

APPEAL NO. 020658
FILED MAY 2, 2002

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 held on February 7, 2002, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that the injury did not occur while the claimant was in a state of intoxication and the appellant (carrier) is not relieved of liability for compensation; and that the claimant had disability beginning on _____, and continuing through September 21, 2001. The carrier has appealed these determinations on evidentiary sufficiency grounds. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that on the evening of _____, from 7:00 p.m. to 10:30 p.m., he drank seven or eight beers while shooting pool at a bar; that he then went home and went to bed; that he arose at around 4:00 a.m. and arrived at work before his 5:00 a.m. shift started; and that about 10 minutes later, while pushing a very heavy cart out of the way, his foot slipped and he fell against the cart, dislocating his left shoulder. The claimant further stated that he was taken to an emergency room where he was sedated and his shoulder joint relocated, and that at about 10:00 a.m., he was taken to a facility where he submitted a urine specimen for drug testing at 10:10 a.m. He denied being intoxicated on the job and said he customarily goes to the bar twice on weekdays to shoot pool and drink a similar quantity of beer and that on some weekends he goes to the bar earlier and drinks a 12-pack of beer. The claimant indicated that his doctor took him off work the day of his injury and has not yet released him to return to work, that he still has medical restrictions, and that he has been unable to obtain further treatment because his doctor wants more x-rays which the carrier refuses to pay for. A Work Status Report (TWCC-73) from Dr. E dated September 7, 2001, reflects that the restriction against use of the left arm and the wearing of a shoulder immobilizer are expected to last through September 21, 2001.

The drug test results reflected that the claimant's urine specimen was positive for ethanol at 144 milligrams per deciliter (mg/dl) and that the testing cutoff amount is 50 mg/dl. Dr. M reported on October 23, 2001, that the urine alcohol test "is completely inconclusive in evaluating the current status of this employee's blood alcohol level"; that "alcohol in the urine is in no way indicative of the level of alcohol that may or may not currently exist in the bloodstream"; and that "any alcohol found in the urine has probably been removed from the bloodstream." The December 26, 2001, report of Dr. K, a laboratory director, stated that urine alcohol cannot provide conclusive evidence that the claimant was under the influence of alcohol at the time of collection; that "the extensive period of five hours from accident (5 AM to the collection (10:10 AM) makes an accurate evaluation impossible, especially since the beer consumption time is not clearly defined";

that “as a general rule the body is able to metabolize the equivalent of one alcoholic drink per hour”; and that “using this fact, it would appear possible, that [the claimant] may not have been legally drunk (i.e. greater than 80 mg/dl or 0.08% in blood) at 5 AM.” Dr. K went on to say that “to support intoxication, supervisor/coworker reports or observations would be critical.” The claimant introduced the statements of three coworkers to the effect that they noticed nothing unusual about the claimant immediately following his accident.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Sections 401.013(a)(1) and (2)(A) define intoxication to mean the state of having an alcohol concentration to qualify as intoxicated under Section 49.01(2)(B) Penal Code, of 0.08 or more, or 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, Alcoholic Beverage Code. The Appeals Panel has said that a claimant has the burden of proving that an injury occurred within the course and scope of employment; that a claimant has a presumption of sobriety; and that once a carrier presents probative evidence of intoxication, thus raising a question of fact, the presumption of sobriety disappears and the claimant has the burden of proving that he or she was not intoxicated at the time of the injury. Texas Workers’ Compensation Commission Appeal No. 92662, decided January 26, 1993; Texas Workers’ Compensation Commission Appeal No. 961625, decided October 12, 1996.

Whether the claimant had the normal use of his mental or physical faculties at the time of the accident was a fact question for the hearing officer who is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As for the fact questions concerning whether the claimant sustained the claimed injury and had disability, it is well settled that the testimony of the claimant alone may suffice to meet his or her burden of proof. Texas Workers’ Compensation Commission Appeal No. 91124, decided February 12, 1992. As an appellate reviewing body, the Appeals Panel 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).

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**PRENTICE-HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge