APPEAL NO. 040146
FILED MARCH 10, 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 December 15, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant was not in the course and scope of her employment when she was involved in a motor vehicle accident (MVA) on _____; that the respondent (carrier) is relieved of liability for compensation because the claimed injury occurred while the claimant was in a state of intoxication; and that the claimant did not have disability because she did not sustain a compensable injury.

DECISION

Affirmed.

It is undisputed that the claimant sustained severe injuries resulting from an MVA that occurred on _____. At issue was whether the claimant was in the course and scope of employment at the time of the MVA and whether the claimant was intoxicated.

COURSE AND SCOPE

The claimant testified that she had attended a business meeting/dinner with coworkers and clients on the evening of _____. She further testified that after leaving the meeting she was going to drive to a climate controlled storage facility to unload some business related materials, including prescription drug samples, and continue to her apartment and enter 11 phone calls in her computer and put together an expense report. The evidence reflected that the claimant kept an office at her home.

The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). Section 401.011(12)(B)(i) and (ii) embody the so-called "dual purpose doctrine." These subsections provide that the phrase "course and scope of employment" does not include travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless "the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel" and "the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel." Texas Workers' Compensation Commission Appeal No. 002187, decided October 20, 2000. In order to come within the dual purpose doctrine an employee must satisfy both requirements and the question of whether the two requirements of the dual purpose doctrine are met is a question of fact. St. Paul Fire and Marine Insurance Co.

v. Confer, 956 S.W.2d 825 (Tex. App.-San Antonio 1997, pet. denied).

There was sufficient evidence to support the hearing officer's finding that the travel on _____, would have been made had there been no affairs or business of the employer to be furthered by the travel. The hearing officer noted in her Statement of the Evidence that the claimant's contention that she intended to go to her storage facility was not persuasive.

It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). 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).

INTOXICATION

An employee is presumed sober. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier rebuts the presumption by presenting probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of injury; that is, that he or she had the normal use of his or her faculties at the time of the injury. The hearing officer found that the claimant had lost the normal use of her mental and physical faculties at the time of the injury on _____, due to the voluntary introduction of alcohol into her body. The evidence reflects that the claimant had a blood alcohol concentration of 0.03% at the time the blood was drawn approximately 45 minutes after the reported time of the MVA. In evidence was a toxicology report dated December 12, 2003, which used a retrograde extrapolation to determine that at the time of the accident the alcohol concentration was 0.05%. The toxicologist further opined that it was within a reasonable medical probability that a blood alcohol concentration of 0.05% could cause impairment of cognition, failure to recognize a hazard and failure to respond to that hazard, in a timely manner. 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. The hearing officer correctly noted that no other medical opinions were offered to controvert the toxicologist's opinion.

Therefore, we agree that the evidence was sufficient to shift the burden to the claimant to show that she was not intoxicated at the time of the injury. The issue of whether the claimant was intoxicated at the time of the injury was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a hearing officer's factual determination only if it is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Although several witnesses testified that the claimant had not lost the use of her mental and physical faculties at the time of her injury, the hearing officer did not find their testimony or the testimony of the claimant persuasive. Although another fact finder may have drawn different inferences from the evidence, which would have supported a different result, that fact does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because we have affirmed the determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that she did not have disability.

We affirm the decision and order of the hearing officer.

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

CORPORATION SERVICE COMPANY
800 BRAZOS STREET
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

I write separately because I believe the present case is an appropriate juncture to reiterate that affirmance by the Appeals Panel does not necessarily mean the Appeals Panel agrees with the decision of the hearing officer, but merely that the decision of the hearing officer was not contrary to the great weight and preponderance of the evidence. In the present case there was substantial evidence that the claimant had the normal use of her mental and physical faculties and that she was in the course and scope of her employment at the time of her injury. The contrary evidence, which the hearing officer found persuasive, was quite problematic to me. However, we have also on numerous occasions held that the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deems most reasonable, even though the record contains evidence of inconsistent inferences. Garza, *supra*, Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993; Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992. Sometimes the Appeals Panel is forced to affirm no matter how distasteful the outcome. *See* Texas Workers' Compensation Commission Appeal No. 981860, decided September 23, 1998. For me, this is one of those instances.

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Gary L. Kilgore
Appeals Judge