APPEAL NO. 93278

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On March 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue at the hearing was whether the respondent (claimant herein) was intoxicated at the time of the injury. The hearing officer found that the claimant was not intoxicated at the time of the injury. The hearing officer, in his discussion of the evidence, stated that the "positive" drug test without any quantitative analysis was insufficient to require that the claimant prove that he had the normal use of his mental and physical faculties at the time of the injury, but that even if it were sufficient to do so, the greater weight of the credible evidence supported the proposition that the claimant did have the normal use of his mental and physical faculties at the time of the injury. The appellant (carrier herein) filed a request for review contending that its evidence at the hearing was sufficient to place the burden of proof on the claimant to prove he had the normal use of his mental and physical faculties, and that the finding of the hearing officer that the claimant had normal use of his mental and physical faculties at the time of his injury is so against the great weight and preponderance of the evidence as to be manifestly unjust. The claimant filed no response to the carrier's request for review.

DECISION

Finding no reversible error and the decision not to be against the great weight and preponderance of the evidence, we affirm.

The claimant was hired by (employer herein) on July 17, 1992. On (date of injury), while working as a truck delivery driver for the employer, the claimant injured his back while unloading a heavy box of meat with a dolly.

The claimant testified that while the injury occurred between 7:30 and 8:00 a.m., he completed his deliveries for the day, although in increasing pain. The claimant further testified that once home, and after putting his children to bed, he smoked marijuana to relieve his pain, there being no aspirin in the house. The claimant stated that the marijuana belonged to his wife who occasionally kept it in house for relief of her migraine headaches and who was still at work at the time he smoked the marijuana.

The claimant testified while he had "messed around quite a bit" with marijuana "through the years," he had stopped smoking marijuana after going to work for the employer because of the employer's drug testing policy, which subjects its employees to drug testing at any time. He stated that the last time he had smoked marijuana prior to the night after his injury was in late June or early July of 1992.

The morning after the accident, the claimant stated that he called the employer and reported the accident. He testified that he was told to come to the office where he was scheduled for a drug test that day and an appointment was made for him to see a doctor for

his injury.

The claimant admitted that he had in a phone interview with the carrier denied any drug usage during the time he worked for the employer. He stated that he was afraid to admit smoking marijuana the night after his injury because he feared losing his job. According to claimant's testimony he was in fact fired after the results of the drug test taken the day after the accident indicated "positive" for marijuana.

At the hearing, the claimant offered and the hearing officer admitted into evidence, over the objections of the carrier, three affidavits. The claimant testified that each of the affiants was a person to whom he had made deliveries the day of his injury while he was completing his rounds after the accident. One affiant, Mr. W, stated that on (date of injury), the claimant was not intoxicated from any substance and as a peace officer he would have noticed if the claimant had been intoxicated. Another affiant, Mr. H, stated that the claimant was not intoxicated when he delivered to Popeye's Fried Chicken on (date of injury). The third affiant, Mr. C, to whom the claimant testified he delivered regularly, stated that he had not seen the claimant drunk or intoxicated.

The claimant testified that at the time of his injury he had the normal use of his mental and physical faculties. He also testified that he had been honorably discharged from the United States Marine Corps after six years service.

The claimant testified under cross-examination that the effect of marijuana was different from that of alcohol and that a person who has smoked marijuana will appear "laid back" or tired and have "red eyes." The carrier offered into evidence, and the hearing officer admitted over the objection of claimant, a report from an occupational medicine clinic stating that the claimant had tested positive for marijuana on January 5, 1993.

Article 8308-3.02(1) provides that an insurance carrier is not liable for compensation if "the injury occurred while the employee was in a state of intoxication." The 1989 Act defines "intoxication," as it relates to substances other than alcohol, to mean "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 or analogue, dangerous drug, abusable glue or aerosol paint, or similar substance]." Article 8308-1.03(30)(A). Marijuana comes within this definition. Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992.

In regard to intoxication, courts have held that a claimant need not prove he was not intoxicated as there is presumption of sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct). Yet, when the carrier presents evidence of intoxication raising a question of fact, the claimant has the burden to prove he was not intoxicated at the time of the injury. March v. Victoria Lloyds

Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied).

Thus the first question in the present case is whether the report showing that the day after the injury the claimant tested positive for marijuana is sufficient to require the claimant to prove he was not intoxicated. The hearing officer did not think the report was sufficient to do this because it did not contain a quantitative analysis of the amount of marijuana in the claimant's physical system. The carrier argues that in Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992, we said that to the shift the burden to claimant required some probative evidence "as opposed to evidence that amounts to no more than speculation or which is a mere scintilla." The carrier points out that in Appeal No. 92173, *supra*, we stated it is not required that the carrier present "scientific or expert evidence in order to raise a fact question concerning the intoxication exception . . . ."

The hearing officer's belief that a quantitative analysis is necessary to raise the issue of marijuana intoxication may stem from the fact that in most of the cases concerning this issue which have come before us there have been quantitative analyses in evidence. *See* Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991; Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Appeal No. 91107, *supra*; Appeal No. 92173, *supra*; Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992; Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992; and, Texas Workers' Compensation Commission Appeal No. 92662, decided January 26, 1993. However, following the standard we enunciated in Appeal No. 92173, *supra,* we held in Texas Workers' Compensation Commission Appeal No. 93179, decided April 16, 1993, (after the decision of the contested case officer was issued in the present case) that evidence including claimant's own testimony to his marijuana use some hours before he reported to work, coupled with his reluctance to see a doctor the same day because of fear that he would test positive for marijuana use, was sufficient to raise the intoxication defense and to shift the burden to the claimant of proving he was not intoxicated.

In the present case, we do not have to decide whether the hearing officer erred in stating that the test submitted by the carrier did not raise the issue of intoxication because the hearing officer did, in fact, consider intoxication to be in issue by finding that claimant met the burden of showing he had the normal use of his mental and physical faculties at the time of the injury.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). He resolves conflicts in the evidence and makes findings of fact. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 92224, decided July 16, 1992. Only if the evidence supporting the hearing officer's determination is so weak or against the

great weight and preponderance of the evidence would we be justified in reversing or setting aside the decision. Appeal No. 92224, *supra*.

In the present case the claimant testified that he had not used marijuana for six months prior to his injury and that he had the normal use of his mental and physical faculties at the time of the injury. The carrier argues that his testimony should have been discounted because claimant admitted his testimony at the hearing contradicted a telephone statement he had given the carrier after the injury concerning his marijuana use. This goes to the credibility of the witness and thus is clearly in the province of the hearing officer.

The claimant also offered into evidence the affidavits of three people he had seen on (date of injury), after his injury. Each stated that the claimant was not intoxicated. The carrier contends that the affidavits merely stated conclusions and failed to state specific facts upon which the conclusions were based. The carrier submits that claimant's own testimony shows that a person under the influence of marijuana does not exhibit the same signs of intoxication as a person under the influence of alcohol. The carrier argues that the affidavits are not worthy of consideration. Again we feel that the weight to be given this evidence is within the province of the hearing officer. Also we must point out the testimony from eyewitnesses concerning whether a claimant had the normal use of his physical and mental faculties has been cited in earlier marijuana intoxication cases. *See* Appeal No. 91006, *supra*; Appeal No. 91107, *supra;* Appeal No. 92173, *supra*; Appeal No. 92591, *supra*. *Compare* Appeal No. 91018, *supra*; Appeal No. 92662, *supra*.

The only evidence brought forth by carrier to show that the claimant did not have the normal use of his mental and physical faculties was the report of the test itself. This is where the consideration of the report's failure to quantify the amount of marijuana in the claimant's physical system is most significant. As we stated in Appeal No. 92173, *supra*:

> . . . our decisions have not required the carrier to present scientific or expert evidence in order to raise a fact question concerning the intoxication exception under Article 8308-3.02(1). It would seem reasonable, however, that the more persuasive the carrier's evidence relied on to raise the intoxication exception, the more difficult will be the burden of the employee to prove the absence of intoxication to the satisfaction of the fact finder.

The carrier argues that public policy demands that a "lightened standard" be used to shift the burden of proof to the claimant in cases of marijuana intoxication. The case on appeal shows that when the claimant presents evidence that he had the normal use of his mental and physical faculties and the carrier presents no evidence to prove intoxication other than a report which fails to quantify the amount of marijuana in claimant's system, we cannot find that the hearing officer erred in concluding that the claimant was not intoxicated. As we stated in Appeal No. 92591, *supra*:

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 substance; rather, it provides that benefits are not due an injured party who is intoxicated, as defined in the Act.

The hearing officer's finding that the claimant was not intoxicated at the time of the injury is 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., 715 S.W.2d 629, 635 (Tex. 1986).

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge