APPEAL NO. 93280

On December 7, 1992, and March 11, 1993, a contested case hearing was held in (City 1), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether the respondent (claimant herein) was intoxicated at the time of his injury on ___. The hearing officer determined that the claimant was not in a state of intoxication at the time of his injury on ___, and ordered the appellant (carrier herein) to provide medical and income benefits as required by his decision and the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The carrier contends that the great weight of the evidence is contrary to certain findings of fact and conclusions of law and requests that the hearing officer's decision be reversed. The carrier also contends that a March 15, 1993 report from a toxicologist constitutes "newly discoverable evidence" that should be considered on appeal because the report was not in the possession of the carrier until after the hearing. The claimant responds that the evidence shows that he was not intoxicated, that the toxicologist's report is not newly discovered evidence and should not be considered on appeal, and requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

At the hearing on December 7, 1992, the carrier requested and was granted a continuance, over the claimant's objection. The purpose of the continuance was to obtain the results of a second laboratory test performed on a urine sample collected from the claimant on ___. A portion of the sample had been frozen. The carrier pointed out that the first laboratory test conducted on February 2, 1992, contained a comment about an "improper seal" on the sample that was received by the lab and the carrier said it wanted to "avoid any improper seal, and we could then receive the results from that testing."

Prior to his accident on ___, the claimant had worked for the employer for about three months as a general helper. The employer does electrical work. The claimant testified that on Sunday afternoon, (3 days before date of injury) he smoked one marijuana cigarette which he shared with two friends prior to drinking beer, eating, and watching the Super Bowl on television. He said he did not smoke any marijuana after sharing the one cigarette on Sunday afternoon and that the last time he had smoked marijuana prior to that Sunday afternoon was the previous weekend. He did not elaborate as to the quantity or circumstances involved in the prior weekend's activities. He said the marijuana he smoked on Sunday was not prescribed by a doctor. He worked his normal 7:00 a.m. to 4:00 p.m. shift on Monday and Tuesday, (2 days before date of injury and day before date of injury), without incident.

On Wednesday, ___, he got up around 5:00 a.m., had breakfast, and got to work about 7:00 a.m. where his foreman told him to help RJ, an electrician whom he had also helped on (2 days before date of injury and day before date of injury),. The employer was

doing electrical work on a three story module used in oil and gas exploration. The claimant said that he was working with RJ on the third floor of the module when RJ dropped a part to a drill and he and RJ had to find the part to continue their work. They looked on the second and third floors without success, and then, about 10:00 a.m., the claimant said he thought the part may have dropped on a beam above the first floor so he picked up an aluminum ladder and placed it against the beam with the bottom of the ladder on the floor. The claimant said that some parts of the floor were wet. He testified that he could not recall if the floor was wet where he put the ladder, but in a recorded statement that was in evidence he said the floor was wet where the ladder was. He said RJ started looking elsewhere for the part when he climbed the ladder. The claimant said that he did not notice that the ladder did not have "stoppers" or "shoes" on it because he was upset over the time they had already lost and was desperate to find the part. He also said he assumed that the ladder had stoppers on it because stoppers are supposed to be on the ladders. He also said that he thought about tying the ladder to the beam, but could not do that because the rope attached to the ladder was not long enough to go around the beam. He further testified that he did not ask anyone to help hold the ladder because RJ was looking elsewhere for the part and he didn't want to bother the other workers. He said that all the workers were busy and the workplace was noisy and in chaos. The claimant said that he climbed the ladder four or five feet when the ladder slipped out from under him causing him to fall to the floor with the ladder landing on him. The claimant fractured his right leg in the fall and was taken to a clinic and then to a hospital. He gave a urine sample at the clinic.

The claimant testified that the only effect that the marijuana cigarette had on him on Sunday, (3 days before date of injury), was that it made him hungry. He said that he felt no effects of marijuana on Monday, (2 days before date of injury) when he went to work. He further testified that no one at work on (2 days before date of injury and day before date of injury), or ___, told him that he was not acting normally nor did anyone complain about his job performance, which he said included operating a tractor and a forklift. He also said that he was not intoxicated at the time of his accident on ___, that he did not smoke marijuana during work, that the last time he had smoked marijuana was the one cigarette he shared with friends on Sunday, (3 days before date of injury), and that he was "normal" at the time of his accident and knew what he was doing. He said the accident was just due to the "timing of the work that had to be done."

In evidence were transcriptions of two recorded statements given by RJ. RJ corroborated the claimant's testimony regarding the search for the lost drill part, but said that they had looked for about 15 or 20 minutes before the accident. He did not see the accident because he went back up to the second floor when the claimant used the ladder. While on the second floor he heard a crash and looked through the floor grating and saw the claimant lying on the first floor with the ladder on top of him. He said the first floor was not wet and that the ladder was the top part of an aluminum extension ladder. He also said that they could not continue their work without the part they were looking for. He said he

had never seen the claimant outside of work and had never seen the claimant smoke marijuana. He had worked with the claimant prior to the date of the accident. When asked to describe the events leading up to the accident, RJ said that the claimant was "not stoned or drunk or anything else." RJ also stated that the claimant did not appear to be intoxicated, that the claimant's eyes were not bloodshot, that the claimant's speech was not slurred, and that there were no unusual smells about the claimant. When asked whether the claimant was doing his job like he did every day that he had an opportunity to work with him, RJ said "correct." He said that the claimant was not acting erratically and was performing his job adequately. When asked whether the claimant had the normal use of his mental and physical faculties, RJ responded "yes." RJ's opinion was that the accident was caused by the unsafe ladder that should not have been at the job. RJ said that the claimant was an excellent worker.

RC, who is an instrument fitter for the employer, also gave a recorded statement which was in evidence. He said he saw the claimant's accident. He said the claimant set up the ladder and climbed it and that the ladder slipped out from underneath the claimant. He said the floor was made of "skidproof" plate and was not wet. He said he saw the claimant before the accident and that the claimant did not look confused. He said the claimant appeared to be in a minor state of shock after the accident.

The carrier introduced into evidence two laboratory reports from (NHL). The first report (Carrier Exhibit A) indicates that a urine sample was collected from the claimant on ___, received by NHL on January 30, 1992, and results of a test for "THC (marijuana)-GCMS" were reported on February 1, 1992. The test results are stated as "Delta-9-THC GC/MS 59.2 NG/ML." No expected range is indicated. A comment on the report states "improper seal."

Carrier Exhibit B consists of three pages. The third page is a letter to NHL from TV dated November 18, 1992. TV states in the letter as follows:

> This specimen (gives number) was originally collected ___. I saved an aliquot of urine. I poured off a portion of this aliquot to send to your lab for re-confirmation. I then resealed and re-froze the the (sic) remainder of the original aliquot of urine.

The second lab report from NHL dated November 20, 1992, which is part of Carrier's Exhibit B, contains the claimant's name and indicates that a sample was received on November 18, 1992. The test requested was for "THC (marijuana) - GCMS," and the test results are stated as "Delta-9-THC GC/MS 49.1 NG/ML." The report indicates that tests results were confirmed by GC/MS and that the "confirmatory cutoff" was 15 NG/ML.

The carrier contends that the great weight of the evidence is contrary to the hearing officer's findings that the claimant did not appear confused, careless, or act in anyway out

of the ordinary on ___, prior to his accident, and that the claimant was performing his job normally. The carrier also contends that the great weight of the evidence is contrary to the hearing officer's conclusions that the claimant had the normal use of his mental and physical faculties at the time of his injury, and that the claimant was not in a state of intoxication at the time of his injury. The carrier points out that the drug screens were positive for THC and that the claimant engaged in a number of unsafe activities at the time of his injury.

Article 8308-1.03(10) defines "compensable injury" to mean an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act. However, Article 8308-3.02 provides that an insurance carrier is not liable for compensation if: (1) the injury occurred while the employee was in a state of intoxication. That part of the definition of intoxication as set forth in Article 8308-1.03(30) which is applicable to a controlled substance such as marijuana is "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of: (ii) a controlled substance or controlled substance analogue, as those terms or defined by the Texas Controlled Substances Act (Chapter 481, Health and Safety Code)."

In Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, a marijuana intoxication case, we noted that:

> A claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of employment. Reed v. Aetna Casualty and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). However, even if otherwise within the course and scope of employment, if a claimant is intoxicated, the 1989 Act precludes his recovery for an injury. In this regard, a claimant need not prove he was not intoxicated as the courts will presume sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct), March, *infra*. Nonetheless, when the carrier presents
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> evidence of intoxication, raising a question of fact, the claimant then has the burden to prove that he was not intoxicated at the time of injury. March v. Victoria Lloyd Insurance Co., 773 S.W.2d 785 (Tex. Civ. App.-Fort Worth 1989, writ denied); Texas Employers' Insurance Association v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1949, writ ref'd n.r.e.).

In Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991, we observed that the definition of intoxication involving a controlled substance such as marijuana is the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of such a drug, and that "[t]he 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)."

In the instant case, the claimant admitted smoking one marijuana cigarette three days before his injury at work and drug tests showed that the claimant tested positive for the presence of THC in his urine immediately following the injury (tetrahydrocannabinol is the active proscribed ingredient in marijuana, *See* Appeal No. 91006, *supra*). The level of THC in the claimant's urine was between 59.2 and 49.1 ng/ml after the accident. The second drug test indicated a confirmatory cutoff level of 15 ng/ml. As previously stated, there is no presumptive or conclusive level of a drug found in the blood or urine as establishing intoxication; however, the evidence raised the issue of intoxication and the burden was then on the claimant show that he was not intoxicated. *See* Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. To meet his burden, the claimant presented the recorded statements of the electrician he was helping on the day of his accident, RJ. RJ's statements corroborated the claimant's testimony that he was not intoxicated when injured and that he was "normal." RJ specifically opined that the claimant had the normal use of his mental and physical faculties while working on ___, and described the claimant as not acting erratically and as performing his job adequately. RJ attributed the accident to an unsafe ladder that should not have been at the workplace. A coworker, RC, also said that the claimant did not look confused when he saw him before the accident. The claimant explained that he used the ladder because he was desperate to find the lost drill part and that he would have tied off the ladder had the rope been long enough to do so. Evidence was conflicting as to whether there was any water on the floor where the claimant put the ladder.

Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Articles 8308-6.34(e) and (g). The hearing officer is privileged to believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Where there is sufficient evidence, as there is here, to support the hearing officer's findings and conclusions and the findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb the decision of the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991; Texas Workers' Compensation Commission Appeal No. 91048, decided December 2, 1991; Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 92224, decided July 16, 1992; Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992.

The carrier requests that we consider on appeal a "Medical Toxicologic Report" dated March 15, 1993, which is attached to its appeal. The carrier asserts that the report is

newly discovered evidence because the report was not in the possession of the carrier until subsequent to the hearing on March 11, 1993. The report reviews the two NHL laboratory reports that were in evidence and gives the opinion of the medical toxicologist as to whether the claimant was intoxicated at the time of injury.

We decline to consider the toxicology report. First, the Appeals Panel reviews the record developed at the hearing. Article 8308-6.42(a)(1). The report was not made a part of the hearing record. Second, we do not consider the report to be newly discovered evidence simply because it was not in the possession of the carrier at the time of the hearing. The hearing was originally set for December 7, 1992. The carrier obtained a continuance to get the results of the second lab test. The second lab test is dated November 20, 1992. The carrier does not explain why it did not obtain the toxicologist's report between the original hearing date of December 7, 1992, and the rescheduled hearing date of March 11, 1993, and it offers no explanation for its lack of diligence in this regard. There was no mention made by the carrier at the December 7, 1992, hearing or the March 11, 1993, hearing of any expected report from a medical toxicologist (other than the second lab test) nor did the carrier request that the record be left open or request a continuance for the receipt of such a report. The report simply appears unannounced on appeal. In Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983), the Supreme Court of Texas stated as follows in regard to newly discovered evidence:

> It is incumbent upon a party who seeks a new trial on the ground of newly discovered evidence to satisfy the court first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is not cumulative; fourth, that it is so material that it would probably produce a different result if a new trial were granted.

In the instant case, the carrier has failed to satisfy the Appeals Panel that it was diligent in attempting to secure the toxicologic report before the hearing. As stated in 54 TEX. JUR. 3d *New Trials* § 73 (1987), in some circumstances a lack of diligence is evidenced by the fact that the case was pending for a long period prior to being brought to trial. *See also* City of Beaumont v. Dougherty, 298 S.W. 631, 637 (Tex. Civ. App.-Beaumont 1927) *affirmed* Tex. Comm. App., 9 S.W.2d 1030. We also decline to consider an excerpt from a book published in 1989 which the carrier has attached to its appeal. The excerpt was not made a part of the hearing record and clearly could have been offered at the hearing had due diligence been used. We are also not convinced that the excerpt would probably produce a different result if it were to be considered.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge