APPEAL NO. 92401

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On July 14, 1992, after being continued twice (once at the request of claimant and once, by carrier), (hearing officer) presided at a contested case hearing in (city), Texas. He decided that claimant, respondent herein, was not intoxicated at the time of his accident and is entitled to benefits. Appellant (insurance carrier) asserts that it provided sufficient evidence to raise the issue of intoxication and offers added evidence not admitted at the hearing and asks that the decision be overturned.

DECISION

Finding that the evidence sufficiently supports the decision, we affirm.

Respondent was working as a rigger in a basket held by a crane on (date of injury), when the basket malfunctioned and spun around hurting his knee. Both he and another worker in the basket were wearing safety belts when the accident happened at approximately 2:20 in the afternoon. He notified his superintendent and was taken to the hospital, where per company policy, a urinalysis was done. He had surgery on the knee that week and learned of a positive finding for cocaine use approximately one week after giving the sample. There is no dispute that the injury happened on the job and that notice was given.

Appellant sought to raise the issue of an exception to its liability based on intoxication under article 8308-3.02(1) of the 1989 Act. Intoxication for purposes of this case is defined at article 8308-1.03 (30) as "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of:" certain drugs. After repeated attempts, appellant's exhibit A, a report of drug analysis, was admitted into evidence. This report showed a positive result for cocaine in the amount of more than 9000 nanograms per milliliter. The report had an identification number on its right upper corner; had certain numbers corresponding to a social security number, which, where legible, matched respondent's; had respondent's name written on the form; and showed respondent to be a female. He is not. When asked by the hearing officer whether evidence would be offered to explain the inconsistency on the form, the appellant replied that it would not make such an offer. Although no evidence was offered to explain any inconsistency or illegible portion on the drug report, marking over some numbers imprinted for the social security number is apparent.

Respondent denied any knowing drug usage. He acknowledged abundant liquor consumption on New Year's Eve and that an acquaintance gave him a pill at approximately 9:00 p.m. which he took to "keep us awake." He attributed any possible drug use to that pill, and otherwise said that he had used drugs before but had been "clean" for three or four years. He said he has never used crack cocaine. He said he did not know if the report was his and offered that his name written on the report was not in his handwriting. He

added that he did no drinking on (date), a holiday, and except for his hangover was not intoxicated on (date). He testified that on (date of injury) he went to work at 7:00 a.m., was not intoxicated, and had the normal use of his mental and physical faculties. When asked to give the urine specimen, he was not reluctant to do so because he had no fear that it would be positive; he added that if he had used drugs, he could have delayed the exam.

Mr. M., the crane operator, testified that he had worked with respondent the week before the accident and for several hours on (date of injury) before the injury. In his opinion, the respondent was not impaired either mentally or physically on (date of injury). He has not seen respondent impaired, but has seen others intoxicated, both by alcohol and cocaine; he has been intoxicated also. He stated that he could tell if respondent were intoxicated and he was not. He added that if he felt respondent was impaired, he would not have let him get into the basket held by the crane.

Appellant produced no evidence of witnesses to respondent's conduct on (date of injury). In addition to the drug report, appellant called Dr. G, an expert witness in addiction, who testified that the 9000 nanogram level of cocaine was exceedingly high. He observed that a level of that magnitude is usually reached by smoking crack cocaine, and snorting cocaine generally will not produce a level higher than 2000 nanograms. The order of intensity of cocaine introduced to a user's system is highest with smoking, injection is next, and snorting follows. He said generally that cocaine stays in the system approximately two and one-half days. He answered the question whether he could disagree with witnesses who said respondent was not intoxicated, by saying that he "could" disagree based in the amount on the report, but was not associated with the testing laboratory and could not say the report was respondent's. He could not say who took the test reflected as appellant's Exhibit A, but said that this testing was accurate and valid for the specimen involved. He described his own experience as a medical review officer of drug analysis reports by stating that he would compare a copy of the paperwork made when the samples were taken with a copy after the results were compiled and if anything was out of order, he would cancel the test.

When the hearing officer did admit appellant's exhibit A, he made it clear that the amount of weight he gave it would be influenced by its inconsistencies. The decision to admit was consistent with Article 8308-6.34(e) of the 1989 Act. In March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied), the report as to intoxication was admitted, with the court saying that any gaps in the chain of custody would go to the weight, not the admissibility of the document. In that case, however, there was no specific inconsistency on the face of the document reported; the unanswered chain of custody question was general in asking why the sample was taken and from what part of the body of the deceased it was taken. The March court went on to say, "[w]hen (VL) introduced the blood alcohol report and the testimony of those who witnessed March's erratic driving at the accident scene, the burden returned to the . . . claimants, to prove that he was not intoxicated . . ."

The hearing officer made two findings, attacked on appeal:

5.Carrier failed to present sufficient probative evidence
to raise the issue that claimant was in a state of intoxication
at the time of his injury.

6.Claimant was not in a state of intoxication at the time of
his injury on (date of injury).

Finding of Fact No. 6, standing alone, would be upheld as not against the great weight and preponderance of the evidence. The hearing officer as trier of fact is sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. Mr. M was a steadfast witness, of some experience, who observed respondent and said he was not intoxicated. Such evidence can overcome an indication of intoxication based on an analysis of body fluids performed in a laboratory, as held in Westchester Fire Ins. Co. v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e.).

There appears to be some question, however, as to a basis for Finding of Fact No. 6 once Finding of Fact No. 5 was made. If an issue as to intoxication was not raised by the evidence, there would appear to be no need for a finding as to intoxication. The appeals panel has previously looked to the hearing officer's decision as a whole to interpret a conclusion of law. *See* Texas Workers' Compensation Commission Appeal No. 91048 (Docket No. redacted) decided December 2, 1991. In the case before us, we will consider the hearing officer's "Discussion of Evidence," indicating that he questions the credibility of the drug report, in reviewing the two findings of fact. Without additional evidence, the hearing officer says that he does not consider the report to be reliable.

The hearing officer's decision thus makes it clear that he made Finding of Fact No. 5 because of the lack of credibility of the only evidence that tied respondent to cocaine use at the time of the accident. Although the question is related to chain of custody, it is more; an unexplained inaccuracy in gender may raise a question as to whether other entries are inaccurate in identifying respondent and, in the least, presents an inconsistency in this report. As trier of fact, the hearing officer may resolve inconsistencies. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). If contested case hearings were structured with a jury in addition to a presiding officer, we could be compelled to consider whether the hearing officer should have ruled that an issue of intoxication had been raised so that the jury could judge credibility and weight, and resolve inconsistencies. In this case, even if the hearing officer had ruled that the evidence did raise the intoxication issue, he would still have had to consider the same issues of credibility, weight, and inconsistency in deciding whether intoxication was present just as he has done in deciding whether that issue was raised. Since the hearing officer did not indicate that an issue had not been raised at hearing, both parties were free to proceed in developing their case as they saw fit. Appellant chose to present no more evidence, even upon inquiry by the hearing officer. On the other hand, respondent provided the evidence of Mr. M and respondent's wife as to whether respondent

was impaired mentally or physically at the time. As a result, the hearing officer had before him all the evidence either party wished him to consider in order to decide whether respondent was intoxicated.

In again looking to the hearing officer's "Discussion of Evidence" and to the evidence developed at the hearing, we believe it reasonable to consider that Finding of Fact No. 6 was provided to show that the hearing officer weighed all the evidence just as if an issue of intoxication had been raised. In making Finding of Fact No. 5 the hearing officer showed that credibility of evidence should be considered in determining whether an issue was raised, and he indicated that the evidence was not only insufficient to determine intoxication, but that it was insufficient to raise the issue. Even if we viewed Finding of Fact No. 5 as being unwarranted, we could disregard it under the facts of this case and affirm for the respondent on the valid finding. *See* Texas Indem. Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940).

Finally, appellant asks the appeals panel to consider a letter from the doctor at (Clinic) dated August 4, 1992; a letter from the laboratory manager dated August 6, 1992; and another copy of the same drug report introduced at the hearing but with a chain of custody document attached. The appeals panel only considers the record, the appeal, and the response in its review of contested case hearings. *See* Texas workers' Compensation Commission Appeals No. 92400 (Docket No. redacted) decided September 18, 1992 and No. 91015 (Docket No. redacted) decided September 18, 1991. To constitute "newly discovered evidence," there must be a showing that the evidence came to appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). *See also* Article 8308-6.42(a) of the 1989 Act. In addition, as stated previously, the hearing officer is the sole judge of weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act.

The decision is not against the great weight and preponderance of the evidence and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge