APPEAL NO. 033362
FILED FEBRUARY 17, 2004

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 November 13, 2003. The hearing officer determined that the decedent was in a state of intoxication at the time of the fatal accident and that the self-insured (carrier) is relieved of liability.

The appellant (claimant beneficiary) appealed, contending, as she had at the CCH, that an accurate blood alcohol reading at the time of the accident cannot be determined due to several unknown factors. The self-insured responds, urging affirmance.

DECISION

Affirmed.

This is an alcohol intoxication case. The decedent, a parole officer, was returning from a training conference (course and scope is not an issue) when he was involved in a one-vehicle accident (his vehicle crossed the center line and overturned in the ditch with no evidence of braking or evasive steering), which ultimately led to his death. The accident occurred at about 6:30 to 7:00 p.m. on _____. There was conflicting evidence whether the decedent smelled of alcohol and whether the overturned vehicle had an open container of alcohol (the police (DPS) report stated there was an odor and an open container but a witness who was first on the scene said there was not). The decedent was taken to a hospital where a drug screen showed an ethyl alcohol level of 0.103 mg/dl. A laboratory blood test of blood drawn at 11:05 p.m. on _____, showed an alcohol level of 0.112. A DPS blood specimen was drawn between 11:30 p.m. on _____, and 12:30 a.m. on _____. Eventually that specimen was tested to have a blood alcohol level of .09. Dr. C testified for the self-insured, using retrograde extrapolation, that at the time of the accident the decedent had a blood alcohol level of between .16 and .18. The claimant's expert, Dr. B, submitted a report and testified that using factors enunciated in Mata v. State of Texas, 46 S.W.3rd 902 (Tex. Crim. App. 2001) (drinking pattern, how much the person drank, what the person drank, the time of the last drink and how much, what, if anything, the person had eaten), it was not possible to determine the decedent's blood alcohol level at the time of the accident. Both Dr. C and Dr. B addressed the peaking factor, where the blood alcohol level does not peak until some time after consumption, but reached differing conclusions.

Section 406.031(1)(A) provides that an insurance carrier (the self-insured in this case) is not liable for compensation if the injury occurred while the employee is in a state of intoxication. Section 401.013(a) defines intoxication as having an alcohol concentration to qualify as intoxicated under Section 49.01(2), Penal Code (currently

0.08 or more, the statutory definition of intoxication was lowered from 0.10 to 0.08 effective September 1, 1999); or not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a specific list of substances, including alcohol. An employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. March v. Victoria Lloyds Insurance Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ dism'd). Once the carrier has rebutted the presumption, the employee has the burden of proving that he or she was not intoxicated at the time of the injury. *Id*.

The Appeals Panel has held that for the purposes of the 1989 Act, an alcohol concentration meeting the stated limit contained in Penal Code Section 49.01(2) is by definition intoxication, not merely a presumption, and there need be no further analysis of whether the claimant had the "normal use" of his faculties. Texas Workers' Compensation Commission Appeal No. 91012, decided September 11, 1991; Texas Workers' Compensation Commission Appeal No. 972159, decided November 25, 1997. A claimant would still remain free to prove that the tested level was inaccurate or that the tested concentration was impacted by some other condition or medication (excessive blood loss or analgesic medications, for example). Texas Workers' Compensation Commission Appeal No. 011341, decided July 30, 2001. In this case Dr. B did not testify that the tested level was inaccurate or that the tested concentration was impacted by some other condition, but rather that because certain factors were unknown the blood alcohol level at the time of the accident, between 6:30 and 7:00 p.m., could not be determined. In Texas Workers' Compensation Commission Appeal No. 030090, decided March 5, 2003, the Appeals Panel discussed retrograde extrapolation, the Mata, *supra*, case, and 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).

In this case the hearing officer did not comment or find whether the burden shifted to the decedent to prove that he was not intoxicated. Rather the hearing officer found that the decedent's "blood alcohol concentration level was greater than 0.08 at the time of the one-vehicle accident on _____." The question of whether the decedent had an alcohol concentration of greater than 0.08 at the time of the accident was a question of fact and the hearing officer's determination is supported by sufficient evidence. As noted, although the peaking factor was discussed by the experts, there was no scenario or testimony presented which suggested that the decedent's blood alcohol level was less than 0.08 at 6:30 to 7:00 p.m. on _____. Dr. B merely testified that he could not accurately determine the blood alcohol level at that time because of the unknown factors.

We have reviewed the complained-of determination and conclude that the hearing officer's determinations are not erroneous as a matter of law and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Edward Vilano
Appeals Judge