9th and reviewing the transcript of the September 24th hearing. Carrier bases this assertion of error on comments made by Hearing Officer II during carrier's opening statement. We have reviewed the portions of the transcript cited by the carrier and find no merit to this assertion of error. The hearing officer asked several questions of the carrier's counsel in an effort to clarify and understand the carrier's theory of the intoxication defense it raised in this case. The hearing officer also asked if the carrier had any legal authorities to support its theory other than the definition in the 1989 Act and the carrier conceded it had been unable to find any precedent in Texas case law or in Appeals Panel decisions. While we would agree that Hearing Officer II's comments indicated some skepticism, he did say "Well, you might very well be correct." Again, we find no merit to this assigned error.

Finding that the challenged findings are not so against the great weight and preponderance of the evidence as to be manifestly unjust (In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951)) and further finding no reversible error, we affirm the decision and order of the hearing officer.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge