APPEAL NO. 92723

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On November 19, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant, claimant herein, was intoxicated at the time of his accident and not entitled to benefits. Claimant asserts on appeal that the hearing officer misstated the evidence, made use of evidence that was not admitted, and was in error in making Findings of Fact Nos. 6 through 10. Respondent, carrier herein, states that the decision is not against the great weight and preponderance of the evidence, and the hearing officer did not abuse his discretion.

DECISION

Finding that the decision that claimant was intoxicated is supported by no evidence that claimant did not have the normal use of his mental or physical faculties, we reverse and render.

Claimant had worked in the oil business for several years when he fell on (date of injury), just after coming to work on the night shift at a rig. The only issue stated by the hearing officer was whether claimant was intoxicated at the time of the accident. Claimant testified that he was in his third day of work for this employer when he fell. He was questioned as to taking a preemployment urine drug test, and claimant stated that he gave such a sample on the second day he worked. Another urine sample was taken after the accident, but because his shift on (date of injury) started at 11:00 p.m., and he did not arrive at the hospital, approximately 55 miles away, for a period, the second sample was dated (date). Even though claimant testified that he gave the "preemployment" urine on his second day at work, evidence admitted as to the results of the tests shows sample dates of (date) and (date).

The hearing officer does not recite in his opinion who had the burden of proof, but he correctly stated on the record that once the carrier raised evidence of intoxication at the hearing, it then became the claimant's burden to show he was not intoxicated. The evidence that raised the issue included claimant's own testimony that he had begun using cocaine three years before the hearing and last used it on July 30, 1992. While some of carrier's laboratory evidence of positive urine tests was not admitted and its expert was not allowed to testify because of notice requirements, documentary evidence it introduced of cocaine use, coupled with claimant's own admission of usage was adequate to raise the issue of intoxication and put the burden on claimant to show he was not intoxicated. *See* Texas Workers' Compensation Commission Appeal No. 92173, dated June 15, 1992.

Claimant's evidence provided in attempting to meet his burden of proof consisted of his own testimony, two statements of relatives, and one statement by a coworker who rode with him to work. He did not offer a statement or testimony from either of the two other workers who were present at the rig at the time of the fall. The coworker's statement said

that claimant was alert and his speech was clear; it added that claimant "had no trouble changing into his work clothes." (Claimant had just walked onto the floor of the rig right after changing when he slipped and fell.) Claimant did testify that his mental and physical faculties were not impaired.

While the hearing officer did not allow the laboratory report of the urinalysis taken prior to the fall, he did allow the urinalysis taken at the hospital after the fall plus a letter dated October 27, 1992, from the laboratory director of the testing laboratory, who discussed therein both tests, their results, and conclusions he could reach "with a high degree of scientific certainty." The laboratory director pointed out in that letter that claimant's levels of cocaine increased from the first sample (H 839) taken on "(date)", which was 22,036 nanograms per milliliter, to 35,441 ng/ml in the sample (H 840) taken on "(date)". He added,

> Based on the known rates of eliminations of cocaine as benzoylecgonine, the two specimens collected three days apart document a pattern of additional use after the collection of H839.

Claimant first asserts on appeal that the "preemployment" urine sample was taken two days after he was on the job. He says that he did not receive a copy of the report of that test, but points out that the second test only shows 300 nanograms per milliliter. The results of the second test were admitted and they show only that it was positive with a cut-off level of 300ng/ml--that cut-off level does not show the specific nanogram level the claimant registered.

Next, claimant objects to any comparison of the report of H839 (the first sample) to the second sample. It is true that the report of H839 was not admitted, but the laboratory director's letter was admitted and it gave the results of the two tests and compared the results. Since the reason why the report of H839 was not admitted related to failure to exchange that particular report within the time limits set by Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13, (Rule 142.13), and was not related to evidence of a problem in the test or identity of the subject, the exclusion of the laboratory report on H839 does not preclude other evidence of the results of the sample. Claimant also says that the carrier did not meet its burden to show that he had lost the normal use of his faculties. As stated, this is a mistaken assertion; claimant had the burden in this case to show he had the normal use of his faculties. *See* Texas Workers' Compensation Commission Appeal No. 91048, dated December 2, 1991. Claimant does not assert that the letter of the laboratory director dated October 27, 1992, admitted by the hearing officer on a showing of good cause for failing to comply with time standards, was erroneously admitted. If he had raised this question, our examination of the facts considered by the hearing officer as to when the letter was received and when it was exchanged would not have resulted in a determination that the hearing officer acted arbitrarily in allowing the letter into evidence.

Claimant objects to Finding of Fact No. 6 because it refers to the first drug test;

claimant again points out that the report of the positive result of that test was not allowed in evidence. The finding states:

On (date), his second day on the job, claimant submitted to a urine sample drug test (No. H00839), which later tested positive for a cocaine metabolite (benzoylecgonine) at a level of 22,036 nanograms per milliliter.

This finding is sufficiently supported by evidence the claimant gave as to when he gave the sample and the letter of October 27th of the laboratory director which gave the results of the tests made on claimant's urine.

The claimant then addresses Finding of Fact No. 7 and says that it relates a high count of cocaine when the laboratory report on the second sample, admitted into evidence, showed that it was only 300 nanograms per milliliter. That finding read:

On (date), several hours after his injury, claimant submitted to a second urine sample drug test (No H00840) which later tested positive for a cocaine metabolite (benzoylecgonine) at a level of 35,441 nanograms per milliliter.

This finding is supported by the laboratory report on this second urine sample which showed that the sample was "positive" for cocaine. That report, as stated, only referred to a cutoff level and did not give the actual numerical amount that the sample tested. The level of 35,441 is supported by the October 27th letter from the laboratory director, and claimant admitted that he submitted to another urine test after arriving at the hospital after his fall. This finding is sufficiently supported by the evidence.

Next, the claimant correctly points out that a prior Appeals Panel decision said that there is no presumptive standard of intoxication in regard to an amount of cocaine use. Claimant in this context refers to Finding of Fact No. 8. That finding reads:

The NIDA guidelines for recent use of cocaine is 150 nanograms per milliliter.

That finding does not apply a presumption as to intoxication. Without more, it does not support a decision of intoxication. The test for intoxication by cocaine, as stated, is not whether there was recent use as this finding shows, but whether the person has the normal use of his mental or physical faculties. This finding, while sufficiently supported by evidence of record, does not support the principle determination that the claimant was intoxicated at the time of the injury.

The claimant then points out that there were no witness statements to show he had taken any drug and no one said he did not have the normal use of his faculties. He does acknowledge that the drug test showed usage. Finding of Fact No. 9 reads:

Claimant was not telling the truth when he stated that he had not used cocaine since

9:00 A.M. on 7-30-92 (up to and including the date of his injury on (date of injury)).

The hearing officer is the sole judge of the credibility of the evidence offered. He could question claimant's testimony since he is an interested witness. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). As fact finder, the hearing officer could infer, from claimant's admission of cocaine usage and the laboratory director's opinion that there was drug use after the first sample based on the results of the two samples, that claimant used cocaine more recently than 7-30-92. *See* Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). The hearing officer also could believe part or none of claimant's testimony. *See* Ashcraft v. United Supermarkets Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Finding of Fact No. 9 is sufficiently supported by evidence of record.

Finally, claimant attacks Finding of Fact No. 10 by saying that the carrier did not present evidence that he acted abnormally--that the carrier did not prove he did not have the normal use of his faculties. Claimant adds that evidence not admitted because of lack of timely exchange was considered so the decision is unfair. Finding of Fact No. 10 reads:

At the time of his injury on (date of injury) claimant did not have the normal use of his physical or mental faculties due to his recent voluntary ingestion of cocaine.

As stated, the carrier did not have the burden to prove that claimant was intoxicated, claimant had the burden to show he had the normal use once the carrier raised the issue of intoxication through probative evidence of cocaine usage. While it would appear reasonable to view the burden as shifting to the claimant only after some evidence is presented both as to usage and effect, the Appeals Panel has not made that requirement. *See* Appeal No. 92173, *supra*. (*See also* Texas Workers' Compensation Commission Appeal No. 91018, dated September 19, 1991 and Texas Workers' Compensation Commission Appeal No. 92424, dated October 1, 1992.) In the case before us, however, the carrier presented no testimony or statements as to whether claimant had the normal use of his mental or physical faculties at the time of the injury and provided no scientific treatise or evidence that relates levels of substance in the body to impairment of mental or physical faculties. In addition, the expert opinion evidence on this question provided by the carrier is limited to the letter of October 27, 1992 from the laboratory director (previously discussed). While it indicates levels of cocaine in claimant's system over a period of time, it does not relate this to whether claimant had the normal use of his faculties. In fact, that letter does not help the carrier's case in this regard because it only addressed the effects of usage by saying:

Cocaine effects on performance are not as closely related to concentrations of cocaine as they are to being pre-occupied with obtaining more of the drug. Cocaine has a very strong psychological addiction. The preoccupation with the drug is the important aspect interpreting the safety issue with cocaine and

many other drugs.

Claimant in his testimony only admitted that he cried upon regaining consciousness. He agreed on cross-examination that he could not perform if he were using drugs on the job. He gave no indication of preoccupation with drugs on the job and did not admit that drugs used at some time prior to the job could affect his performance. As a result, there was no evidence provided that claimant did not have the normal use of his mental or physical faculties on (date of injury), when he was injured. Finding of Fact No. 10 is not supported by any evidence of record. On the other hand, statements claimant provided that say he had the normal use of his faculties, while reciting few facts to support that contention, do provide some evidence in support of claimant's contention that he was not intoxicated.

We would point out, in addition, that statements of coworkers which were not admitted were not used against claimant, contrary to his assertion on appeal. The report of a laboratory test that was not admitted was not used (data from the test was referred to in a letter that was admitted, and this was fairly used by the hearing officer), and there is no indication in the opinion of the hearing officer that he used or considered any evidence that was not admitted. In considering this appeal, finding of Fact No. 11 was also reviewed, although not asserted as in error, to see if it could support a determination of intoxication as found by the hearing officer. It said:

The voluntary introduction of cocaine into claimant's body probably occurred while he was in the rig's doghouse a few minutes prior to walking up the catwalk to begin work at 11:00 P.M. on (date of injury).

An examination of the evidence of record, however, discloses no evidence to support that finding.

Without evidence that claimant did not have the normal use of his mental and physical faculties as required by Article 8308-1.02(30) of the 1989 Act, no determination of intoxication based on drug use alone can stand. Conclusion of Law No. 2 that said claimant was intoxicated is not supported by any evidence that claimant did not have the normal use of his faculties. As a result, the decision of the hearing officer is reversed and rendered. Claimant was injured on (date of injury), in the course and scope of employment.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge