APPEAL NO.92224

On April 23, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. The hearing was held on a remand directed in Texas Workers' Compensation Commission Appeal No. 91107 (Docket No. redacted), decided January 21, 1992. The hearing officer determined once again that the appellant did not sustain a compensable injury since the injury was sustained while the appellant did not have the normal use of his mental and physical faculties as a result of being in a state of intoxication. The hearing officer ordered that the appellant was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges that the evidence introduced at the contested case hearing is sufficient to substantiate a finding that the appellant was not intoxicated on the date of the injury.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer, we affirm.

The issue on remand in this case involved the question of whether the evidence of drug intoxication was sufficient to remove the presumption of sobriety and thereby place the burden on the appellant to prove he was not intoxicated at the time of the injury causing incident. Under Article 8308-3.02(1) an insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. At the first contested case hearing, the hearing officer found the appellant ingested enough marijuana to cause him not to have normal use of his mental and physical faculties at the time of the injury and concluded that the appellant did not offer sufficient evidence to prove by a preponderance of the evidence that he had the normal use of his mental and physical faculties at the time of the injury and that the injury occurred while he was in a state of intoxication. The evidence in that hearing that caused us great concern and led to the remand involved a blood and urine sample taken at the same time and which came up with what appeared to be unsatisfactorily explained opposite results, the urine test showing presence of the metabolite of marijuana and the blood test being negative. Contrary to the insinuation raised in the respondent's reply to this appeal, the Appeals Panel has never suggested that expert testimony is required to raise the issue of intoxication and thereby place the burden of proof on a claimant to establish sobriety. However, if expert testimony or other scientific evidence is offered and admitted, then it has to be meaningful and not appear to be self contradictory without some satisfactory explanation or interpretation. As we stated in Texas Workers' Compensation Commission Appeal No. 92173 (Docket No. redacted) decided June 15, 1992, we have never held nor implied that a carrier must present scientific evidence and/or expert testimony in order to raise the intoxication exception. That does not detract from the matter that evidence offered to raise the issue of intoxication and erase the presumption of sobriety thereby shifting the burden back to claimant, must have some probative value and not be so weak as to be meaningless or amount to no more than a mere scintilla. "We believe it clear from the above referenced Texas cases and Appeals Panel

decisions that evidence sufficient to raise the issue is what is required of the insurer to overcome the presumption of the employee's sobriety." Appeal No. 92173, *supra*. The respondent's position that the Appeals Panel's remand decision suggests a higher standard than previously applied in prior decisions or Texas case law and that "any" evidence at all is enough to erase the presumption of sobriety is just not persuasive. We have extensively examined cases referring to any evidence raising the issue and it is clear that there was sufficient evidence in those cases. None involved what appeared to be unexplained, inherently contradictory evidence or a mere scintilla of evidence or some evidence lacking an indicia of reliability. Appeal No. 91107, *supra*; Appeal No. 92173, supra; Texas Workers' Compensation Commission Appeal No. 91006 (Docket No. redacted), decided August 21, 1991; Texas Workers' Compensation Commission Appeal No. 91012 (Docket No. redacted), decided September 11, 1991; Texas Workers' Compensation Commission Appeal No. 91018 (Docket No. redacted), decided September 19,1991. We believe our decisions clearly set forth what is required in this matter.

At the hearing on this remand, both parties introduced statements from experts concerning the difference in the results from the urine specimen test and the blood specimen test. We find, as did the hearing officer, that the statement of the expert (Mr. C)[1], a forensic chemist, explains and clarifies what we had determined to be apparent, unexplained ambiguous or inherently contradictory evidence in the previous contested case hearing and

[1] The statement provides: "(1) Concerning the rate of metabolism of THC, the psychoactive component of Marihuana, data cited in the (DOT) studies (Feasibility Assessment of Chemical Testing for Drug Impairment, Final Summary Report. Sept. 1985 and subsequent Final Technical Report) demonstrate that the serum concentration of THC itself decreases to undetectable levels in two hours or less for light users. The fact that the samples in question (blood and urine) were taken from (appellant) over eight hours after the accident clearly accounts for the fact that THC itself was not detected in the plasma of (appellant). (2) THC-COOH (THC metabolite), on the other hand, persists in the urine for much longer periods. Thus, the detection of THC-COOH in urine, as reported in (appellant's) sample, after eight hours of elapsed time from the time of usages would be considered typical. High concentrations (greater than 100 ng/ml) are considered to be indicative of recent usage. It should be noted that (appellant's) THC results were well above this value. (3) DOT studies (cited previously in response #1) cite data showing the typical THC-COOH concentration curves in urine and plasma parallel the periods of subjective "highs" and impairment noted in certain performance tests (Complex Tracking Tasks). Both periods are from 5-8 hours in duration from the time of ingestion. The DOT study also noted that urine concentrations of THC-COOH peaked at 100 ng/ml or less within 4-6 hours of the consumption of a standard NIDA 2.8% cigarette. While precise one to one correlations cannot be made, it is noted that (appellant's) urine THC level was 173 ng/ml. This would roughly equate to the consumption [of] two (2) or more such cigarettes at or near the time of the accident in question. Due to the above considerations, the probability of (appellant's) intoxication at the time of the accident, due to the voluntary consumption of an illegal controlled substance, is supported."

that the evidence is sufficient to raise the issue of intoxication from drug ingestion and to overcome the presumption of sobriety. The hearing office clearly did not find the appellant's evidence to be credible and determined that he had not met his burden of proof by a preponderance of the evidence that he was not intoxicated at the time of the injury. Hence, he had not established he suffered a compensable injury. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). He resolves conflicts in the evidence, as there was in this case, and makes his findings of fact. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As the trier of fact, he may believe all, part or none of the testimony of a witness (Taylor v Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). We do not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). Only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight and preponderance of the evidence, which it is not here, would we be justified in reversing or setting aside his decision. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex 1986).

The decision is affirmed.

_____

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____

Joe Sebesta
Appeals Judge

_____

Robert W. Potts
Appeals Judge