APPEAL NO. 961710

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 July 1, 1996. The issues at the CCH involved the claimant (whose name is misspelled on some records). It was undisputed that claimant injured his elbow when he slipped and fell on ___, on the premises of his employer. The issues for the hearing officer to determine were whether claimant was injured while in a state of intoxication and whether he had disability from his elbow injury.

The hearing officer determined that the claimant was not in a state of intoxication when he slipped and fell and that claimant had the inability to obtain and retain employment at wages equivalent to the preinjury wage (disability) for the period from ___, through January 23, 1996.

The carrier has appealed, essentially arguing that claimant's version of the facts was incredible. The carrier also argues that the hearing officer misapplied the law in that, although claimant's blood alcohol level was by definition a state of intoxication, she also made findings that claimant had the normal use of his faculties at the time of the accident. The carrier argues that the hearing officer committed reversible error by excluding Exhibit No. 8 for purposes of rebuttal. There is no response from the claimant.

DECISION

We reverse and remand.

The claimant worked for the employer, an auto repair shop, for about a month prior to his accident. The store manager, Mr. N, testified that he knew when claimant was transferred to him from another store that he had had previous problems with drinking on the job. The claimant admitted that he had problems with alcohol, although at the time of the CCH he had been recently discharged from a rehabilitation hospital.

Mr. N said that around 10:00 a.m. on the morning of ___, he sent claimant on a "run" for parts. When claimant returned, he detected alcohol on claimant's breath. Claimant denied that he had been drinking. Mr. N sent claimant on another run for parts. When claimant returned, carrying some boxes, he slipped and fell on a puddle of rainwater and injured his elbow. This occurred sometime around 12:00-12:30 in the afternoon. When the bleeding did not stop, he asked to be sent to a doctor and was sent to Clinic. Claimant said when he got there he was told he would have to have paperwork to be treated. However, he agreed he was examined and informed by the doctor that it was that doctor's intent to run several tests, including an alcohol/drug screen. Claimant indicated his understanding that this would be a routine part of treating a workers' compensation injury. Mr. N, however, stated that he had called ahead and asked Clinic to run the test. Clinic informed Mr. N that certain paperwork would need to be completed by the employer in

order to perform this test. Clinic indicated they would send claimant back for the paperwork.

Claimant said he returned to his house to pick up his girlfriend to accompany him somewhere else for a second opinion. Although claimant denied he had anything to drink before the accident happened, he indicated that in the 45 minutes to a hour while he waited for his girlfriend to shower and dress, he consumed a six pack of 16-ounce malt liquors. Both Mr. N and claimant testified that he returned to the employer to retrieve the paperwork and his girlfriend was with him. Claimant's statement to the adjuster, taken soon after the accident, indicates that he returned home to get her because her car was an automatic transmission. This statement does not mention the somewhat significant fact of the malt liquor consumption, but claimant said this was because the adjuster "didn't ask."

Rather than return to the Clinic, claimant went instead to Center, which administered a "drug screen" at around 4:00 p.m. The results showed a blood/alcohol content of 0.178 grams per decaliter (g/dl). The carrier offered two letters from a consulting expert, Dr. G, stating first that, assuming no additional alcohol consumption, claimant's blood alcohol level at the time of the accident would have been 0.24 g/dl. When asked two months later to respond to the assertion that there had been consumption of a "six pack", Dr. G responded that six 12-ounce cans of beer would account for 0.10 to 0.12 g/dl of the total measurement detected at 4:00 p.m.

There was evidence in the record that claimant was not observed at the time of the accident to be visibly impaired. Claimant said that it was well known that the floor was slick, and he would have fallen no matter what his state of mind was. Claimant was off work, returned on January 23, 1996, for two days and then either resigned or was fired. He said had this not occurred, he would have continued to work. The hearing officer's determination of a limited period of disability for this time period was not appealed.

At the CCH, the claimant denied he had been to the Clinic before. The carrier then produced a medical record showing that he had been at the Clinic the week prior to his accident, for a non work-related incident, which the claimant readily admitted. The report was kept out of evidence on an objection of failure to timely exchange it. The carrier pointed out that it had exchanged the document the day after it was received (June 24, 1996), and further argued that it should come in as rebuttal evidence.

Section 401.013(a)(1) provides that a blood/alcohol level of 0.10 or more is by definition intoxication, and the carrier is therefore discharged from liability for the claim regardless of whether the worker had normal use of mental or physical faculties. In this case, evidence that the claimant's blood alcohol level was around 0.24 at the time of the accident shifted the burden of proof to the claimant to prove he was not intoxicated at the time of the accident. He attempted to do this by explaining that his consumption of alcohol all took place after the accident and before the test. The hearing officer believed claimant's

testimony that he drank a six pack of 16-ounce malt liquor prior to returning to the Center for a blood screening test. However incredible this might arguably be to another finder of fact, such a finding is exactly the evaluation of weight and credibility that the hearing officer was empowered to make. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

However, the carrier's expert nevertheless opined, albeit based on 12-ounce cans, that the measurement derived would not be wholly accounted for by post-accident consumption, and that the accident-level consumption may still have equaled or exceeded 0.10. The hearing officer applied a "normal use" standard which indicates to us that she may not have entirely believed claimant's assertion that his only consumption took place after the accident; had she believed he had nothing to drink, there would have been no need to apply the "normal use" provision under Section 401.013(a)(2) at all. However, we cannot tell, in the absence of a finding that claimant's blood alcohol level was less than 0.10 at the time of the accident, whether the hearing officer did, as the carrier asserts, interpret the statute in a way that claimant's "normal use" of faculties at the time of the accident would render the accident compensable even if his blood alcohol level were 0.10 or over. We therefore reverse and remand for further development and consideration of the evidence with reference to the expert evidence and applicable law. After development of the evidence, the hearing officer should make a finding of fact that addresses the blood alcohol level at the time of the accident.

We agree that the hearing officer abused her discretion by not admitting Clinic medical record that showed treatment for a non-work injury. It appears that the document, as a late-received document, was properly exchanged in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(2) (Rule 142.13(c)(2)). However, exclusion can hardly be said to constitute harmful, reversible error where the claimant freely testified as to every substantive matter set forth in the document. We cannot agree that there is a basis for reversal because of exclusion of the document itself.

We reverse and remand the hearing officer's decision and order for the reasons stated.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge