APPEAL NO. 92424

On July 8, 1992, a contested case hearing was held. The issue before the hearing officer, which was unresolved at the benefit review conference, was whether the claimant, appellant herein, was intoxicated on drugs at the time of the injury. The hearing officer determined that appellant was in a state of intoxication at the time of the injury, that appellant's injury did not occur in the course and scope of his employment, and that respondent, the employer's workers' compensation insurance carrier, is not liable for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant disagrees with Findings of Fact Numbers 5, 6, and 7, and states that he is owed income benefits. Respondent asserts that appellant's request for review was not timely filed, and that the evidence supports the hearing officer's findings and decision.

DECISION

The decision of the hearing officer is affirmed.

Appellant's request for review was timely filed. The decision was sent to the parties by the Division of Hearings & Review on July 30, 1992. Appellant's request for review is postmarked August 13, 1992, and was received by the Texas Workers' Compensation Commission on August 17, 1992. Allowing for mailing time as provided by Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sections 102.5(h) and 143.3(c), the request for review was filed not later than the 15th day after the day of receipt as required by Article 8308-6.41(a).

Prior to his injury of _____, appellant had worked for the employer for three years and had received good employee evaluations. On _____, appellant was at work cutting a piece of steel tubing when the tubing rolled over and smashed the little finger of his left hand. The injury occurred approximately 15 to 30 minutes after he had started work at 7:00 a.m. He immediately reported the injury to his supervisor and then drove himself to a medical clinic and had his finger treated. At the clinic he voluntarily gave a urine sample which tested positive for marijuana. On March 26, 1992, appellant was terminated from employment due to the positive drug test.

Appellant testified that he had not used marijuana for at least 12 years, that he had not been around anyone smoking marijuana, and that he believed the drug test showed a "false positive" because he had taken cough syrup, aspirin, and Advil for a cold within 24 hours of the drug test, and because he had not used marijuana. He introduced into evidence the results of urine drug screens taken on April 16, 1992, and May 22, 1992, both of which were negative for all drugs tested, including marijuana. He also introduced into evidence an article entitled "Drug Testing In The Workplace" which was published by the American Society of Clinical Pathologists and the Bureau of National Affairs, which article questions the reliability of urine drug screening, mentions certain analogues which could give a false positive result if present in the urine, mentions that bloodshot eyes and

increased heart rate are physical changes associated with marijuana use, and states, among other things, that: "[p]ositive confirmed tests mean the drug is present. They do not prove impairment or absolutely guarantee that the individual consumed the drug."

A foreman of the employer testified that he saw appellant before the accident and after appellant returned to work from the clinic. When asked if he could give an opinion as to whether appellant was "impaired" at the time of his injury, this witness said he could not do so. He explained that he had not been looking for any type of impairment at the time. He said that appellant looked more or less like he was frustrated with himself for getting hurt.

A "Consent For Toxicology Tests" and an "Authorization For Testing, Release, and Use of Results," both dated _____ and signed by appellant, were in evidence. The consent form noted that appellant was taking "Robitussin cough syrup, Advil, Aspirin, Comtrex." Also in evidence was a document entitled "Toxicology Test Requisition/Chain of Custody Form" which identified appellant as the patient, urine as the specimen type, _____, as the collection date, and 9:30 a.m. as the collection time. Appellant's signature appears on the "donor's" signature line, and the person identified on the form as the collector of the specimen signed the form and noted the condition of the specimen as "intact" when transported. The consent, authorization, and test requisition forms each contain appellant's name and a Social Security number which is the same Social Security number as shown on appellant's "W-4" (Employee's Withholding Allowance Certificate) which was in evidence.

The report of toxicology test results dated March 26, 1992, which was in evidence and which contained the same Social Security number as shown on appellant's W-4 and on the previously mentioned forms relating to the specimen taken on _____, showed that the tests were completed on March 26, 1992, and that there was a positive test result for marijuana "CARBOXY-THC 447 ng/ml." The report stated that "all positives confirmed by GC/MS."

Also in evidence was a letter dated May 28, 1992, from Dr. W, Ph.D, to respondent's claim representative. According to another document in evidence, Dr. W is an Associate Professor of Pharmacology at the (College), and holds a certification from the American Board of Forensic Toxicology. In the letter of May 28th, Dr. W stated the following (the hearing officer noted portions of this letter in the Statement of Evidence portion of her decision):

> From the information submitted concerning [appellant], it is apparent that he submitted a urine sample that tested positive for Delta-9-Carboxy-THC, the major metabolite of marijuana. The concentration found in the urine by gas chromatography/mass spectroscopy was 447 ng/ml.

> The Delta-9-Carboxy-THC metabolite is approximately 30% of the total cannabinoids (marijuana metabolite) excreted in urine after use. The value of 447 ng/ml would be roughly equivalent to total marijuana metabolites of 1490 ng/ml. This value is consistent with very recent use of marijuana.
>
> Based on my personal research and review of the scientific literature, this concentration is consistent with use within a 24 hour period prior to the collection of the urine sample from [appellant]. Several research studies have revealed that the effects of marijuana that result in loss of normal mental and physical faculties are felt up to twenty-four hours post use. This is correlated with plasma THC (active compound of marijuana) of greater than one (1) ng/ml. A standard dose-response curve demonstrates that greater than 50% of individuals tested with plasma concentrations of greater than or equal to one (1) ng/ml are significantly effected in critical tracking errors. This is loss of normal mental and/or physical faculties.
>
> From the above, it is within all reasonable scientific probability that [appellant] had lost the use of his normal mental and physical faculties during the last 24 hours prior to the collection of the urine sample listed.

In addition to the foregoing, a "Statement of Facts" dated April 12, 1992, which was taken by an investigator for the Texas Employment Commission in relation to appellant's application for unemployment benefits and his job termination, attributed to appellant the statement "I had smoke pot the day before" in discussing the circumstances of his injury and termination. Appellant admitted reading and signing the TEC document, but said that the statement was a mistake on the part of the investigator because he had told her he had not smoked pot the day before his injury. He also said that the statement was added to the form by the investigator after he had signed it.

After finding that appellant had injured his finger at work on _____, and that appellant voluntarily gave a urine sample, the hearing officer made the following findings of fact and conclusions of law:

> Finding No. 5. Claimant's urine sample tested positive for Delta-9-Carboxy-THC, the major metabolite of marijuana.
>
> Finding No. 6. The concentration found in Claimant's urine by gas chromatography/mass spectroscopy was 447 ng/ml.
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> Finding No. 7. The Carrier having presented evidence of intoxication, the Claimant failed to show by probative evidence that he was not intoxicated at the time of injury.

Conclusion No. 3. Claimant was in a state of intoxication at the time of his injury.

Conclusion No. 4. Claimant's injury did not occur in the course and scope of his employment.

Appellant states that he disagrees with Finding No. 5 because "testing positive for a drug does not prove drug use or intoxication," disagrees with Finding No. 6 because "the concentration level, there is no specific scale establishing impairment from intoxication or intoxication level," and disagrees with Finding No. 7 because "I did provide medical documentation showing my heartbeat was normal, my blood pressure was normal and two other drug tests which were completely negative."

Article 8308-3.02 provides that an insurance carrier is not liable for compensation if: (1) the injury occurred while the employee was in a state of intoxication. That part of the definition of intoxication as provided in Article 8308-1.03(30) which is applicable to a controlled substance such as marijuana is "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of: (ii) a controlled substance or controlled substance analogue, as those terms or defined by the Texas Controlled Substances Act (Chapter 481, Health and Safety Code)."

In Texas Workers' Compensation Commission Appeal No. 91018 decided September 19, 1991, a marijuana intoxication case, we noted that:

> A claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). However, even if otherwise within the scope and course of employment, if a claimant is intoxicated, the 1989 Act precludes his recovery for an injury. In this regard, a claimant need not prove he was not intoxicated as the courts will presume sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct), March, *infra*. Nonetheless, when the carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove that he was not intoxicated at the time of injury. March v. Victoria Lloyd Insurance Co., 773 S.W.2d 785 (Tex. Civ. App.-Fort Worth 1989, writ denied); Texas Employers' Insurance Association v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1949, writ ref'd n.r.e.).

In the present case, respondent presented the toxicology test results of appellant's urine showing that it tested positive for marijuana and gave a quantitative result of 447 ng/ml, and presented an expert's opinion that the value of metabolite found was consistent with very recent use of marijuana and that within all reasonable scientific probability

appellant had lost the use of his normal mental and physical faculties during the last 24 hours prior to the collection of the urine sample. While we would agree that testing positive for a drug does not, in and of itself, compel a finding of intoxication at the time of the injury, *see* Texas Workers' Compensation Commission Appeal No. 92173 decided June 15, 1992, and that the 1989 Act does not provide either a presumptive or conclusive level of a drug found in the blood or urine as establishing intoxication (as opposed to an alcohol concentration of 0.10 or more which is deemed to be intoxication), *see* Texas Workers' Compensation Commission Appeal No. 91006 decided August 21, 1991, we hold here, as we did in Appeal No. 91018, that the toxicology test results and the opinion of respondent's expert witness shifted the burden of proof to appellant to prove that he was not intoxicated at the time of the injury. By so holding, we do not mean to imply that a carrier must present scientific and/or expert testimony in order to raise the intoxication exception. *See* Appeal No. 92173, *supra*.

Appellant's testimony, evidence concerning his blood pressure and pulse, the two subsequent negative urine drug screens on April 16th and May 22nd, and the article on drug testing in the workplace, was evidence which the hearing officer clearly did not find sufficient to sustain appellant's burden of proof that he was not intoxicated at the time of his injury. Hence, appellant did not establish that he sustained a compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 92224 decided July 16, 1992. We note that appellant did not offer evidence that the specific over-the-counter medications he said he had taken could cause or did cause a false positive drug test. No evidence was offered which showed that the analogues mentioned in the drug testing article which were found to have given false positive results were in the medications taken by appellant, nor that if such were present that they would cause a false positive test in a gas chromatography/mass spectroscopy. 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 the evidence. Article 8308-6.34(e). She resolves conflicts in the evidence and makes findings of fact. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). We do not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence as in this case. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ); Appeal No. 92224, *supra*. Only if the evidence supporting the hearing officer's determination is so weak or against the great weight and preponderance of the evidence, which it is not in this case, would we be justified in reversing or setting aside the decision. Appeal No. 92224, *supra*.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge