APPEAL NO. 030090
FILED MARCH 5, 2003

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 August 20, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) was not in a state of intoxication when his injury occurred at work on _____, and thus the appellant (carrier) is not relieved of liability for workers' compensation benefits, and that the claimant had disability from March 27, 2002, through the date of the CCH. The carrier appealed and the claimant responded. In Texas Workers' Compensation Commission Appeal No. 022407, decided November 13, 2002, the Appeals Panel reversed the hearing officer's decision and remanded the case to the hearing officer. In his decision on remand, the hearing officer again decided that the claimant was not in a state of intoxication when his injury occurred at work on _____, and thus the carrier is not relieved of liability for workers' compensation benefits, and that the claimant had disability from March 27, 2002, through the date of the CCH, August 20, 2002. The carrier appeals the hearing officer's determinations on the issues of intoxication and disability. The claimant's response requests that we affirm the hearing officer's decision on remand.

DECISION

Affirmed.

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. Appeal No. 022407, *supra*, sets forth the applicable law with regard to intoxication. The carrier relied on a report from a medical toxicologist which used a retrograde extrapolation to determine that, based on a blood-alcohol concentration of 0.051 approximately one and one-half hours after the injury, the claimant's blood-alcohol concentration at the time of the injury was 0.081. The Appeals Panel has held that an extrapolation of a blood-alcohol concentration can be sufficient evidence to shift the burden of proof to the claimant to prove that he was not intoxicated. Texas Workers' Compensation Commission Appeal No. 002818, decided January 17, 2001. In fact, in Texas Workers' Compensation Commission Appeal No. 011341, decided July 30, 2001, the Appeals Panel rendered a decision that a claimant was intoxicated based on retrograde extrapolations from two medical toxicologists.

However, it has been noted in Texas case law that courts in the criminal context have generally found that this question of extrapolation, the lag time between driving and the chemical test, is an issue for the trier of fact to weigh in its decision. Mireles v. Texas Department of Public Safety, 993 S.W.2d 426, 429 (Tex. App.-San Antonio) *aff'd*. 9 S.W.3d 128 (Tex. 1999). The Mireles case concerned an administrative driver's license suspension for driving while intoxicated where there was a breath test, which showed an alcohol concentration over 0.10 (the legal limit in effect at the time), but no

extrapolation evidence to the time of driving, and in a *per curiam* opinion upholding the suspension, the Texas Supreme Court noted that nothing in the statutory framework of the driver's-license-suspension procedure mandated extrapolation evidence (under the applicable statute, a finding against the defendant could not be made if the breath test was less than 0.10), but that, if offered, scientific extrapolation evidence may be subject to a reliability analysis. In Mata v. State, 46 S.W.3d 902 (Tex. Crim. App. 2001), the court remanded a conviction for driving while intoxicated based on its determination that the state failed to prove that the expert's retrograde extrapolation was reliable. The court stated that a retrograde extrapolation "is the computation back in time of the blood-alcohol level – that is, the estimation of the level at the time of driving based on a test result from some later time." The court in Mata noted that it believed that the science of retrograde extrapolation can be reliable in a given case, but also noted that in evaluating the reliability of a retrograde extrapolation, a court should consider various enumerated things, including, among others, whether, and if so, to what extent, any individual characteristics of the defendant were known to the expert on providing his extrapolation. Some of the things listed by the court were weight, gender, typical drinking pattern and tolerance for alcohol, how much and what the person had to drink, and what the person had to eat and when he ate. The court stated that it could not determine an exact blueprint for reliability in every case. The court also noted that it was not addressing whether retrograde extrapolation is necessary in a DWI case.

In the instant case, the hearing officer was not persuaded of the reliability of the toxicologist's retrograde extrapolation based in part on what was not in the toxicologist's report regarding factors affecting the claimant's own rate of metabolism. In addition, we note that there was a witness who testified that the claimant looked normal when he left from the witness's house for work the evening of the accident. Although the hearing officer again erred in referring to a 0.08 alcohol concentration as a rebuttable presumption, because that level of alcohol concentration is a definition of intoxication (*See* Section 401.013(a)(1) and Appeal Nos. 011341 and 022407, *supra*), whether the claimant had that level of alcohol concentration when the injury occurred or whether the claimant did not have the normal use of his mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage when the injury occurred were fact questions for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations on the issues of intoxication and disability are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order on remand.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Edward Vilano
Appeals Judge