APPEAL NO. 93258

At a contested case hearing held in (city), Texas, on February 19, 1993, to determine whether appellant (claimant) had a compensable injury or whether the intentional injury and intoxication defenses applied to defeat his claim, the hearing officer, (hearing officer), concluded that injuries sustained by claimant to his left arm, elbow and back on (date of injury), were caused by his willful intention and attempt to injure himself, and further that such injuries occurred while claimant was intoxicated. Claimant seeks a remand of the case so he can cross-examine two witnesses whose transcribed interviews were admitted at the hearing and, in essence, he challenges the sufficiency of the evidence to support the adverse determination of the disputed issues. The respondent (carrier) urges our affirmance.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged determinations, we affirm.

Claimant testified that in February 1992 he became employed as a "detailer" to help wash and dry cars at an (employer) car wash. Pickup trucks were occasionally washed. To enter pickup truck beds to wipe off the back windows and cab tops claimant said he would step up on the rear bumper. On (date of injury), at about 10:30 a.m., claimant said he was in the bed of a pickup truck, finished wiping off the cab top and back window, and, in his attempt to exit the truck bed by reaching up and swinging his legs one at a time over the side of the truck on the driver's side, he slipped and fell onto the concrete floor striking his left shoulder, elbow and back. He said a coworker, (Mr. C), who was wiping the inside of a window on the driver's side of the truck, saw him fall. Claimant said he reported the injury to the car wash manager, (Mr. J), who later that day took claimant to a medical clinic utilized by employer to be examined. Claimant was questioned in minute detail on cross-examination and by the hearing officer as to precisely how he attempted to step or otherwise get over the side of the truck, and slip and fall in the process. He gave varying accounts to such inquiries, said he guessed it was just "a freak accident," and concluded he did not really know what caused him to fall.

Claimant denied intentionally injuring himself at work on August 13th and also denied having told coworkers Mr. C and (Ms. L) before the accident that he was tired of working at the car wash and was going to create a claim. He admitted calling Mr. C and Ms. L after learning at the Benefit Review Conference that they had given statements, but denied an effort to get them to change their statements. Claimant maintained that Mr. C wanted to talk to him about his statement and gave a second statement but that Ms. L did not. Asked whether he had any prior workers' compensation claims, claimant at first said he did not want to answer. When asked about his answer to an interrogatory question from the carrier to the effect that he had had four such prior claims, claimant said that the information on only one of such claims in his answer was accurate. His ombudsman assistant then stated he had assisted claimant with that answer based on information in the assistant's "terminal."

Claimant was asked if he had any felony convictions and responded that he had none other than three traffic tickets. However, he then conceded he had served a prison term from 1981 to 1986 for theft. Claimant also stated his employment was terminated by employer several weeks after the accident because he insisted on seeing a doctor of his own choice instead of the employer's doctor, and he denied he was terminated for having failed the drug test administered on the day of his accident.

Claimant testified that throughout his employment from February 1992, he smoked only one to two "joints" of marijuana every other day after finishing work. He denied using the drug before going to work and insisted he never came to work drunk or "high." He said his marijuana use most proximate to his accident occurred on August 9th and 11th, and that on the morning of his accident on August 13th he felt "fresh" and in his "right mind." He said he was tested for drugs that day at the clinic where Mr. J took him after the accident and attributed the positive test result to the marijuana remaining in his body after his last use.

Mr. J testified that he personally clocked claimant in for work at 9:07 a.m. on August 13th and noticed nothing unusual about claimant's appearance and behavior. He glanced through a window at the car washing activities from time to time and observed nothing unusual about claimant's wiping water off the cars being washed. He did notice claimant's limping from a sore left foot which Mr. J understood claimant to have injured at home several days earlier. Claimant did mention to Mr. J that he had been to a party the preceding evening. When the claimant advised him of the accident, claimant gave varying accounts of how the accident actually happened and had such difficulty in explaining it that Mr. J took him to a nearby truck in an effort to have claimant demonstrate how the accident occurred. About 45 minutes later, Mr. J took claimant to a medical clinic where claimant provided a urine specimen for drug testing and was examined by a doctor. According to Mr. J, the doctor pointed out some swelling on claimant's left shoulder, provided an ointment to apply to it, and released claimant to return to work without restrictions. According to a record from the clinic, claimant's diagnosis was a strained left trapezius muscle. Mr. J also testified that while waiting to be attended to at the clinic, claimant fell asleep. Mr. J said claimant worked for one week after August 13th and was then terminated for having failed the drug test. According to Mr. J, both Mr. C and Ms. L told him claimant had said before the accident that he was tired of working and was going to get hurt on the job. Acting on that information, Mr. J said he called employer's investigator who interviewed these coworkers.

In a signed transcript of her recorded statement of August 26, 1992, Ms. L stated that on August 13th, before he "jumped out of the truck," claimant said he "wanted to do something to get worker's comp because he didn't want to work here anymore." Right after the incident, claimant said he was "going to get some worker's comp and stuff like that." In a signed transcript of his August 26th interview, Mr. C said he did not see claimant fall off the truck but saw him on the ground, that claimant complained of hurting his leg, and that

claimant then walked down the wash line with Mr. C and helped finish the job on the truck. Mr. C stated that before the incident, claimant had said he was "trying to get worker's comp." Claimant introduced an undated, handwritten statement, apparently signed by Mr. C, which stated that he had told Ms. L that claimant was trying to get workers comp "as a joke," but that Ms. L "took it seriously and told the boss," and that she thought claimant "was a crook." Claimant raised no objections to the interview transcripts nor was there any indication in the record that he made any effort to either depose Mr. C and Ms. L or obtain their presence at the hearing. Accordingly, claimant's request for remand of the case so that he can cross-examine those witnesses is without merit.

The carrier introduced a report from D. (Dr. R), dated December 3, 1992, to which was attached a toxicology report indicating urine test results positive for marijuana metabolites (THC). Dr. R stated that the toxicology report showed a THC level of 100 nanograms per milliliter (ng/ml). From that level, according to Dr. R, the following three general conclusions could be drawn:

> either the subject smoked about two joints immediately prior to testing, or he smoked a number of joints a few hours before testing, or the subject is a chronic and regular marijuana abuser whose system is saturated with a significant level of THC.
>
> At this level marijuana metabolite in the urine the subject is significantly intoxicated (poisoned) and his normal faculties impaired to a significant degree.

In Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, we stated the following:

> "[r]egarding expert testimony in cases involving drug intoxication, there is a respectable body of law which finds expert testimony more competent, if not necessary, as opposed to lay testimony which is widely accepted in alcohol intoxication cases. (Citation omitted.) Recognizing the generally accepted proposition that a person under the influence of alcohol can be observed and detected with little or no particular scientific knowledge, the same is not necessarily true in drug situations."

Article 8308-3.02 provides certain exceptions to an insurance carrier's liability for compensation including the occurrence of an injury while the employee was in a state of intoxication, and an injury caused by the employee's wilful intention and attempt to injure him or herself. Respecting the intoxication defense, at the outset of the hearing claimant was presumed not to have been intoxicated at the time of his injury, but when the carrier raised this defense, which it did with Dr. R's report, the burden shifted to the claimant to prove he was not intoxicated at the time of the injury. *See* Texas Workers' Compensation

Commission Appeal No. 92662, decided January 26, 1993, and cases cited therein. Article 8308-1.03(30)(A) defines intoxication (from a substance other than alcohol) 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. "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 alcoholic concentration of 0.10 or more which is deemed to be intoxication.)" Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991.

The hearing officer found that at about 1:30 p.m. on (date of injury), claimant had a THC concentration of 100 ng/ml by urinalysis; that claimant smoked marijuana on a regular and frequent basis, a joint or two every other night, since February 1992; that claimant last smoked marijuana, two joints, on the night of August 11, 1992; that at about 10:30 a.m. on (date of injury), while attempting to get down from a pickup truck bed, claimant stepped over the side and fell to the concrete floor; and that at the time of his injury, claimant was intoxicated by his marijuana use, citing both claimant's 100 ng/ml THC level three hours after the accident and claimant's impaired mental functioning as manifested by his stepping over the side of the pickup truck. The hearing officer's finding that claimant last smoked marijuana on August 11th, while supported by claimant's testimony, is questionable at best given the content of Dr. R's report. However, even were we to disregard this particular finding, we are satisfied that the hearing officer's other relevant factual findings support his conclusion that claimant's injury occurred while he was in a state of intoxication as defined in the 1989 Act, and are sufficiently supported by the evidence. The hearing officer could and obviously did consider the expert opinion of claimant's intoxication, together with the circumstances of the accident and claimant's efforts to explain it, in determining that he was indeed intoxicated at the time of the injury. 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, 665 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)).

We are similarly satisfied sufficient evidence supports the hearing officer's finding that "[p]rior to his accident claimant was overheard by two coworkers to declare that he was going to injure himself to get workers' compensation benefits." This finding, together with the finding that claimant in attempting to get down from the pickup truck bed stepped over the side and fell to the floor, sufficiently support the hearing officer's conclusion that claimant's injury to his left forearm, elbow and back were "caused by the claimant's wilful and successful attempt to injure himself to create a workers' compensation claim," and thus fell within the intentional injury exception in Article 8308-3.02(2).

Since the hearing officer's findings and conclusions in this case find sufficient support in the evidence, we do not substitute our judgment for that of the hearing officer. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ.) The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge