

APPEAL NO. 981848

This appeal is brought 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 21, 1998. Neither the respondent/cross-appellant (Carrier 1) nor the respondent (Carrier 2) disputed that the appellant/cross-respondent (claimant) was injured on \_\_\_\_\_, while in the course and scope of his employment. The issues at the CCH were whether (Employer 1) or (Employer 2) was the claimant's employer for workers' compensation purposes at the time of the injury on \_\_\_\_\_; whether the claimant was intoxicated at the time of the injury; and whether the claimant had disability. The hearing officer determined that the claimant was intoxicated at the time that he was injured on \_\_\_\_\_, and that neither carrier is liable for workers' compensation benefits. The claimant appealed those determinations, urging that the hearing officer erred in placing the burden of proof on him to prove that he was not intoxicated and that the evidence is not sufficient to establish that he was intoxicated when he was injured. The claimant also urged that the hearing officer erred in refusing to permit the deposition of (Dr. P). Both carriers responded, urging that the hearing officer did not err in placing the burden on the claimant to prove that he was not intoxicated and that the evidence is sufficient to establish that the claimant was intoxicated when he was injured on \_\_\_\_\_. Carrier 2 also urged that the request for deposition does not comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(a) because it was not shown that the information could not be produced voluntarily and that a health care provider may be deposed only on written questions.

At the CCH, both carriers agreed that Employer 2 was the employer of the claimant for workers' compensation purposes when he was injured. The claimant would not stipulate to that fact. The hearing officer determined that under the provisions of the Staff Leasing Services Act, TEX. LAB. CODE §§ 91.001 *et seq.*, both Employer 1 and Employer 2 were co-employers of the claimant when he was injured. The claimant appealed that determination, urging that the hearing officer erred in applying Section 91.042 and in determining that Employer 2 was a co-employer of the claimant because Employer 2 was not a licensed staff leasing services company and contending that Employer 1 was the employer of the claimant because Employer 1 exercised control over the claimant. Carrier 1 appealed, urging that there is no evidence that Employer 2 is a staff leasing services company, that the hearing officer did not properly apply the law, and that she erred in determining that Employer 1 and Employer 2 were co-employers. The claimant responded to the appeal of Carrier 1, stating that he agreed with the appeal of Carrier 1. The file does not contain a response from Carrier 2 to the appeal of Carrier 1.

DECISION

We affirm in part and reverse and remand in part.

The claimant requested a subpoena for medical records of Dr. P and filed a motion to depose Dr. P. The hearing officer issued the subpoena for the records. The attorney representing the claimant said that the subpoena had been sent to the sheriff in the county in which Dr. P practices medicine, that a response had not been received, and that he did not want a continuance to receive a response from Dr. P. The hearing officer denied the motion to depose Dr. P. Section 410.158(a)(1) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(a)(3)(A) (Rule 142.13(a)(3)(A)) provide that a health care provider may be deposed only on written questions. Rule 142.13(e)(5) provides that a request to depose a witness shall include a copy of the questions to be asked if the deposition is to be on written questions. The request to depose Dr. P does not contain questions to be asked of Dr. P. The hearing officer did not abuse her discretion in denying the motion to take the deposition.

We next address the determination that the claimant was intoxicated when he was injured on \_\_\_\_\_. The claimant testified that on \_\_\_\_\_, he arrived at work at about 7:00 a.m.; that he repaired one crane; that he went to work on another crane; that he slipped and fell, injuring his back; that he was taken to a hospital by ambulance; that he was given a shot for pain; that x-rays were taken; and that about one and one-half hours later a urine sample was taken for a drug test. A laboratory report states that a screen with confirmation test was conducted, that the screen cutoff is 300 milligrams per milliliter (MG/ML) and the confirmation cutoff is 150 MG/ML, and that the sample was confirmed positive for the cocaine metabolite with 227 MG/ML. In a letter dated March 13, 1998, Dr. P wrote that the urinalysis screen was presumptive positive for cocaine; that in his opinion, this represents presumptive evidence of intoxication at the time of the \_\_\_\_\_, incident; and that this would reflect the claimant's not having the normal use of mental and physical faculties resulting from the voluntary introduction of cocaine into the body.

The hearing officer determined that this evidence was sufficient to shift the burden to the claimant to prove that he was not intoxicated when he was injured. In Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992, the carrier introduced a laboratory report stating that the claimant tested positive for the marijuana metabolite and expert opinion that the test results were consistent with recent use of marijuana and that within all reasonable scientific probability the claimant had lost the use of his normal mental and physical faculties during the last 24 hours prior to the collection of the urine sample. The Appeals Panel held that the evidence was sufficient to shift the burden to the claimant to prove that he was not intoxicated at the time of the injury. In the case before us, the laboratory report stating that the test was positive for the cocaine metabolite and the opinion of Dr. P are sufficient to shift the burden to the claimant to prove that he was not intoxicated at the time of the injury.

The claimant testified that he was not intoxicated when he was injured on Monday morning; that he had the normal use of his body at that time; that during the weekend, he was tired, worn out, and sick from the hard work he had done; that he did not use drugs; that he had not been around anyone who was smoking drugs; that he was told that the

urine test was positive; that he had another test performed the next day; and that the test results were negative for drug use. In a written statement, the claimant's wife stated that her husband spent the whole weekend in the house sick and that she knew that he was not intoxicated when he returned to work on Monday morning. The claimant's wife also testified, stating that the claimant stayed at home during the weekend and did not use drugs. (Mr. K), a coworker, wrote that the claimant was not intoxicated at work on \_\_\_\_\_, because he talked with the claimant before he started work that morning. In a written statement (Mr. E), a coworker, said that the claimant was not intoxicated at work on \_\_\_\_\_, because he was "in his right mind" when he worked on his crane. Laboratory reports indicated that the claimant provided another urine sample on March 16, 1998, and that the results were negative for alcohol and 10 drugs, including cocaine. (Dr. EC) reviewed laboratory reports at the request of Carrier 2. Dr. EC reported that the results from the sample taken soon after the injury are confirmed positive for the cocaine metabolite at 227 MG/ML; that that portion of the test was specific for cocaine and that a positive result cannot be achieved by administration of anything other than cocaine; that in reasonable medical probability, it is a valid test for the cocaine metabolite; that six days later the claimant tested negative for cocaine; that such test did not invalidate the initial test since the metabolite of cocaine continues to be excreted in the urine, as a general rule, for only three days; and that only under very heavy use and very unusual circumstances is the cocaine metabolite found six days after use of cocaine. Dr. EC also stated that it is not possible to determine when the claimant ingested the cocaine; that the effects of cocaine persist for only a few hours while the metabolite, which is biologically inactive, continues to be excreted for up to three days; that a positive urine test established only that cocaine had been used; that the test results do not permit an assessment of impairment; and that it is not possible to determine whether the claimant was under the influence at the time of the accident.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a determination of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the hearing officer's determination that the

claimant was intoxicated when he was injured is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer that the claimant was intoxicated when he was injured, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994. We affirm the determination that the claimant was intoxicated when he was injured. Since he was intoxicated when he was injured, a carrier is not liable for benefits and the claimant did not sustain a compensable injury. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id.* Since we found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, the claimant could not have disability.

We next address the determination that Employer 1 and Employer 2 were co-employers of the claimant when he was injured on \_\_\_\_\_. At the CCH, Carrier 1 and Carrier 2 agreed that Employer 2 was the employer of the claimant when he was injured and offered to enter into a stipulation stating that fact. The claimant would not so stipulate. None of the parties offered into evidence documents concerning the relationship of Employer 1 and Employer 2; whether Employer 2 is a licensed staff leasing services company; and which employees, including those that the claimant testified supervised him, worked for which employer. The claimant testified that he has worked at Employer 1 as a mechanic for about eight years, that he receives paychecks from Employer 2, that at one time he was paid by (Employer 3), and that Employer 2 provides him with a W-2. He also said that for about one year and one-half or two years before the CCH he started a 401(K) account, that the account is administered by Employer 1, and that persons who receive paychecks from Employer 2 are permitted to participate in the 401(K). The claimant said that he heard about a job at Employer 1, that he went to Employer 2 to apply for a job, that Employer 1 told Employer 2 that he was a good worker, and that he was hired. The claimant stated that his first supervisor was (Mr. CC), that Mr. CC was an employee of Employer 1, and that Mr. CC no longer works because he is disabled. He testified that (Mr. S) is now his supervisor; that Mr. S works for Employer 1; that on the day that he was injured, Mr. S told him to work on the two cranes; that everyone who supervised him worked for Employer 1; and that on the day that he was injured, no one from Employer 2 told him how to do his work. Employer 2 filed an Employer's First Report of Injury or Illness (TWCC-1) dated March 11, 1998. The claimant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated March 13, 1998, in which he stated that his employer was Employer 2. A TWCC-41, dated March 23, 1998, and signed "for the claimant" by the attorney representing the claimant states that the employer was Employer 1.

In her Decision and Order the hearing officer stated that the issue of the identity of the claimant's employer was rendered moot by the determination that the claimant was intoxicated when he was injured, but that nonetheless some discussion of the issue was appropriate. Comments in JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM (1991) and provisions in the 1989 Act; especially those concerning benefit review conferences, arbitration, benefit CCHs, appeals to the Appeals Panel, and judicial review; indicate that disputed issues are to be resolved. Resolving one issue at a CCH does not make another issue moot. An issue is not finally resolved until administrative remedies and, if appropriate under the circumstances, judicial remedies are exhausted. The issue of whether Employer 1 or Employer 2 was the claimant's employer for workers' compensation purposes at the time of the injury did not become moot by the hearing officer determining that the claimant was intoxicated at the time he was injured.

In her Decision and Order, the hearing officer also referred to the Staff Leasing Services Act and wrote:

In particular, the Hearing Officer notes that Section 91.042(c) indicates that under the circumstances which appear to exist in this case, both [Employer 2] and [Employer 1] would be considered co-employers, and, since [Employer 2] purchased workers' compensation insurance coverage, both [Employer 2] and [Employer 1] would be protected by the exclusive remedy provision set forth in Section 408.001(a) of the Act. Since the cited Section of the Labor Code speaks in terms of whether the license holder, as opposed to the client company, did or did not purchase workers' compensation coverage, and indicates how the workers' compensation premiums of the license holder shall be calculated, it would have appeared appropriate to determine that [Carrier 2], as the workers' compensation carrier for [Employer 2], would have been liable for workers' compensation benefits, if any had been payable to Claimant on account of his injury of \_\_\_\_\_. The fact that Claimant was included in [Employer 1's] 401K Plan does not alter the forgoing analysis, since Section 91.041(a) of the Labor Code specifically states that it is acceptable for a client company to include assigned employees in any benefit plan sponsored by that client company, and, for this reason, Claimant's inclusion in [Employer 1's] 401K Plan does nothing to indicate that Claimant either was or was not an employee of [Employer 1] at any time relevant to this decision. Although Section 91.041 also states that assigned employees must be advised that they are being included in the benefit plan sponsored by the client company, the record of the [CCH] contains no evidence to indicate that such notice was not provided to Claimant and his co-workers.

The hearing officer made Finding of Fact No. 5 that states "[o]n \_\_\_\_\_, [Employer 1] and [Employer 2] were co-employers of Claimant pursuant to V.T.C.A. Labor Code 91.001 *et seq.*"

Section 91.001(3) of the Staff Leasing Services Act states "[c]lient company" means a person that contracts with a license holder and is assigned employees by the license holder under that contract. Section 91.001(9) defines "license holder" as a person licensed under the chapter to provide staff leasing services. Section 91.001(11) of that act provides in part:

"Staff leasing services" means an arrangement by which employees of a license holder are assigned to work at a client company and in which employment responsibilities are in fact shared by the license holder and the client company, the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or specialized group within that work force consists of assigned employees of the license holder.

Section 91.001(12) defines "staff leasing services company" as a business entity that offers staff leasing services. Section 91.004 concerns employees who are licensed, registered, or certified under law. Section 91.032 states that a contract between a license holder and a client company must provide that the license holder does certain things, including that the license holder reserves the right of direction and control over employees assigned to a client's worksites. Section 91.042 provides that a license holder may elect to obtain workers' compensation insurance coverage for the license holder's employees from an insurance company or through self-insurance. Subsections (c) and (d) of Section 91.042 provide:

(c) For workers' compensation insurance purposes, a license holder and the license holder's client company shall be coemployers. If a license holder elects to obtain workers' compensation insurance, the client company and the license holder are subject to Sections 406.004 and 408.001.

(d) If a license holder does not elect to obtain workers' compensation insurance, both the license holder and the client company are subject to Sections 406.004 and 406.033.

The evidence is not sufficient to support the finding of fact that at the time the claimant was injured Employer 1 and Employer 2 were co-employers of the claimant pursuant to the Staff Leasing Services Act. We reverse that finding of fact and the conclusion of law based on that finding of fact and remand for the hearing officer to resolve the issue of whether Employer 1 or Employer 2 was the claimant's employer for workers' compensation purposes at the time of the injury. Each party shall be afforded the opportunity to present evidence on that issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a

request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Judy L. Stephens  
Appeals Judge