APPEAL NO. 91006

On June 17, 1991, a contested case hearing was held. The hearing officer determined that the respondent (requestor at the contested case hearing), was within the course and scope of his employment with Employer at the time of his injury and decided that the appellant (respondent at the contested case hearing), was liable for payment of benefits. Appellant urges us to reverse the decision of the hearing officer on the grounds that the respondent was intoxicated at the time of his accident; hence, he is not entitled to benefits under the Texas Workers' Compensation Act.

DECISION

Finding an insufficient basis to disturb the decision of the hearing officer, we affirm. The appellant is determined to be liable for benefits under the Texas Workers' Compensation Act of 1989 (1989 Act). Tex. Rev. Stat. Ann., art. 8308-1.01 et seq., (Vernon Supp. 1991).

This is a case of first impression involving the issue of drug intoxication under the 1989 Act. In pertinent part, the 1989 Act provides that "[a]n insurance carrier is not liable for compensation if: (1) the injury occurred while the employee was in a state of intoxication; . . ." Art. 8308-3.02. The definition of intoxication involving a controlled substance such as marijuana is ". . . the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body" of such drug. Art. 8308-1.03(30). The 1989 Act does not provide either a presumptive or conclusive level of a drug found in the blood or urine as establishing intoxication (as opposed to an alcoholic concentration of 0.10 or more which is deemed to be intoxication).

The respondent was employed as a roughneck by Employer on _____ when he was injured on the job. During a rigging-down process on an oil rig, a heavy piece of equipment being hoisted suddenly shifted hitting a pry bar being used by the respondent. The respondent was flipped "like a popsicle stick" to the ground some twelve feet below, breaking both of his ankles. The accident occurred at approximately 10:00 a.m. and the respondent was immediately taken to a hospital where, inter alia, a urine sample was obtained. The laboratory results of the confirmatory test established the presence of tetrahydrocannabinol (THC) in the respondent's urine at a level of 55 nanograms per milliliter (.55 ng/ml). (Tetrahydrocannabinol is the active and proscribed ingredient in marijuana). The respondent admitted that he had taken three to four puffs from a marijuana cigarette the night before the injury, but denied any use of marijuana either going to or while at work.

Four witnesses (one of whom was the respondent's brother) called by the respondent all testified that they had been in close proximity and had observed the respondent at work the day of the accident. They did not notice any signs of use of marijuana nor any impairment of his physical or mental faculties. The respondent was able

to do all his tasks without any problems, did not have slurred speech, stagger, or have blurry eyes, and appeared completely normal. All were working on the same rig and all testified they had smoked marijuana before and knew how it affected a person's appearance and actions.

There was evidence that the respondent had been picked up for work at approximately 4:00 a.m., rode with two others some 105 miles to the rig site and worked from approximately 7:30 a.m. until the accident at about 10:00 a.m. when the heavy piece of equipment shifted and flipped him to the ground.

The appellant presented evidence of the company's strict drug abuse policy which provided for dismissal from employment for a person who registered 50 nanograms per milliliter or more of THC in his urine sample and required a written consent from employees to participate in the company's urine testing program. The respondent was aware of the policy and had signed a consent form.

The appellant presented a deposition of Dr. P, an occupational medicine specialist, who examined the laboratory test results on the respondent's urine sample. Dr. P had not examined the respondent nor did he review any of his medical treatment records. He concluded from his review of the chain of custody records and laboratory reports that the respondent had THC in his system. He further stated that the 100 ng/ml cut off level for an enzyme immune assay and the 15 ng/ml cut off level for confirmatory gas chromatography/mass spectrometry was to assure active use of marijuana and not passive inhalation. Dr. P indicated that functional impairment is known to occur with drug use and that preliminary studies suggest performance is impaired long after acute subjective effects have ended. How much impairment with how much drug is not determinable. He concluded that "if intoxication is strictly interpreted as some impairment, then we must assume impairment if the drug is present." He also stated that for at least four to six hours after a dose of marijuana, employees probably function with reduced abilities.

In answer to cross written questions, Dr. P indicated that inasmuch as he did not examine the respondent at the time of treatment on _____, he could not determine or attest to whether the respondent was in control of his mental or physical faculties prior to the time of the treatment at the hospital.

Based upon all the evidence before him, the contested case hearing officer concluded that the respondent was acting within the course and scope of his employment at the time of his injuries and that he was not in a state of intoxication. He determined that the appellant was liable for payment of benefits.

Urging error in the finding that the respondent was not intoxicated at the time of the injury, appellant asks us to reverse and render a new decision that the respondent is not entitled to any benefits under the Workers' Compensation Act. Citing no authority for his position, the appellant argues for the imposition of a strict standard in determining drug intoxication and points out that employers are required by the Texas Workers'

Compensation Commission to implement safety and drug abuse policies and programs. The appellant further suggests that any impairment should be equated to not having "normal use of his faculties" and that "[t]he standard of .50 nanograms per milliliter should be the standard that creates a presumption of intoxication." Noting that the four witnesses testifying in behalf of the respondent were co-workers (one was his brother) and all had used marijuana before, appellant opines that it is highly unlikely they would ever testify that a co-worker did not have the normal use of his mental and physical faculties. Thus, it follows that the presumption of intoxication would not have been overcome by this testimony.

While the argument advanced may have certain appeal, particularly with the emphasis on safety on the job and eradication of drug abuse in the work place, the Texas Legislature has not established a presumptive or conclusive standard for determining drug intoxication. Rather, "the state of not having the normal use of mental or physical faculties . . ." is the standard by which a case is measured for Workers' Compensation purposes. Tex. Rev. Civ. Stat. Ann., art. 8308-1.03(30) (Vernon Supp. 1991). This language closely follows the definition of intoxication in Tex. Rev. Civ. Stat. Ann., art. 6701l-1(a)(2)(A) (Vernon Supp. 1991) as applied in March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785 (Tex. Civ. App.-Fort Worth 1989, no writ), a case concerning alcohol intoxication. The court upheld a jury finding of intoxication where there was evidence of the driver's speeding, swerving and near collisions, the presence of alcohol containers at the accident site, the odor of alcohol on the driver's person, and a blood-alcohol concentration of 0.16 percent.

Earlier cases involving the issue of alcohol intoxication upheld verdicts for the claimant; however, these cases preceded the above statutory and case definition of intoxication. In United States Fidelity and Guaranty Company v. Whiting, 597 S.W.2d 504 (Tex. Civ. App.-El Paso 1980, no writ), the court upheld a verdict for the employee's surviving wife and children where the deceased had been drinking and firing shots from a pistol when he was killed by a policeman and where he had a blood-alcohol content of 0.18 percent. A pathologist testified the deceased was in the gray zone between not intoxicated and definitely intoxicated. Deceased's wife and her sister testified the deceased was sober when he was shot. The court stated the testimony of the pathologist was opinion evidence, not conclusive and the jury was not compelled to believe it. Similarly, in Westchester Fire Insurance Company v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App.-Eastland 1977, no writ), the court upheld a verdict for the surviving spouse and that it was not against the great weight and preponderance of the evidence where there was evidence the deceased had been drinking beer in the afternoon and evening and an expert witness, a pathologist, testified he had a blood-alcohol concentration of 0.165, that the American Medical Association had determined that an individual with a concentration greater than 0.15 would "have lost to a measurable extent some of that clearness of intellect and control of himself that he would normally possess" and that the deceased was intoxicated at the time of death. See also Trader and General Insurance Co. v. Scott, 189 S.W.2d 633 (Tex. Civ. App.-Fort Worth 1945, writ ref'd w.o.m.).

In Aetna Casualty and Surety Co. v. Silas, 635 S.W.2d 424 (Tex. 1982) evidence that a witness observed Silas smoking a hand rolled cigarette in a funny manner some one and one-half to two hours before an accident and later saw him put something in his lunch box. A half smoked cigarette testing positive for marijuana was found in his lunch box. The witness also stated he saw Silas when he complained of hurting his back and that he looked "funny". A policeman testified that depending on the person and quality of the marijuana, a person could get high or intoxicated after smoking just half a cigarette. The Texas Supreme Court agreed with the trial court that, as a matter of law, this evidence was insufficient to present a jury issue on intoxication. See also Texas General Indemnity Company v. Jackson, 683 S.W.2d 879 (Tex. Civ. App.-Tyler 1985, writ ref'd n.r.e.).

In the instant case, we have an expert witness testifying that the respondent had THC in his system above the cut off levels for passive inhalation at the time of the accident, together with his opinion as to the respondent's impairment based upon studies with which he is familiar. He did not see or examine the respondent and based his opinion on a general conclusion that any level of THC in the system would be impairing to some degree. This would, as the reasoning goes, equate to not having the normal use of mental or physical faculties; therefore, intoxication. On the other hand, four witnesses who were with the respondent (several from 4:00 a.m.) on the morning of the accident until 10:00 a.m. when the accident occurred testified the respondent had the normal use of his mental and physical faculties. In addition, there was evidence that the respondent took three or four puffs off a marijuana cigarette the night before but performed, in a normal manner, his usual duties at work until 10:00 a.m. The measurement to determine "normal use" is found in Massie v. State, 744 S.W.2d 314 (Tex. App.-Dallas 1988, pet. ref'd), a DWI case, where the court indicated the evidentiary test was whether a person could or could not use his faculties in a manner that a normal, non-intoxicated person would be able to as opposed to establishing what the specific person's normal abilities were. In our opinion, the evidence in the record is sufficient to uphold the hearing officer's determination that the respondent was not intoxicated at the time of his injuries. Conversely, appellant has not shown the decision is so against the great weight and preponderance of evidence to warrant reversal.

Appellant faults the hearing officer's statement of evidence for not showing one of the respondent's four witnesses was his brother and that all were co-workers. Although not explicitly set out in his Final Decision and Order, it is clear from the record that this information was before the hearing officer when he decided the case. The hearing officer is entrusted with the authority to weigh and judge the relevancy and weight of evidence before him. Tex. Rev. Stat. Ann., art. 8308-6.34(e) (Vernon Supp. 1991), Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). There is absolutely no indication that he abused or misapplied this authority. Similarly, the appellant faults the hearing officer for failing to mention portions of the written deposition of Dr. P. Again, all this evidence was before the hearing officer and that a particular item is not specifically set forth in his statement of evidence in his Final Decision and Order is of no consequence. We do not find the Final Decision and Order to be misleading or deficient.

Appellant disagrees with the hearing officer's conclusion number two which states "[T]hat the existence of a drug policy or the right of Employer to fire DR for a positive result of his urine drug test has no bearing on the issue of whether or not he is entitled to benefits under the Texas Workers' Compensation Act." In essence, and again with no authority cited, the appellant proposes that this evidence "was presented to show from a practical standpoint what this employer has done to develop a standard for presumption of intoxication through the use of marijuana." While the appellant's program may be laudable and is in furtherance of the safety and drug-free work place policies of the Texas Workers' Compensation Commission, the standard to be applied in determining intoxication is set forth in the legislation and it is this standard to which the hearing officer must adhere in weighing all the evidence and making his findings and conclusions. There is nothing to indicate he deviated in fulfilling his responsibilities.

In disagreeing with the hearing officer finding number ten, "[T]hat the accident occurred at approximately 10:00 a.m. on _____, was unavoidable, and in no manner due to any impairment of the mental or physical faculties of DR," the appellant states that this "implies that there is a proximate cause or producing cause requirement regarding the accident itself in order to avoid responsibility by the appellant." Of course, whether intoxication proximately caused or was a factor in an accident is not relevant in determining compensability under the language of the 1989 Act. This is consistent with case law interpreting the intoxication exception found in prior workers' compensation law (as opposed to "horseplay" where producing cause is specifically included). The fact of intoxication alone precludes compensability regardless of whether there is any causal connection to the injury. Dill v. Texas Indemnity Ins. Co., 63 S.W.2d 1016 (Tex. Comm'n App. 1933, judgm't adopted), March v. Victoria Lloyd Insurance Company, supra. The inadvertent wording of this finding could suggest that a causal relationship between intoxication and the accident was somehow relevant. From the evidence, the hearing officer very likely was stating only that, from the circumstances surrounding the accident itself, there was no indication of intoxication as defined in the 1989 Act. In any event, the hearing officer makes it absolutely clear that his decision is footed on his conclusions that the respondent was injured while acting within the course and scope of his employment and that the respondent "was not in a state of intoxication immediately prior to or at the time of his injury." Although there was some testimony that the accident was unavoidable and it was this that the finding apparently alluded to, that factor is of no importance to the issue of compensability in this case. And, we do not find, from the four corners of the record and the Final Decision and Order of the hearing officer that it had any meaningful effect or otherwise conflicts with the result. J. H. Rose Truck Line, Inc. v. Ross, 442 S.W.2d 483 (Tex. Civ. App.-Houston 1969, writ ref'd n.r.e.), Texas Employers' Insurance Co. v. McDowell, 278 S.W.2d 444 (Tex. Civ. App.-Amarillo 1955, writ ref'd n.r.e.).

The decision of the hearing officer is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge