

## APPEAL NO. 990283

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 December 16, 1998. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on \_\_\_\_\_, and whether the claimed injury occurred while the claimant was in a state of intoxication, thereby relieving the respondent (carrier) of liability. The hearing officer found that the claimant was injured at work while intoxicated and the carrier was relieved of liability. The claimant appeals, arguing the hearing officer should not have shifted the burden of proof on the issue of intoxication because the only evidence of intoxication was a blood test that should have been excluded from evidence. The claimant argues that reasons that the blood test should have been excluded are that it was taken without consent, it was taken illegally, there was no evidence that the person taking the sample was qualified to do so, there was no evidence of chain of custody and there was spoliation because the sample was destroyed before it could be independently tested. The carrier responds that the results of the blood test were properly admitted and that there was other evidence of the claimant's intoxication that independently lay the basis for shifting the burden to the claimant to prove he had the normal use of his mental and physical faculties, which burden the carrier argues that the claimant failed to meet. The carrier argues that there was consent to the blood test, that there was chain of custody and that there was not spoliation.

### DECISION

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

It was undisputed that the claimant suffered an injury while working on \_\_\_\_\_, which resulted in the loss of his right arm. The claimant described the injury as taking place when his arm was caught in a conveyor belt. The claimant was taken to the hospital immediately following the accident. The employer's assistant manager testified that he smelled alcohol in the claimant's hospital room after the accident. The assistant manager testified that he requested the hospital to test the claimant for alcohol. He testified that the hospital refused, so he called and had a testing service come to the hospital and take a sample of the claimant's blood. It was undisputed that the claimant had been administered morphine prior to this blood test, but there was conflicting evidence as to whether or not he was conscious. The report of the blood test showed a blood alcohol level of .121. There was also evidence that the claimant had malt liquor in his property at work.

The claimant challenges the following finding of fact and conclusions of law found in the hearing officer's decision:

## **FINDING OF FACT**

2. On \_\_\_\_\_, Claimant was injured at work at a time when he did not have the normal use of his mental and physical faculties as a result of the voluntary introduction into his body of ethanol.

## **CONCLUSIONS OF LAW**

3. On \_\_\_\_\_, Claimant sustained an injury while he was in a state of intoxication.
4. Because Claimant sustained an injury while he was in a state of intoxication, Carrier is relieved of liability for compensation.
5. The Claimant did not sustain a compensable injury on \_\_\_\_\_.

Texas workers' compensation law relieves a carrier or liability for injuries received when an employee is in a state of intoxication. Section 406.032(1)(a). Once a carrier presents evidence of intoxication, the burden shifts to the employee to prove that he was not intoxicated or that he had the "normal use of mental or physical faculties at the time of his injury." Section 401.013(a)(2); Texas Workers' Compensation Commission Appeal No. 92148, decided May 28, 1991. However, as a matter of law, an employee is intoxicated if he has an alcohol concentration of 0.10 or more. Section 401.013(a)(1); Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. We have held that "injuries sustained while in a state of intoxication are not considered injuries sustained in the course and scope of employment." Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992.

The first matter we will consider is the whether the hearing officer erred by admitting the blood test into evidence. We first note the Texas Rules of Evidence do not apply to CCHs under the 1989 Act. The claimant raises troubling points about the blood test that go in one way or another to the trustworthiness of the test. The question of trustworthiness goes to the weight to be given to the test rather than its admissibility. The claimant argues that the way in which the blood test was taken, particularly in regard to consent, makes the admission of the blood test, or reliance upon it, a violation of due process. The carrier responds that there was prior consent to such testing given by the claimant at the time he was hired by the employer. Again, we do not think that the question of consent goes to admissibility. If the test was taken contrary to law and in violation of the claimant's rights, this might provide the basis for some independent cause of action for the violation of such rights, but we do not believe that it lays the basis for exclusion of such evidence or precludes reliance upon it by the hearing officer. We note that the claimant points to no specific provision for his position other than general due process concerns. While certainly cognizant of the importance of due process, we are not aware of any specific legal provision that requires the exclusion of the blood test or prohibits the hearing officer from considering it.

Clearly, the blood test provides a basis for shifting the burden of proof on the issue of intoxication as well as support for the hearing officer's decision that the claimant was intoxicated at the time of his injury. We therefore affirm the decision and order of the hearing officer.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Judy L. Stephens  
Appeals Judge