APPEAL NO. 92662

At a contested case hearing held in (city), Texas, on October 13, 1992, the hearing officer, (hearing officer), determined that at the time of his work-related accident driving a forklift on (date of injury), appellant (claimant) was in a state of not having the normal use of his mental or physical faculties resulting from the introduction into his body of a controlled substance, and therefore that respondent (carrier) was not liable to the claimant for compensation under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.02(1) (Vernon Supp. 1992) (1989 Act). Claimant has filed a request for review which essentially challenges the sufficiency of the evidence to support the hearing officer's determination. Carrier's response urges the sufficiency of the evidence and seeks our affirmance.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, we affirm.

Claimant testified that he had been employed by (employer) in its warehouse for approximately two and one-half years and had operated a forklift for the past two years without an accident. He had operated a forklift in prior employment for about one and one-half years, also without an accident. On (date of injury), he arose at 5:00 a.m., arrived at work at 6:00 a.m., and filled out some paperwork and visited with coworkers until about 7:00 a.m. when his supervisor directed him to unload a truck. Needing pallets, he drove the forklift to the area where the pallets were located, apparently an aisle or breezeway between two buildings. At that location, as he conversed with coworker (Mr. H), coworker (Mr. E), came through the breezeway on a forklift and claimant decided to let Mr. E pass. Because of the narrowness of the breezeway, claimant had to back the forklift up to let Mr. E pass. He was aware that his maneuvering room was scant. As he drove the forklift backwards, claimant said Mr. E told him to watch out for the fan, a fan claimant described as very large, about 4 feet wide, weighing about 120 pounds, and suspended on a chain. When Mr. E told him to stop, he stopped the forklift suddenly and the forklift mast, which he said was raised up in the air but descending, rocked backwards and hit the fan which, in turn, swung backwards on the chain about two feet and struck the cinder block wall. Claimant saw the cinder blocks falling and got off the forklift. He said he was hit in the head by falling cinder blocks, lay unconscious on the floor for a while, and did not move until an ambulance arrived and he was taken to a hospital. He said the wall had been previously struck twice by other drivers and was already weakened, dangerous, and about to fall. However, according to the report of (Mr. V), the warehouse manager who investigated the incident shortly after its occurrence, the raised forklift mast hit a header beam knocking it loose and causing cinder blocks to fall. Mr. H, who was present at the time, provided a statement to the same effect.

Claimant was taken to a hospital, apparently with minor injuries, and released around noon. Just before leaving the hospital, claimant said he provided, with his consent, a urine specimen to be tested for drugs. He said that before he departed the hospital, he did not

see the nurse, who was holding his specimen, label it. The report of (lab report) stated that the detection limit for the urinary metabolite of tetrahydrocannabinol (THC), the active ingredient of marijuana, is 15 nanograms per milliliter (ng/ml) and that the urine specimen identified as claimant's (No. 59916) contained 70 ng/ml, as confirmed by a gas chromatography/mass spectrometry analysis. The lab report contained a chain of custody document bearing the apparent signatures of claimant and a witness as the first persons in the chain of custody of the specimen. According to the accompanying report of the lab director, the presence of the primary marijuana metabolite (11-nor-delta-9-Tehrahydrocannobinol-9-carboxylic acid) at a level of 70 ng/ml "further supports the finding that passive inhalation is not involved." The carrier introduced an unsigned report of (Dr. S), which was not objected to on the basis that it was unsigned. This report stated that claimant's urine test results, while not constituting absolute proof, were "highly suggestive by medical terms of recent active marijuana smoking." (Dr. S's) report summarized his review of current literature which revealed that urine levels "greater than 20 ng/ml are highly unlikely to be the result of casual passive inhalation," and that "a level of 70 ng/ml is highly indicative of recent inhalation or ingestion of marijuana in an infrequent user or of chronic heavy use." (Dr. S's) literature review also stated the following:

> . . . multiple studies have been conducted to define a relationship between drug levels and motor behavioral and cognitive impairment. It has been determined that urinary levels of THC metabolites are not adequately associated with one's level of impairment. Symptoms of intoxication are usually gone within three hours after use, while THC can be detected in the urine for two to four weeks (in some studies up to 77 days in chronic users). Thus urine tests are NOT useful for determining impaired ability to perform complex tasks.

Claimant insisted that he never used marijuana and in his request for review states he felt he never had a chance when the lab test showed positive results. Claimant's position respecting the lab test results was that his urine specimen must have been mixed up, possibly by the nurse, with that of someone else because there were other drug tests being administered. He also suggested that Mr. V might have had something to do with it as he had been trying to get rid of claimant for some time and stayed behind at the hospital talking with the nurse who had the specimen. Claimant also said he agreed with the benefit review officer's report of his position, stated in the benefit review conference report in evidence, that several weeks earlier, he and friends rode around in a van and two of the six occupants smoked marijuana. He attributed his forklift accident to the previously weakened wall. Employer's human resources director testified that employer had no record of that wall being previously hit by a forklift but did have a record of one of the coworkers identified by claimant hitting another wall. There was no testimony or evidence, aside from claimant's outright denial of the use of marijuana, that he exhibited the normal use of his mental or physical faculties at work prior to the accident.

Article 8308-3.02 provides, in pertinent part, that "[a]n insurance carrier is not liable for compensation if: (1) the injury occurred while the employee was in a state of

intoxication; . . . " The 1989 Act defines drug intoxication as "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body" of a controlled substance, such as marijuana. Article 8303-1.03(30). A claimant has the burden to prove an injury occurred within the course and scope of employment, and when a carrier presents probative evidence of intoxication, thus raising a question of fact, the presumption of sobriety disappears and the claimant then has the burden to prove he or she was not intoxicated at the time of the injury. Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. *And see* Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992. As we observed in Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991, our initial decision concerning the matter of marijuana intoxication, the 1989 Act does not provide, as it does for alcohol, a presumptive or conclusive level of a drug found in the blood or urine as establishing intoxication. In Appeal No. 91006, the evidence showed that the employee, who provided a specimen on the morning of the accident, had a urine level of 55 ng/ml of the marijuana metabolite, that he had taken three or four puffs from a marijuana cigarette the night before his injury, and that four coworkers felt that the injured employee had the normal use of his mental and physical faculties at the time of the accident. We felt the evidence sufficient to support the hearing officer's determination that the employee was not intoxicated at the time he was injured.

In Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, the claimant's urine test showed 86 ng/ml of the marijuana metabolite and a forensic pathologist testified that in his opinion the claimant had a high level of intoxication at the time the specimen was taken, and that the claimant could not have had the normal use of his mental or physical faculties. In reversing and rendering for the carrier on the claimant's failure to establish his sobriety in the face of the carrier's scientific report, we noted the claimant's testimony that he had not used marijuana for about one year and had not been around the drug for about one month to be patently incredible. Noting the absence of evidence concerning the relative normality of the claimant's behavior prior to the accident, as well as the absence of evidence, aside from the claimant's brief testimony, as to how the claimant performed his tasks, we determined that with the evidence in that posture the claimant had not met his burden to establish he was not intoxicated.

In Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992, the claimant injured himself shortly after starting work in the morning and his urine specimen, taken at a clinic that morning, tested positive for the marijuana metabolite at a level of 447 ng/ml. In that case, an expert witness report stated that such a level was consistent with very recent use of marijuana, that is, within 24 hours, and opined that the claimant lost the use of his normal faculties during such 24 hour period. While observing that the testing positive for a drug does not compel, in and of itself, a finding of intoxication at the time of the injury (citing Appeal No. 92173, *supra*), we held that the test results coupled with the expert opinion shifted the burden to the claimant to prove he was not intoxicated.

In Texas Workers' Compensation Commission Appeal No. 92591, decided

December 17, 1992, the claimant's urine specimen, taken in the hospital where he was treated for his injury, revealed a THC level of 67 ng/ml and the hearing officer determined he was not intoxicated at the time of his injury. The claimant admitted to smoking one marijuana cigarette on the Saturday before the Wednesday of the accident at work. However, three coworkers indicated he was doing his work okay and was not impaired. Further, the doctor who examined the claimant at the hospital stated there was no medical evidence of his being under the influence of alcohol or other drugs, nor did that doctor have any impression the claimant had been under the influence of alcohol or drugs within the last 24 hours.

The hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Article 8308-6.34(e). As the trier of fact, the hearing officer 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.). The hearing officer here obviously found the test result and expert opinions sufficient to raise a fact question as to whether claimant was intoxicated at the time of his injury. The hearing officer just as obviously did not find claimant's testimony denying his use of marijuana credible and was not persuaded that claimant met his burden to prove that he was not intoxicated at the time of the injury. The facts of the accident itself could just as well be accounted for by claimant's carelessness rather than by intoxication. Indeed, Mr. V's investigation report, prepared before the lab report was prepared, stated that claimant had used poor judgment and had not concentrated on what he was doing. In concluding as a matter of law that claimant did not have the normal use of his mental or physical faculties at the time of the accident, the hearing officer could consider not only the lab report result and expert opinions in evidence regarding passive inhalation, but also the conflict in the evidence concerning the description of the accident, that is, whether the forklift mast hit the fan, as claimant maintained, or hit the wood beam as others contended. The hearing officer could consider also the fact, testified to by claimant without contradiction, that he had operated forklifts for approximately the preceding three and one-half years without an accident, and that he was aware of the dangerous wall nearby and the small area in which to back up. The hearing officer could also consider the absence of evidence, aside from claimant's denial of the use of marijuana, that claimant did not appear impaired to others who had contact with him at work before the injury, and that claimant had not earlier that day operated a forklift.

It is somewhat troubling that the carrier's own expert report basically suggests that urinary levels of THC metabolites are not well connected to a decrease in impairment levels, at least for the performance of complex tasks. However, consistent with (Dr. S's) report, the hearing officer could believe that claimant had directly inhaled or ingested marijuana within the previous four to six hours, and could conclude that he did not have the normal use of his mental or physical faculties at the time he was injured. We do not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865

(Tex. App.-Texarkana 1989, no writ). The findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge