APPEAL NO. 001204

On April 28, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. The hearing officer resolved the disputed issues by deciding that appellant (claimant) was not injured while in the course and scope of his employment with (employer); that the claimed injury occurred while claimant was in a state of intoxication, thereby relieving respondent (carrier) of liability for compensation; and that claimant has not had disability. Claimant requests that the hearing officer's decision be reversed and that a decision on all issues be rendered in his favor. Carrier requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

There is conflicting evidence as to whether claimant, who worked as a foreman for employer, was in the course and scope of his employment with employer on _____, when he fell from a second story balcony of a house that was being built by someone other than employer and was injured. The house was under construction and the balcony did not have railings. Claimant said he had had two beers that had been given to him by a painter he had talked to at the house about finishing a job for employer before he fell and that DS, an owner of employer who was drinking beer with him, had told him to go up to the balcony with him to show him a defect that DS did not want in houses built by employer. DS testified that he and claimant where drinking beer, shooting the breeze, and making observations about construction that had been done on the house after work on _____, when claimant fell from the balcony of the house that employer had no ownership interest in, and that they were not working at the time. DS said that claimant was inebriated and that he did not direct claimant around the house. Claimant's brother said that DS told him at the hospital that DS and claimant had been talking about work when claimant fell from the balcony.

An emergency medical service was called at 6:21 p.m., claimant was taken to a hospital, and a blood test done on claimant at 7:17 p.m. showed a blood alcohol level of 77 milligram/deciliter (0.077 gm/dl or 0.077%). Dr. T reviewed claimant's blood test results and reported that claimant had severely impaired mental and physical capabilities. Dr. A, a medical toxicologist, reviewed claimant's hospital records and blood test results and reported that at a normal metabolism rate for alcohol by the liver, claimant's blood alcohol level at the time of his injury was between 0.09575% and 0.103% and that in his opinion claimant had a level of alcohol that was sufficient to deprive him of the normal use of his mental and physical faculties. Dr. A testified at the CCH that in reasonable medical probability claimant did not have the normal use of his "faculties" at the time of his injury.

The hearing officer found that claimant was not within the course and scope of his employment when he fell and that claimant did not have the normal use of his mental or physical faculties due to the voluntary introduction into his body of an alcoholic beverage at the time of the accident. The hearing officer concluded that claimant was not injured while in the course and scope of his employment with employer; that the claimed injury occurred while claimant was in a state of intoxication, thereby relieving carrier of liability for compensation; and that claimant has not have disability. Without a compensable injury, claimant would not have disability as defined by Section 401.011(16).

Claimant contends that the hearing officer erred in finding that claimant's injury was not sustained in the course and scope of his employment, in admitting the reports of Drs. A and T and the testimony of Dr. A, in finding that claimant was intoxicated, in finding that claimant's was not furthering the interests of his employer, in finding that the accident did not occur during working hours, and in finding that claimant's work ended when he delivered the message to the painter.

No objection was made at the CCH to the report of Dr. T or to Dr. A's testimony and thus we will not address the admissibility of Dr. T's report or Dr. A's testimony for the first time on appeal. Claimant objected at the CCH to the admission of Dr. A's report on the basis that it lacked scientific reliability. We perceive no error in the hearing officer's admission of that report. We agree with claimant that an injury in the course and scope of employment can be sustained off the employer's premises and after normal working hours, and that there is a "temporary direction" doctrine in the workers' compensation law (*See* Section 401.012(b)(1)). However, the question of whether claimant was injured in the course and scope of his employment was a question of fact for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a).

Claimant has offered no evidence to substantiate his contention that his blood alcohol testing was done on blood serum instead of whole blood. Dr. A testified that blood serum testing is usually done after a person is dead. Claimant contends that his blood was drawn less than an hour after his accident and that Dr. A's calculations are faulty because they are based on his blood having been drawn one hour and fifteen minutes to one hour and thirty minutes after his accident. Although the call to the emergency medical service was made by DS's wife at 6:21 p.m. after DS called her to make that call, the exact time of the accident is not known, although it was probably shortly before the call to the emergency medical service. The weight to be given to Dr. A's report, as well as all the other evidence, including DS's testimony that claimant was inebriated, was for the hearing officer to determine. The hearing officer found that claimant was intoxicated under the definition of intoxication provided in Section 401.013(2)(A), that being not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage, as defined by Section 1.04 of the Alcoholic Beverage Code.

We conclude that the hearing officer's decision that claimant was not injured in the course and scope of his employment with employer, that he has not had disability (because he did not sustain a compensable injury), and that the injury occurred while claimant was in a state of intoxication, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Section Manager