APPEAL NO. 931091

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On October 20, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) was injured while working for the city but was intoxicated at the time and therefore entitled to no benefits from the injury. Claimant asserts that the evidence from two medical reports provided by carrier is insufficient to support the decision. Claimant also points out that claimant's condition did not cause the accident in question and cites certain Appeals Panel decisions. Respondent (city) asks that the decision be affirmed.

DECISION

We affirm.

Claimant worked for the city since 1988. He repaired buildings on city park property and mowed the grounds. On (date of injury), claimant was mowing when injured. He was driving a tractor that pulled a large mower attachment. While mowing, the hitching bar connecting the tractor to the mower broke. Attached hoses pulled a control assembly loose and claimant's arm was struck forcefully causing broken bones in three places. He was taken to the hospital and had surgery to set the broken bones the next day. While in the hospital his urine was tested. It tested 17,294 nanograms per milliliter (ng/ml) for benzoylecgonine, the cocaine metabolite, and 795 ng/ml for cannabinoids (THC).

Claimant testified that he was driving the tractor about 14 to 15 miles per hour when he hit a prairie dog hole and the bar broke. He stated that he has been told to watch for deep holes and objects while mowing. He added on cross-examination that the prairie dog hole did not appear to be too large so he drove over it. He heard a "breaking sound," and stopped quickly, but not right away. He did not turn off the tractor immediately after hearing the breaking sound. He testified that he stopped the tractor, got off, and walked to where another employee, (Mr. B), was mowing, stating that (Mr. B) was two miles away. (Mr. B) went for help and a vehicle came to take claimant to the hospital. Claimant testified that he had been mowing about two hours when the accident happened; that the employees gather together for about 15 minutes before starting the work day; and that he operated his car well that morning. He also said he had his normal capability, had no problem driving the tractor, and no one told him that he was not doing his job correctly.

Claimant testified that he had ingested cocaine the night before the accident (the accident was on a Thursday) and on the Sunday before the accident. He also had smoked three joints of marijuana on the same Sunday with friends. He specified that the amount of cocaine the night before the accident was one-fourth gram. No other drugs were taken. Claimant added that he ingested no drug the day of the accident. On cross-examination, he also stated that he felt he had normal use of his faculties when he did use cocaine and marijuana. He stated that he could still drive a car after drinking a six pack of beer or smoking three marijuana cigarettes. He asserted that he had not used any drugs, except

for the Sunday and Wednesday in question for six months.

City offered the statement of (Dr. S), into evidence. His letter was formatted to answer questions asked of him. He stated that the "issue of impairment remains a hotly debated topic, even when considering alcohol [ethanol] levels in blood." Later in the same paragraph, he added, "[a]ttempting to guarantee that a state of impairment existed at the time of an accident, based on a urine result, or even a blood value, places an impossible burden of proof on the part of any company." He referred to the levels in the case under review as "very much higher" than what is normally seen in his NIDA certified laboratory (emphasis in statement). He was of the opinion that the cocaine level "strongly suggests" recent use and "could reasonably be linked to a behavioral modification at the time of the accident." He said the marijuana level "suggests very heavy use," possibly in the recent past.

Also offered was the statement of (Dr. G). He, too, reviewed the results of testing in the case under review. While he cautioned that determining impairment by urine testing is "very difficult and somewhat speculative," he did not qualify his conclusion that the levels in this case "reflect substantial and recent use of these two drugs." He opined in regard to impairment, that there would be no significant effect from cocaine at the time of the accident because of the rapid excretion of cocaine from the blood. He said that the marijuana level was due "probably to a more recent use on (date), and/or to repeated chronic use. . . . " He stated that "some effects" of marijuana can "persist for 24 hours or longer. . . ." He concluded by saying:

> . . . I believe that there is a probability that there was some impairment induced by at least one of the drugs found in the urine of (claimant) after the accident on (date of injury). The degree and type of effect can not be determined from the available information.

Claimant pointed out that a statement of (Dr. H), who saw claimant in the emergency room and then performed surgery the next day to set the broken arm, said, "[t]here were no signs of impairment from drugs or alcohol." Claimant also provided the statement of ((Mr. B)), who claimant first notified of the broken arm. (Mr. B) said that before beginning work, claimant did nothing unusual, that he did not slur his speech, "did not stumble or fall down;" (Mr. B) said that he appeared normal and capable of doing the job. Claimant also referred to the statement of (AG) as indicating that claimant did nothing unusual that day. That statement was in question and answer format and stated, in part:

Q.Do you remember any unusual activities on [claimant's] part?

A.No, he was like he always was wearing sunglasses.

Q.Did he always wear sunglasses?

A.Yes.

Q.No sign of unusual behavior?

A.No, he acted that way all the time, always blowing his nose and wearing sunglasses.

Q.Was there anything that made you suspect he might be on drugs?

A.Yes, I suspected.

Q.What made you suspect?

A.Like I said he was always blowing his nose and acting kind of hyper.

Later in the statement, AG opined that claimant had to walk about 100 yards to get (Mr. B) to help him after the accident.

The hearing officer found that claimant ingested marijuana the day before ((date)) the accident that occurred on (date of injury). He found that claimant was intoxicated at the time of the accident because he was impaired from having used marijuana. The hearing officer cited the high level of marijuana found, claimant's reaction to the accident, and the circumstances of the accident for finding impairment. The hearing officer also cited in his decision Section 401.013 of the 1989 Act. That section defines intoxication as not having the normal use of mental or physical faculties from voluntarily ingesting certain substances.

The circumstances of driving over the prairie dog hole, reacting to the breaking bar as claimant did, and testifying that he walked over to (Mr. B) who was two miles away place claimant's perception in question. Once the carrier presented evidence that raised the issue of intoxication, the claimant had the burden to show that he was injured compensably and was not intoxicated. Dr S's statement that an impossible burden of proof is placed on a company is incorrect; under the 1989 Act, the city does not have the burden of proof in this case. Dr. S also believed that the cocaine results could be reasonably linked to behavioral modification, while Dr. G believed there was a probability of some impairment at the time of the accident from one of the drugs tested.

Claimant's evidence to show that he had the normal use of his mental or physical faculties was based on his own statement, the opinion of Dr. H, and the statement of (Mr. B). The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The fact finder does not have to accept claimant's testimony as to the injury. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The hearing officer could question claimant's credibility when he described the distance he travelled to get help, when he said that six beers would not impair his driving, and when he said that three marijuana cigarettes would not impair his driving. Dr. H did say that claimant showed no signs of impairment when in the emergency room for treatment of his arm. He did not say what he looked for or how focused he was

on the question of impairment at the time he was attending the broken arm; he did say that claimant was alert and oriented and explained the accident well. (Mr. B) described claimant as not acting unusual, but he then described an absence of conditions, such as slurred speech and falling down, that one could expect to see in considering alcohol intoxication. As stated, claimant had the burden to show that he was not intoxicated. *See* Texas Workers' Compensation Commission Appeal No. 91012, decided September 11, 1991.

The hearing officer did not make any finding of fact as to whether the claimant's actions caused the accident. He was correct in so doing, because intoxication, to be a defense to liability to provide benefits, is not conditioned on the manner in which the accident occurred. *See* Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991 (also cited by claimant). Appeal No. 91006 was similar to Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, and Texas Workers' Compensation Commission Appeal No. 91048, decided December 2, 1991, (all cited by claimant) in that all three were Appeals Panel affirmations based on sufficient evidence to support a hearing officer's factual determination as sole judge of the evidence. In the case under review, the hearing officer has made a factual determination after hearing all the evidence. We would point out that the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92224, decided July 16, 1992, affirmed the hearing officer's decision that claimant did not show he was not intoxicated when evidence was introduced that he had a urine level of 173 ng/ml of THC; in Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992, affirmed the hearing officer's decision that claimant did not show he was not intoxicated when evidence was introduced that he had a urine level of 447 ng/ml of THC; and in Texas Workers' Compensation Commission Appeal No. 93258, decided May 20, 1993, affirmed the hearing officer's decision that claimant did not show he was not intoxicated when evidence was introduced that he had a urine level of 100 ng/ml THC. On the other hand, in Texas Workers' Compensation Commission Appeal No. 93887, decided November 16, 1993, the Appeals Panel affirmed a hearing officer's decision that claimant showed he was not intoxicated after evidence was introduced that he had a urine level of 158 ng/ml of THC. The question of intoxication is generally one of fact when the correct standard under the 1989 Act is applied.

The Appeals Panel will not disturb the decision of the hearing officer on a factual determination unless the decision is against the great weight and preponderance of the evidence. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge