APPEAL NO. 92591

A contested case hearing was held in (city), Texas, on October 13, 1992.. The Hearing Officer determined that the respondent's (claimant) injury was compensable and that he was not in a state of intoxication at the time of the injury. Accordingly, the hearing officer awarded benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Appellant (carrier) urges that we reverse the decision of the hearing officer and render a new one since "the evidence clearly showed that the (claimant) was intoxicated at the time of his injury as that term is defined in the Texas Workers' Compensation Statutes." Claimant asks that the decision be affirmed as it is not against the great weight and preponderance of the evidence; rather, that the evidence is overwhelming that (claimant) was not intoxicated.

DECISION

Finding evidence sufficient to support the determinations of the hearing officer, the decision is affirmed.

The single issue in this case was whether the claimant was in a state of intoxication at the time of his on-the-job injury on Wednesday, _____. The evidence is fairly and adequately set out in the Decision and Order of the hearing officer and will be briefly summarized here. Claimant, a 37 year old oil field worker, was working on a derrick some 50 to 60 feet off the ground. He had taken off a safety belt and safety cable to adjust his trousers and forgot to reattach the safety cable when he slipped, fell forward and grabbed a pipe and slid/fell to the ground. He injured his back in the fall and was taken to the hospital. He was released two days later but before his release a urine sample was taken for drug testing. There was no dispute on the chain of custody or analysis of the sample. It tested positive for THC (delta-9 tetrahydrocannabinol, the active metabolite in marijuana) and was confirmed by gas chromatography/mass spectrometry at a level of 67 nanograms per milliliter.

Intoxication at the time of an injury relieves a carrier from liability for compensation. Article 8308-3.02. Intoxication as a result of ingestion of a controlled substance (which includes marijuana) is defined in the 1989 Act as "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body" of such controlled substance. Article 8308-1.03(30). The evidence on the claimant's state of intoxication or condition at the time of the injury consisted of the testimony of the claimant, interview statements of three coworkers, the statement of the doctor who examined him upon his admission to the hospital, and the deposition of a doctor concerning the urine test results and drug impairment generally.

Claimant testified that he smoked one marijuana cigarette on the Saturday before the Wednesday of the accident, and asserts that it is the only marijuana he has smoked for about 10 years. He claimed to be curious as to whether it would have the same effect on him as it did when he smoked marijuana regularly some 10 years earlier. In any

event, he stated that on the day of the injury he had the normal use of his mental and physical faculties and that it was an oversight that he failed to reattach the safety cable.

Statements of three coworkers indicated that at the time of the injury the claimant was doing his work okay and was not impaired, that he was talking normally, and that he functioned well. Dr. W, the physician who examined the claimant when he was brought into the hospital, stated in a letter as follows:

> He was never unconscious. He spoke clearly and gave a clear history. His eye function was normal. His memory was normal. His speech was normal and I saw him and examined him approximately two hours after the injury. Since some question has arisen about this man being under the influence of drugs and/or alcohol, I will state further that careful neurological exam showed absolutely no medical evidence, in my opinion, of a man under the influence of alcohol or other drugs nor did I get any impression that he had been under influence of alcohol or drugs within the last 24 hours.
>
> I might add that my practice of orthopedic surgery for thirty years had given me a very keen ability to recognize this problem. In fact, in emergency cases such as this, if I have any reasonable suspicion I get a "so-called" drug profile on blood and urine.

A deposition of Dr. P was introduced into evidence by the carrier. He indicated that he had reviewed the records of the urine test in this case and that everything appeared in order. He stated that a 67 nanogram level was well above the passive inhalation cutoff and that the "euphoria effects usually last four to six hours after smoking marijuana, but that the actual psychomotor skills effects can last as long as 24 hours or even possibly longer." With regard to the claimant's intoxication, Dr. P stated:

> Intoxication would depend on when the test was taken and when he last smoked marijuana. The only studies we have available carry it out to 24 hours.
>
> It is considered in the realm of probability that there is some impairment beyond 24 hours; however, I need to base my interpretation on the scientific studies to date, and if he had smoked prior to 24 hours before the accident, I cannot address whether or not he was intoxicated.
>
> However, if he had smoked within 24 hours of the accident, then we consider him to still be impaired especially with a 67 nanogram per milliliter level in his urine.

He disagreed with Dr. W's opinion and stated that "[u]nfortunately, the gross

examination skills utilized by physicians are grossly inadequate for determining loss of psychomotor skills unless there is just a gross loss and gross impairment." He stated Dr. W did not have all of the material he needed to make a final decision such as this.

The hearing officer apparently accepted the claimant's testimony and found that he smoked one marijuana cigarette on the Saturday before the accident and had not smoked marijuana at any other time prior to the injury on Wednesday, _____. The hearing officer, who sees, hears, and observes the demeanor of a witness who testifies, is in the best position to assess credibility. The 1989 Act empowers him to be the sole judge of the weight and credibility to be given the evidence before him. Article 8308-6.34(e). Only if his determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would it be appropriate to reverse that determination. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). While the presence of a laboratory report indicating a 67 nanogram level of THC in the claimant's system some six days following his claimed smoking of a single marijuana cigarette stretches the imagination, there is no overwhelming evidence to the contrary. However, the ultimate matter is whether the claimant was intoxicated at the time of the accident, that is, whether he was in the state of not having the normal use of his mental or physical faculties resulting from the ingestion of marijuana. Clearly, the claimant used marijuana, and had it in his system on the date of the accident. However, the evidence is, at best, in conflict as to whether this measured up to intoxication, as defined in the 1989 Act. The hearing officer resolved the matter in the claimant's favor, and there is sufficient evidence to support that resolution.

The carrier argues that awarding benefits in this case sends the message that there is no penalty to be paid by a worker who chooses to violate the criminal laws and who has drugs in his system at work and is injured. The carrier also makes very cogent arguments about the public policy, at all levels of government, for a drug free work place, and we have nothing but agreement and accolades for such programs. However, the 1989 Act does not provide that carriers are relieved of paying benefits resulting from the use of any controlled substances; rather, it provides that benefits are not due an injured party who is intoxicated, as defined in the Act.

This case is remarkably similar in many respects to Texas Workers' Compensation Appeal No. 91006, decided August 21, 1991. In that case, we upheld the hearing officer's decision which awarded benefits to a claimant who registered 55 nanograms of THC in a post accident urinalysis, and where there were witnesses and other evidence that the claimant had the normal use of his mental and physical faculties. *Compare* Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. We observed in Appeal No. 91006, *supra*, that the Texas Legislature has not established a presumptive or conclusive standard for determining drug intoxication, as opposed to the provisions regarding alcohol intoxication. Having or not having the "normal use" of mental and physical faculties is not as exacting a standard

as a deemed or presumptive standard. As the court stated in Massie v. State 744 S.W.2d 314 (Tex. App.-Dallas 1988, pet. ref'd) in determining normal use, the evidentiary test is whether a person could or could not use his faculties in a manner that a normal, non-intoxicated person would be able to, as opposed to establishing what the specific person's normal abilities were. As was our view of the case authority as applied to the evidence in Appeal No.91006, *supra*, there is sufficient evidence in the testimony of the claimant, the statements of the three coworkers and the statement of Dr. W, to uphold the hearing officer's determination that the claimant was not intoxicated as defined in the 1989 Act. Conversely, the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust thereby warranting reversal. Accordingly, the decision is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge