APPEAL NO. 950139

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on May 12, 1994, with the record left open to allow the claimant to submit a signed medical report. The single issue before the hearing officer, (hearing officer), was whether the deceased was in a state of intoxication at the time of his injury on (date of injury). The hearing officer held that the deceased was not intoxicated and that the carrier was required to pay death benefits to claimant, who is the deceased employee's widow. The carrier appeals, citing to expert testimony that supports its position, as well as to statements of the deceased's coworkers. The claimant contends that the hearing officer's decision is correct and should be affirmed.

DECISION

We affirm.

The deceased had been employed as a machinist by the (employer). On (date of injury), he arrived at work at 3:30 p.m. and at about 7:00 p.m. suffered a severe head injury while polishing a piece of machinery. CPR was administered at the site and en route to (Center), where he was pronounced dead at 8:39 p.m. An autopsy toxicology report signed by forensic toxicologist (Dr. F), stated that the deceased's blood tested positive for alcohol. Claimant's blood alcohol level was given as 92 mg/dl (or .092 g/ml); the report states, "The blood alcohol concentration encountered in the decedent represents an absorbed body burden of at least 3 and most probably approximately 4 `drinks' of an alcoholic beverage in an adult of average size weighing approximately 155 pounds" although the report of the autopsy performed by (Dr. B) gave deceased's weight as "approximately 200 pounds."

The 1989 Act defines "intoxication," in relevant part, as the state of having an alcohol concentration of 0.10 g/ml or more, or not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage. Section 401.013. The carrier presented evidence at the hearing in support of its contention that at the time of injury the claimant's alcohol concentration was higher than .092 g/ml or, in the alternative, that the manner in which he was performing his duties indicated that he did not have the normal use of his faculties.

(Mr. RO), a chemist employed by the Texas Breath Alcohol Testing Program, testified for the carrier as an expert witness, stating his opinion that at the time the accident occurred the claimant's blood alcohol level was 0.10 g/ml or greater. He noted that the blood sample was taken from the deceased approximately 90 minutes after the injury occurred; he stated that it was possible that the level recorded was lower, higher, or the same as at the actual time of injury. He said he rejected the latter two possibilities as they would require that the claimant have consumed the alcohol on the job, which he had ruled out based upon interviews with deceased's coworkers. Therefore, based upon the

assumption that claimant had consumed the alcohol before coming to work, and using the middle value for elimination rates based upon the population as a whole and upon the fact that deceased, following CPR, had begun breathing on his own (indicating that there was continued blood circulation and thus alcohol elimination prior to death), he opined that claimant's actual blood alcohol level at injury exceeded 0.10. On cross-examination, however, he acknowledged that he did not speak with any coworker who was with deceased the entire time he was on the job, which was located at a brewery, and that he interviewed coworkers about one year after the incident in question. While he said he was informed that the employer had a policy about employees not drinking on the job, he did not inquire as to whether that happened anyway.

(Dr. CO), a forensic pathologist and medical examiner for (city) County, testified that in his opinion he had sufficient information to extrapolate backward and determine deceased's blood alcohol content at the time of injury. He said a principal factor in his consideration was that the deceased, according to medical records, bled "profusely" from the injury, although he conceded that the amount of blood lost was not recorded or estimated. While deceased thus lost blood containing alcohol, Dr. CO said, medical records show he was given 700 cc of replacement fluid that did not contain alcohol and which would dilute the amount of alcohol in the blood and mean that the actual level was higher. Further, he stated that a person's total blood volume can be estimated by a formula based on weight, which provides that a person has 75 cc of blood per kilogram (200 pounds = 91 kg); by multiplication he estimated that claimant's blood volume was 6,825 cc. Assuming that the claimant lost 500 cc of blood (which he stated equaled about one pint, a low amount for a head wound), his blood volume would have been 6,325 cc which would have risen to 7,025 cc at the time of autopsy, following introduction of the fluid. At the time of autopsy the concentration was 92 mg/dl (milligrams per deciliter); multiplying 92 by 70.25 equals 6,463 cc, the total alcohol blood at that time. Dividing 6,463 cc by 6,325 cc (the prior blood volume), he said, equates to a blood alcohol level of approximately .102. Dr. CO also said that if any metabolic activity during the survival interval of approximately one hour were factored in, the number would be even higher. Dr. CO, acknowledging on cross-examination that he did not know the volume of blood lost, also performed the same calculations assuming a blood loss of 100 cc and stated the result would be slightly over 0.10.

Also on cross-examination Dr. CO said he was not involved in the actual testing nor chain of custody at the laboratory which analyzed the deceased's blood; he said that there was some margin of error in such laboratory testing but stated that it was a plus or minus factor. He also acknowledged some debate in the medical community as to differing results based upon the part of the body from which the blood was drawn; he stated that the levels would be greater in blood higher in serum rather than cellular component but that he did not believe the difference would be significant.

Also in evidence was a September 22, 1993, letter from (Dr. G), who stated he had reviewed the hospital medical records and the autopsy report. He wrote in part as follows:

> The post-mortem level of alcohol may be the result of metabolism from that present when he reported to work, three and one half hours prior to the accident and reflect a level at that time as high as 137 mg/dl (0.14). (It is also possible that the post-mortem level may represent a concentration closer to a lower peak, with absorption of alcohol and ascendancy to this latter level retarded by the presence of a moderate amount of food in the stomach.) . . . The level of ethyl alcohol; its relationship to the times of reporting for work and of the accident; and the enlarged liver do provide the basis for an opinion of intoxication due to impairment secondary to voluntary ingestion of an alcoholic beverage.

The claimant provided a letter from Dr. B, the doctor who had performed the autopsy on deceased. That doctor wrote:

> The blood level of ethanol detected in [deceased] at the time of his death is less than the level defined as "intoxication" for the purposes of workers' compensation in Texas.
>
> In response to the comments by [Dr. G] . . . there are numerous conclusions reached by [Dr. G] which cannot be made from the autopsy report or single blood ethanol determination. [Dr. G] stated, based upon the time that [deceased] reported to work and the time of the accident, that [deceased] may have had a higher blood ethanol when he reported for work. This statement is based upon an assumption that is unsupported by fact. In fact, it is equally likely that [deceased] had consumed alcohol while at work in close temporal sequence to the accident, and at the time of the accident was in the absorptive phase of alcohol metabolism. This would suggest that, at the time of the accident, his blood ethanol was less than the 0.092 g/ml determined at autopsy.
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> After reviewing witness statements of (Mr. SJ), (Mr. CJ) and (Mr. WR), there was no evidence of intoxication as [deceased] had not lost the normal use of his mental or physical faculties resulting from the voluntary induction of alcohol in his system. The witness' denial of intoxication along with a blood alcohol 0.092 would suggest that, within a reasonable degree of medical probability, [deceased] was not intoxicated at the time of accident which caused his death.
>
> In addition, because of assumptions not supported by fact and the numerous physiologic variables during a period of shock, one cannot within reasonable medical probability, calculate an accurate blood ethanol level at the time of [deceased's] accident.

The aforementioned coworkers, Mr. SJ, Mr. CJ, and Mr. WR, all gave statements to carrier's adjuster concerning the accident; none said that deceased appeared to be

intoxicated or that they smelled alcohol on him (including Mr. WR, who administered CPR). However, each one commented on the fact that deceased bent to polish "the wrong end" of a piece of machinery from which moving parts were protruding and the fact that they had never seen him do this before.

While not accepting the carrier's witness's opinions that the deceased's blood alcohol was 0.10 or greater, the hearing officer determined that the carrier had presented sufficient evidence to rebut the presumption of sobriety and shift the burden of proof to the claimant to establish that the deceased was not intoxicated at the time of injury. The hearing officer then found that the deceased had the normal use of his mental and physical faculties at the time of his injury, relying upon the statements of his coworkers. The carrier in its appeal cites to its expert evidence concerning claimant's probable blood alcohol level, as well as to the fact that the coworkers' statements only reflect that the odor of alcohol was not detected under the circumstances and that the evidence shows the coworkers could not understand why deceased walked into moving machinery, indicating impaired judgment, alertness, and coordination.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Where, as here, there is conflicting evidence, the hearing officer is entitled to resolve it. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This applies equally to medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The finder of fact's determinations may not be disregarded if the record discloses any evidence of probative value in support thereof. Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). While the record certainly contains evidence, largely the testimony of Mr. RO and Dr. CO, which would have supported a determination that the deceased was legally intoxicated at the time of the accident, that fact is not a sufficient basis to compel a reversal of the hearing officer's decision. Garza, *supra*. We cannot say that the hearing officer's decision that deceased's blood alcohol level was not 1.0 or higher at the time of the injury did not find support in the autopsy report and in the opinion of the individual who performed that report, Dr. B.

Likewise, the evidence as to whether the deceased had full use of his mental and physical faculties at the time of the injury was in conflict. In response to questions posed by carrier's representative the day after the accident, Mr. SJ said he did not smell alcohol on the deceased, and had no knowledge of any past drug use or abuse by deceased. Mr. WR, who administered CPR, stated in answer to carrier's question, that he did not detect alcohol on deceased's breath. Mr. CJ, asked whether there was a chance deceased had been using drugs or alcohol, stated, "I didn't notice any last night . . . I saw [deceased] probably 5 or 5:30 maybe somewhere in there and I didn't smell anything or notice anything . . . started off the shift the way he normally does I didn't sense any problems . . ." Nevertheless, there were also statements by these individuals to the effect that claimant was a trained worker who had performed the same task many times before and had never been observed to act in the manner by which he was injured. While we believe this

evidence could have produced a contrary result from a different fact finder, we cannot say that the hearing officer's decision on this point was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). *See also* Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992.

Determining that the hearing officer's decision and order were supported by the evidence, we affirm.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge