APPEAL NO. 010982
FILED JUNE 14, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing (CCH) held on April 11, 2001, resolved the disputed issues by determining that the respondent (carrier) is relieved of liability for compensation for the injury the appellant (claimant) sustained on _____, because he was in a state of intoxication, and that because the claimant did not sustain a compensable injury, he did not have disability. The claimant has appealed these determinations on evidentiary grounds, and also asserts error in the hearing officer's exclusion of evidence from Dr. G. The carrier's response urges the sufficiency of the evidence and the absence of error.

DECISION

Affirmed.

The claimant testified that on the evening of _____, he drank one 24-ounce can of beer and part of a second can brought to him by his son, Mr. S, and that he went to bed around 10:30 p.m. and had no other alcoholic drink before arriving at the employer's yard the next morning at around 6:00. He further stated that, upon his arrival to work, he checked out a truck loaded with bags of cement and commenced his assigned delivery run to another town; that after driving about 45 to 50 miles, he pulled off onto the side of the road to sleep for a while; that he recalls resuming the drive; and that he has no recall of the ensuing accident when the truck left the roadway and rolled over.

According to the Department of Public Safety report, the claimant, who was not wearing a seat belt, fell asleep; the truck veered off the right side of the highway and into a ditch where it struck a concrete culvert and rolled over; and the claimant was airlifted to a hospital. The airlift report states that alcohol was a possible contributing factor; the hospital admission record notes "heavy odor alcohol"; and the blood specimen collected at the hospital at 10:07 a.m. tested positive for alcohol at 15 milligrams per deciliter (mg/dl).

According to the report and testimony from Dr. A, who is board certified in internal medicine and occupational medicine and who holds a subspecialty certification in toxicology, the blood alcohol level collected in the emergency room (ER) was 15 mg/dl, which equals 0.015 mg/dl or 0.015%. Dr. A explained in detail the method for extrapolating estimates of the claimant's blood alcohol level at the time of the accident, including the variables, from the ER test level. He provided a low estimate of 45 mg/dl or 0.045%, a middle estimate of 67.5 mg/dl or 0.067.5%, and a higher estimate of 115 mg/dl or 0.115%. He noted that the middle estimate was slightly lower than the state's presumptive intoxication level of 0.08%, while the higher estimate exceeds the presumptive level. Dr. A also concluded that "it's impossible" for the claimant to have last ingested alcohol at 10:00 the previous evening and yet have the 15 mg/dl level at 10:07 the next morning stating, "he would be dead." He opined, to a reasonable medical probability, that, given

any of the three estimated blood alcohol levels at the time of the accident, the claimant would not have had the full use of his mental and physical faculties. Dr. A explained the varying effects that could be expected from the three estimated blood alcohol levels in terms of reaction time, coordination, performance skills, perception, concentration, judgment, and so on.

The carrier did not contend that the claimant's alcohol concentration at the time of the accident was sufficient to meet the presumptive level for alcohol intoxication provided for in Section 49.01(2) of the Texas Penal Code. The carrier did contend, however, that the carrier's evidence not only rebutted the presumption of the claimant's sobriety but went further and demonstrated that he met the definition of intoxication in Section 401.013(a)(2)(A), namely, not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage.

To prove his sobriety once the burden of proof shifted to him, the claimant relied on his testimony and that of Mr. S. Mr. S acknowledged not knowing whether the claimant drank more after he left the claimant's house on the evening before the accident or whether the claimant had more to drink the next morning. The claimant sought to introduce the telephone testimony of Dr. G, as well as Dr. G's report received by fax during a recess in the hearing, which critiqued Dr. A's report and opined that the claimant was not intoxicated at the time of the accident. The carrier objected to the admission of this evidence on the grounds that it was not timely exchanged and that no good cause was shown to admit it anyway. *See* Sections 410.160 and 410.16 of the 1989 Act and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) for the rules on discovery. While the benefit review conference (BRC), where the claimant was represented, was held on March 5, 2001, the claimant did not identify Dr. G as a witness until April 5, 2001, and did not exchange a report from Dr. G until a recess in the CCH. The claimant contended that he had good cause for not timely exchanging with the carrier Dr. G's identity as a witness, as well as Dr. G's report, because the attorney who represented him at the BRC withdrew from the case on or about March 18, 2001, and the claimant did not receive the attorney's file with names of potential expert witnesses to contact until April 2, 2001. The hearing officer ruled that she did not find good cause to admit Dr. G's testimony and/or report because, after closely reviewing the claimant's actions in this regard following the attorney's withdrawal, she did not find that the claimant was diligent in his effort to identify, contact, and obtain a report from an expert witness. While Dr. G's evidence was supportive of the clamant's position and crucial to his effort to prove his sobriety at the time of the accident, we cannot say that the hearing officer abused her discretion in excluding the evidence from Dr. G. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer admitted Dr. G's report for purposes of the claimant's "offer of proof" for appeal. Also, it was apparent that some of the hearing officer's examination of Dr. A was based on information in Dr. G's report.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v.

Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate-reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Because we affirm the determination that the claimant did not sustain a compensable injury we also affirm the determination that he did not have disability in that a compensable injury is a prerequisite for disability. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge