APPEAL NO. 011341
FILED JULY 30, 2001

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 May 29, 2001. The hearing officer held that the respondent (claimant) sustained a compensable injury on __________, and had disability from February 15 until the present. The hearing officer found that the claimant was not in a state of intoxication when he was injured.

The appellant (carrier) has appealed, arguing the facts and including expert evidence that shows that the claimant's blood alcohol content exceeded the statutory limit for alcohol intoxication as a matter of law and that therefore an analysis of whether he did or did not exhibit outward signs of being drunk was irrelevant. The carrier argues that because the claimant did not have a compensable injury, there is no disability. The claimant responds that the decision should be affirmed and that the claimant carried his burden of proving sobriety through his testimony and that of a coworker.

DECISION

Reversed and rendered.

FACTS

The claimant was working as an iron worker/welder at a client company on a plant "turnaround," in a shift that lasted from 7:00 p.m. until 7:00 a.m. At the end of his first workday, he testified that he and a coworker bought a "30 pack" of beer and drank between 10 to 15 beers each before going to sleep shortly after noon on February 13, 2001. He woke up and reported for work shortly before 7:00 p.m. The claimant said that he and a coworker had "lunch" in his car for about 30 minutes around midnight, and denied that any alcoholic beverages were consumed. At around 2:00 a.m. on __________, when he was working approximately 20 feet above the ground, he stated that he crossed over a railing onto a two-step ladder that was attached to a platform on which he was to work. The claimant had not yet "tied off" his safety harness, and was turning around looking for a place to do so when, he said, the stair on which he was standing broke and he fell. He was attended to at the scene then transported by ambulance to a hospital over an hour away and then transferred to a larger city's hospital. He sustained several fractures and dislocation of his shoulder; none of the medical records indicate blood loss at the time. The claimant was given morphine for pain relief at the hospital.

Ms. T, who was on the client company's safety committee, was one of the persons who administered first aid at the site and then rode in the ambulance with the claimant. She said that part of the treatment included cutting away the claimant's clothes to search for wounds. Ms. T said she smelled an alcohol smell from claimant's mouth, just as strong after his clothing was cut away, and that one of the ambulance attendants even remarked

on this. The claimant's blood was drawn at 6:27 a.m. According to the test results, the blood serum level of alcohol was 58 mg/dl. (0.058%).

The carrier presented two expert witness reports as well as the live testimony of one. Both experts were M.D.s and medical toxicologists. Both doctors converted the serum test result into a "whole blood" figure (49 mg/dl and 49.15 mg/dl, respectively) and then from that extrapolated back to the time of the accident (four and one-half hours). One doctor assumed a metabolizing rate of 20 mg/dl per hour (characterized as the rate for an experienced drinker) and the other doctor used a metabolizing rate of 15 mg/dl. The computed blood alcohol content arrived at by each expert was 0.139% and 0.1159% respectively. Both doctors also said that the claimant would have had impairment of the normal use of his faculties as a result. The doctor who testified said that if the only beers that the claimant had consumed were that which he admitted drinking before work, he would have had a level of 0.27% when he came to work and would have been visibly impaired. There was no evidence that he was visibly impaired. Therefore, the doctor concluded that the tested alcohol level indicated likely drinking during the lunch break. Some treatises in evidence corroborate the computational methods used by the doctors. No chain of custody report is in evidence. (The claimant's urine also testified positive for drug metabolites but this was attributed by the expert witnesses to his pain medication).

Finally, investigators for the client company stated that there were no ladders in the accident site as described by the claimant, and that work was performed by stepping over a railing onto a platform (as shown in pictures in evidence). The results of the company's investigation was that the accident occurred because the claimant had not tied himself off. There were testimony that the standard procedure and part of the safety training was to "tie off (i.e., secure the safety harness to a stationary object) prior to stepping out over a drop off.

A statement was admitted over objection from the carrier that was taken from the coworker with whom the claimant had drunk beer the morning before the accident. This statement asserted that the claimant was acting normally the night of his accident, and that he had fallen from a platform (not a ladder).

INTOXICATION

We agree that the hearing officer erred in determining that the claimant was not intoxicated at the time of his accident, and that her decision is against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d. 660(1951).

Section 401.013(a) defines intoxication as:

> (1) having an alcohol concentration to qualify as intoxicated under Section 49.01(2), Penal Code; or

> (2) not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of: (A) an alcoholic beverage . . . .

The Penal Code section cited, effective September 1, 1999, lists the referenced concentration as 0.08, the ratio of alcohol to specified amounts of blood and urine cited in the first provision of that statute.

The Appeals Panel has held that for purpose, of the 1989 Act, an alcohol concentration meeting this limit 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).

As the hearing officer correctly noted, the carrier presented probative evidence of intoxication, and the burden shifted to the claimant to prove sobriety. The carrier did so through expert analysis, accompanied by corroborating scientific articles that were not written with the claim in mind, as to how the tested level from blood drawn four and one-half hours after the accident would extrapolate back to levels exceeding 0.08. This evidence was unrefuted. The hearing officer has cited nothing in the decision as to why she found such evidence not credible. Indeed, the evidence was enough to persuade the hearing officer that the burden had shifted. While the claimant's attorney made arguments that no chain of custody of the test had been established, the claimant offered no evidence to meet his burden that the sample drawn at the hospital and taken to its lab was from anyone other than the claimant or was inaccurate. No imbibing of alcoholic beverages after the accident is alleged, let alone proven. The great weight and preponderance of the evidence shows that at the time of his accident, his alcohol concentration exceeded the limit of intoxication as defined in Section 401.013(a)(1). The hearing officer appears to have applied the wrong standard by analyzing the evidence in terms of whether the claimant had the normal use of his faculties (as per Section 401.013(a)(2)). We accordingly reverse the hearing officer's decision that the claimant sustained a

compensable injury and was not intoxicated at the time of his injury, and render a decision that the carrier is discharged from liability for the claim. The finding of disability is also, thus, reversed.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge