

APPEAL NO. 032338
FILED OCTOBER 23, 2003

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 031261, decided July 9, 2003, where we remanded the case to the hearing officer to reconsider the issue of whether the appellant (carrier) was relieved of liability for compensation pursuant to Section 406.032(1)(A) because the respondent (claimant) was in a state of intoxication as defined in Section 401.013(a)(1) because he had a an alcohol concentration to qualify as intoxicated under Section 49.01(2), Penal Code (currently 0.08 or more); or because he did not have the normal use of mental or physical faculties resulting from the voluntary introduction into the body of alcohol. On remand, the hearing officer did not hold another hearing and he determined that the claimant was not intoxicated at the time of his injury and that he had disability, as a result of his compensable injury, from June 25, 2002, through the date of the initial hearing on April 21, 2003. In its appeal, the carrier argues that the hearing officer erred in determining that the claimant was not intoxicated at the time of his injury and in determining that the claimant had disability. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant sustained an injury on _____, when he fell 14 feet from a scaffold in the course and scope of his job as a painter. Blood was collected from the claimant approximately two hours and fifteen minutes after his fall at the emergency room. The blood test revealed that the claimant had a blood alcohol level of 0.061. The carrier introduced a report from Dr. A, a toxicologist, who stated that the normal metabolism rate for alcohol by the liver is about .015 to .020 gm/dl/hour. Dr. A did not perform a retrograde extrapolation to determine the claimant's blood alcohol level at the time of his injury because he did not know how much time had passed from when the blood sample was taken and when the claimant's injury occurred. The carrier contends that the hearing officer should have performed a retrograde extrapolation using the proposed metabolic rates, once he determined when the accident happened, and that had he done so, the claimant would have met the definition of alcohol intoxication contained in Section 401.013(a)(1). We considered and rejected a similar argument in Texas Workers' Compensation Commission Appeal No. 030090, decided March 5, 2003, where we noted that Texas criminal courts have generally found that lag time in testing is an issue for the trier of fact to weigh in evaluating the extrapolation. Appeal No. 030090 also noted that in evaluating the reliability of a retrograde extrapolation the fact finder could consider whether several factors, such as weight, gender, typical drinking pattern and tolerance for alcohol, how much and what the person had to drink, and what and when the person ate had been taken into account. The hearing officer noted that Dr. A did not consider those factors in providing his opinion on the metabolic rates and we reject the carrier's argument that the hearing

officer, as the fact finder, could not consider Dr. A's failure to take those factors into account in deciding to discount Dr. A's opinion. The question of whether the claimant had an alcohol concentration of 0.08 at the time his injury occurred was a question of fact for the hearing officer. He was not persuaded that the claimant met the definition of alcohol intoxication in this case and nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer likewise was not persuaded that the claimant did not have the normal use of his mental or physical faculties resulting from the voluntary introduction into his body of an alcoholic beverage. The claimant's testimony and the testimony of his supervisor support the hearing officer's determination of normal use. Accordingly, the hearing officer did not err in determining that the claimant also did not meet the intoxication definition of 401.013(a)(2)(A).

The success of the carrier's challenge to the hearing officer's disability determination is dependent upon the success of its argument that the claimant did not have a compensable injury because he was in a state of intoxication at the time of the injury. Given our affirmance to the determination that the claimant was not intoxicated at the time of the injury, we likewise affirm the determination that the claimant had disability from _____, through the date of the initial hearing on April 21, 2003.

The hearing officer's decision and order are affirmed.

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

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

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge