

## APPEAL NO. 001162

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 April 17, 2000. The hearing officer determined that the appellant (claimant) was not injured in the course and scope of his employment on \_\_\_\_\_; that at the time of the alleged injury, the claimant was in a state of intoxication; and that the claimant did not have disability. The claimant appealed, argued that the respondent (carrier) disputed the compensability of the injury only on the grounds that the claimant was intoxicated at the time of the injury, contended that the hearing officer erred in considering a report from Dr. K as a report from an expert, urged that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier responded, contended that it also disputed the claimed injury by stating that it denied an injury in the course and scope of employment, stated that the record indicates that at the CCH the claimant did not challenge Dr. K's position as an expert witness and that the record indicates that Dr. K is a medical doctor and is a board-certified toxicologist, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

### DECISION

We affirm.

We first address the contention that the carrier's contest of compensability of the claimed injury was limited to the allegation that the claimant was intoxicated at the time of the claimed injury. The basis of the carrier's contest of compensability was not an issue at the CCH; as a consequence, the hearing officer did not make a determination to resolve such an issue; and there is nothing for us to review concerning that issue. In any case, the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) indicates that after the carrier stated its contest of compensability on the basis of intoxication it wrote "and disputes an injury within the course and scope of employment."

We next address the claimant's contention that the hearing officer erred in considering the report of Dr. K to be a report of an expert. The question is raised for the first time on appeal. The first page of the report of Dr. K indicates that it is a "medical toxicology report," contains the letterhead of Dr. K, and indicates that Dr. K is a member of the American Board of Medical Toxicologists. The report also contains a paragraph in which Dr. K states his qualifications and experience. The hearing officer did not err in considering the report of Dr. K to be one of a medical expert.

The Decision and Order of the hearing officer contains a thorough statement of the evidence. Only a brief summary of the evidence will be included in this decision.

Concerning the issue of intoxication at the time of the claimed injury, the claimant testified that he drank about one six-pack of beer the day and night before he was injured, that he did not drink any beer or other alcoholic beverage after 9:00 p.m. the night before the injury, that he did not drink beer or any other alcoholic beverage the day of the injury, that he used mouthwash about 15 minutes before he was injured at about 7:45 a.m., and that he was not intoxicated at the time he injured his back. An alcohol breath test taken the day of the claimed injury at 10:30 a.m. indicated a 0.068% blood alcohol concentration (BAC) and another test taken at 10:48 a.m. indicated a 0.066% BAC. In his report, Dr. K opined that if the lowest (sic, highest) alcohol metabolism rate is used, the claimant's BAC at 7:45 a.m. was 0.099% and if the average metabolism rate is used, the claimant's BAC was 0.110% at that time. Dr. K also stated that the statutory level of intoxication in Texas is 0.08% and that the claimant's BAC level at the time of the injury exceeded the statutory level of intoxication.

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). The claimant testified that he was not intoxicated at the time of the claimed injury. The only medical evidence in the record concerning intoxication is the report of Dr. K. The determination of the hearing officer that the claimant was in a state of intoxication at the time of the claimed injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for his and we affirm that determination. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Lastly, we consider the claimant's contention that the evidence is not sufficient to support the hearing officer's determination that the claimant was not injured in the course and scope of his employment on \_\_\_\_\_. The claimant testified that he injured his back lifting a can containing trash, that a coworker witnessed the injury, and that the coworker was not available to give a statement because he had returned to Mexico. Testimony of the claimant and a person who worked for the employer indicate that the claimant had excused absences related to the claimant's manufactured house being destroyed by fire. The carrier also presented testimony that the claimant had other absentee problems. Reports from a chiropractor indicate that the claimant was taken off work because of low back problems that the claimant said occurred when he attempted to dump a trash can. The claimant's supervisor testified that he helped the claimant move furniture at the claimant's apartment the day before the accident.

In his Decision and Order, the hearing officer stated that he found that the claimant's testimony was not credible. 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). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant was not injured in the course and scope of his employment on \_\_\_\_\_, 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. King, supra; Pool, supra. Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for his and we affirm that determination. Appeal No. 94044, *supra*.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Judy L. Stephens  
Appeals Judge