APPEAL NO. 91012

On June 25, 1991, a contested case hearing was held. The hearing officer determined that the employee, appellant herein, was not injured in the course of his employment. His conclusions of law stated that appellant was injured but was intoxicated; the accident was not within the course of employment; and Employer, respondent herein, was not liable for compensation. Appellant takes issue with some matters referred to in the statement of evidence, with findings of fact 5, 8, 10, and 12, and conclusions of law as to intoxication. He asks to be found in the course and scope of employment at the time of the accident.

DECISION

We do not find merit in appellant's contention that there is no basis in law to find intoxication at the time of injury. Evidence of record supports a conclusion of intoxication and we affirm the decision of the hearing officer.

In addition to questioning portions of the hearing officer's statement of evidence, findings of fact, and conclusions of law, appellant comments that the Texas Workers' Compensation Act (1989 Act), Tex. Rev. Civ. Stat. Ann., art. 8308-1.01, et seq., presumes an injured worker is not intoxicated until the carrier proves he is. Appellant's assertion as to the 1989 Act will be discussed first.

Prior to the 1989 Act, "intoxication" appeared in Tex. Rev. Civ. Stat. Ann., art. 8309, ' 1 which provided in pertinent part: ". . . The term "injury sustained in the course of employment", as used in this Act, shall not include: . . . (3) an injury received while in a state of intoxication." Cases from Texas Employers' Insurance Ass'n v. Monroe, 216 S.W.2d 659 (Tex. App.-Galveston 1948, ref'd n.r.e.) to March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied), which dealt with the intoxication exception, varied greatly in their outcome, but were basically consistent in their criteria. The employee had the burden to prove injury arose in the course of employment; the carrier had the burden to present evidence of intoxication; and if carrier presented such evidence, employee then had the burden to show he was not intoxicated at the time of injury as part of the proof that the injury occurred in course of employment. In addition, peculiar to the facts before it, the court in March, supra, commented that a worker found dead at his workplace during working hours was presumed to be "in scope." It added that evidence of intoxication rebuts that presumption, and claimant must then show the deceased worker was not intoxicated. Article 8308-3.02(1) of the 1989 Act is substantially the same as the prior article regarding the effect intoxication has on compensability and will be viewed in this area as conveying the same meaning as the prior act. Walker v. Money, 120 S.W.2d 428 (Tex. 1938). While a common law rule can be changed by statute, Fulgham v. Baxley, 219 S.W.2d 1014 (Tex. App.-Dallas 1949, no writ), the 1989 Act did not address presumptions. As a result the impact of March and other prior law cases concerning presumptions and burden of proof continues under current law. The 1989 Act defines intoxication and makes a quantitative standard available for use in finding

intoxication whereas the prior law did not. Article 8308-1.02(30) states intoxication is "(A) the state of having an alcohol concentration of 0.10 or more, where "alcohol concentration" has the meaning assigned to it in Article 6701ı-1 Revised Statutes; or the state of not having the normal use . . . ." Article 6701ı-1 defines alcohol concentration as the number of grams of alcohol per 100 milliliters of blood.

In the case before us, three men, working for a temporary employment service, were employed at a plant cleaning a tank. The tank was round, approximately 20 feet in diameter by 8 feet high with one small hole in the top for entry. Two of the men worked inside dipping out "sludge" to one outside. The accident happened as appellant was exiting the tank, fell and hit his head.

Appellant takes no issue with the medical records of Hospital which show .221 alcohol from blood drawn approximately one hour after the injury. Under the 1989 Act that test, uncontroverted, together with the testimony of the toxicologist that appellant would have registered over .10 at the time of the accident constitute sufficient evidence for the hearing officer to use as a basis for his decision.

Findings of fact and statements of evidence that address matters other than laboratory results have little significance in this case. Nevertheless, appellant asserts on appeal that sludge that got in his eyes was toxic; that his co-worker in the tank was taller (resulting in the co-worker dripping sludge into appellant's eyes and also making it easier for that [taller] person to exit through the top hole); that the witness who smelled alcohol on appellant did not do so before the accident; that appellant did not drink alcohol after he began work that day; that appellant was fatigued by the work environment; that appellant was not observed as impaired during the work day; and that the hospital records reflect no notations of odor of alcohol or other signs of intoxication as to appellant. None of these points affects the decision in this case. The hearing officer weighs the evidence. Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991). While neither the statute nor rules adopted by the Workers' Compensation Commission require that a statement of evidence be written, this one presents a fair and accurate summary of the evidence of record.

The hearing officer made 12 findings of fact. Numbers 5, 8, 10 and 12 were "controverted" by appellant.

> Finding of fact 5 said "Although there were two workers inside the tank, only Mr. M repeatedly experienced difficulties with the sludge entering his eyes and with his efforts to exit the tank." While an explanation for appellant's problem is proffered in the record, the existence of appellant's problem was not contradicted by any evidence. This finding is based on testimony of a co-worker, is sufficiently supported by evidence of record, and does not affect the determination of intoxication.
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> Finding of fact 8 said "Mr. M drank at least four ounces of gin and eight 16-ounce cans of beer prior to reporting for

work." This finding is based on appellant's own testimony and is sufficiently supported by evidence of record.

Finding of fact 10 said, "At the time of the accident, Mr. M smelled of alcohol to those in his immediate presence." Appellant states that odor of alcohol was only smelled on appellant after the accident. The finding is sufficiently supported by the testimony of a co-worker that: (1) he smelled alcohol on appellant's breath prior to the accident; (2) he smelled alcohol (strong) on appellant after he fell on him during the accident; and (3) an ambulance driver asked (after getting close to appellant who was not conscious) how much appellant had to drink.

The hearsay portion of this testimony was not objected to and the 1989 Act at Article 8308-6.34(e) provides that conformity to legal rules of evidence is not necessary in a contested case hearing.

Finding of fact 12 said, "At the time of the accident, Mr. M's blood alcohol level was at least .10% or more." Although appellant claims, ".10 percent alcohol is not at issue.", Article 8308-1.02(30) of the 1989 Act, defining intoxication as .10 percent alcohol, makes this amount an issue. There is sufficient evidence of record (the Hospital blood alcohol test) to support this finding. (Note: Appellant did not controvert finding 11 which said, "Approximately one hour after the accident, Mr. M was examined at the emergency unit of Hospital and found to have blood plasma alcohol concentration of .221, which is equal to a blood alcohol concentration of approximately .20.")

The hearing officer's conclusions of law that appellant was intoxicated at the time of the accident, that the injury did not arise in the course of employment, and that Employer is not liable to pay compensation are sufficiently supported by the findings of fact. The findings of fact are sufficiently supported by the evidence admitted of record. Appellant is wrong in contending that Westchester Fire Insurance Company v. Wendeborn, 559 S.W.2d 108 (Tex. App.-Eastland 1977, ref'd n.r.e) and March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied) require an intoxication conclusion to be based on a finding of: (1) significant facts that show an inability to function; (2) alcohol containers at the scene; (3) odor of alcohol on the worker; and (4) blood alcohol test showing alcohol. Even if these cases had set forth a test for "intoxication", the 1989 Act at Article 8308-1.02(30) sets forth a new standard providing that an alcohol concentration of .10 or more, standing alone, is one of the definitions of intoxication.

The decision of the hearing officer that appellant was not injured in the course of

employment and denial of his claim for benefits is upheld.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge