APPEAL NO. 022407
FILED NOVEMBER 13, 2002

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 August 20, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) was not in a state of intoxication on _____, when he sustained his work-related injuries; that the claimant sustained a compensable injury on _____; and that the claimant had disability from March 27, 2002, through the date of the CCH. The appellant (carrier) appeals the determinations, arguing that the great weight and preponderance of the evidence establishes that the claimant was intoxicated at the time of his injury. The carrier additionally argues that the hearing officer erred in taking official notice of the Texas Commission on Alcoholism's (TCA) officially recognized range of metabolic rates of bodily disposition of alcohol per hour and a prior Appeals Panel decision after the close of the hearing. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant worked as an iron worker for the employer. It was undisputed that on _____, the claimant sustained severe multiple injuries when he fell in an internal vessel structure he had entered to try to dislodge a beam that was stuck.

At the CCH and on appeal, the carrier maintained that it should be relieved of liability because the claimant was intoxicated at the time of the accident. The 1989 Act defines intoxication as having an alcohol concentration to qualify as intoxicated under Section 49.01(2), Penal Code (currently 0.08 or more, the statutory definition of intoxication was lowered from 0.10 to 0.08 effective September 1, 1999); *or* not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a specific list of substances, including alcohol. [Emphasis added.] *See* Section 401.013(a). The hearing officer stated that the results of the alcohol content test were not in evidence. However, we note that the results were in evidence in Carrier's Exhibit No. 4 as pointed out in the carrier's appeal.

To establish the claimant's intoxication, the carrier relied upon a toxicology report dated May 20, 2002. The report noted that a blood alcohol analysis was performed on the claimant approximately 1½ hours after the accident and the results showed 0.051 alcohol concentration. The medical doctor who prepared the report using a dispositional metabolism of 0.02/hour extrapolated the results to determine the claimant had a blood alcohol concentration of 0.081 at the time of the accident. The doctor in the report further concluded that in reasonable medical probability the claimant was working under the influence of alcohol and was impaired at the time of the accident.

An employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. March v. Victoria Lloyds Insurance Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ dism'd). Once the carrier has rebutted the presumption, the employee has the burden of proving he or she was not intoxicated at the time of the injury. Id.

The Appeals Panel has held that for the purpose of the 1989 Act, an alcohol concentration meeting the stated limit contained in Penal Code Section 49.01(2) 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 (Unpublished). 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). Texas Workers Compensation Commission Appeal No. 011341, decided July 30, 2001.

The carrier argues that the hearing officer erred in reopening the record to introduce exhibits. The hearing officer notified the parties of his intentions in a letter and no opportunity was given for the parties to respond. We find no error in admitting Hearing Officer's Exhibit No. 4 which was a copy of a prior Appeals Panel decision. The decision was cited by the carrier at the CCH and there is no error in looking to prior decisions for legal precedent. However, we note that it is inappropriate for the hearing officer to decide the case before him using expert evidence presented in an unrelated case.

The carrier further argues that the hearing officer committed reversible error by taking official notice of the TCA's officially recognized range of metabolic rates of bodily disposition of alcohol per hour without telling the parties he intended to do so until after the CCH had been concluded and the record closed. Our standard of review regarding the hearing officer's evidentiary matters is one of abuse of discretion. Texas Worker's Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the admission was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The hearing officer based his decision of the intoxication issue in part on the different metabolic rate he took official notice of.

In numerous cases we have pointed out that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2(11) (Rule 142.2(11)) provides that the hearing officer may "take official notice of the law of Texas and other jurisdictions, Texas city and county

ordinances, the contents of the Texas Register, the rule of state agencies, facts that are judicially cognizable, and generally recognized facts within the [Texas Workers' Compensation] Commission's specialized knowledge."

The document which the hearing officer took official notice of containing the metabolic rate is not dated and although it shows body weight as affecting the level of impairment based on the number of drinks, it contains only one metabolic rate to dissipate the effects of alcohol over time. The only source listed on the document is the TCA and the document refers to the outdated definition of the level of intoxication. We are uncertain that the TCA still exists as a state agency.

If a fact may be disputed by competent evidence, official notice may not be taken. Montgomery Ward & Co. v. Peaster, 178 S.W.2d 302 (Tex.Civ.App.-Eastland 1944). Nor may official notice be taken of facts that the court cannot know without resorting to expert testimony or other proof. Johnson v. Cooper, 379 S.W.2d 396 (Tex.Civ.App.-Fort Worth 1964). There was expert evidence in the record which contradicted the metabolic rate contained in the document the hearing officer took official notice of. We do not consider the metabolic rate to be either a judicially cognizable fact or the rule of state agencies or any other matter the hearing officer had authority to take official notice of. The hearing officer erred in basing his decision on expert evidence in an unrelated case and on the TCA document he took official notice of.

We reverse the hearing officer's decision and order and remand for the hearing officer to: (1) allow the parties an opportunity to respond to any additional evidence which may be added by the hearing officer; (2) not consider the metabolic rates put forth by the TCA; (3) not consider the toxicologist's evidence regarding the dispositional metabolism of alcohol that is set forth in Appeal No. 002818, decided January 17, 2001; and (4) reconsider the issues in this case consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge