APPEAL NO. 941099

This case returns for review pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), following this panel's decision in Texas Workers' Compensation Commission Appeal No. 94673, decided July 12, 1994. In that decision we reversed the hearing officer's decision on the basis of her determination that expert evidence was necessary to rebut the presumption of sobriety. We therefore remanded to allow the hearing officer to determine, based upon all the evidence in the record, whether the presumption was in fact rebutted and if so whether the claimant was intoxicated.

The hearing officer's decision and order on remand determined that the claimant was intoxicated at the time of his compensable injury of (date of injury), and therefore, the carrier was not liable for benefits. In its appeal the claimant contends that the carrier did not present any credible evidence to raise the issue of intoxication, and that claimant proved by a preponderance of the evidence that he had the normal uses of his mental and physical faculties at the time of the injury. The carrier asserts that the hearing officer's decision was correct and should be affirmed.

DECISION

We affirm.

The facts of this case are set forth in Appeal No. 94673 and will be repeated only briefly here. Basically, the claimant, a trailer body builder, was injured on (date of injury), when he fell off the bench on which he was standing to reach the top of the trailer he was working on. The same day he was given a drug test which was positive for cocaine metabolite (7240 nanograms); the claimant acknowledged that he had used cocaine during the prior ten months and that he had last used it the Thursday night prior to the Saturday afternoon accident (some testimony indicated it was crack cocaine).

It was the claimant's testimony that cocaine use made him high for only two to three minutes, and he had full use of his faculties at the time of the accident. Two of claimant's coworkers testified that they had had similar accidents while not intoxicated, and one said he worked around claimant on the day of the injury and did not observe him acting abnormally. Claimant's supervisor, (Mr. R), stated that he had previously spoken to claimant about the need to work faster and on the day of the accident observed claimant working "extra hard" to keep up with the job.

The employer's nurse, (Ms. W), saw claimant after the accident and did not have any reason to suspect he was intoxicated until after she heard of the results of the drug test. At that time, she changed her opinion because she saw claimant walking around after the injury, disclaiming any broken bones, but exhibiting great pain by the time he got to the first aid building (he was later determined to have a broken hip). Ms. W believed the cocaine in claimant's system acted as a pain-killer, although she acknowledged that effects from drugs wear off slowly. She said he was not in shock after the accident because she had checked his vital signs. Claimant's doctor, (Dr. W), wrote that it was

possible that claimant initially had a non-displaced hip fracture which could have shifted while he was walking around after the accident.

(Ms. M), a certified drug counselor, said she visited claimant shortly after the injury, at which time he told her he believed his drug use had become problematic because he was using cocaine weekly, although he did not wish treatment. Ms. M described acute cocaine intoxication shortly following the use of the drug (which she said could last for four hours with crack cocaine) as including agitation, poor judgment, loss of motor abilities, and moving faster than usual; how long the effects lasted would depend upon how much the person had used and over what period of time. She said long term effects could include impairment of motor skills, but she did not know what amount of cocaine in a person's system could cause them to lose the normal use of their mental or physical faculties.

The 1989 Act, Section 401.013(a), defines intoxication in pertinent part 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 or controlled substance analogue. Courts have held that a claimant need not prove he was not intoxicated, as there is a presumption of sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct). However, when a carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove he was not intoxicated at the time of the injury. March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785 (Tex. Civ. App.-Fort Worth 1989, writ denied). Based on Ms. M's inability to interpret the results of claimant's drug test, the hearing officer originally rendered a decision in claimant's favor. The Appeals Panel, citing prior decisions, pointed out that in order to shift the burden of proof a carrier is obliged to present "probative evidence. . . that has some value in establishing a factual matter as opposed to evidence that amounts to no more than speculation or which is a mere scintilla." Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. In her decision on remand the hearing officer determined--based on the presence in claimant's system of cocaine metabolite in greater than trace amounts--that the carrier had rebutted the presumption of sobriety. Applying the reasoning of the cases cited in Appeal No. 94673, we find that the hearing officer's determination is adequately supported by the evidence.

As also noted in Appeal No. 94673, while a positive drug test can shift the burden of proof to the claimant, it does not, in and of itself, compel a finding of intoxication at the time of the injury. Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992. In the decision on remand the hearing officer reasoned as follows:

> Although it would have been helpful for either party to have provided expert evidence regarding the dose/response effect of cocaine, so as to advise the hearing officer whether an individual with 7240 nanograms of cocaine metabolite in his system would or would not retain the normal use of his mental and physical faculties, such information is lacking in the record. Therefore, the hearing officer concludes that the amount of cocaine

> metabolite detected in claimant's system appears to be far greater than the trace amounts which might logically be expected when several days had elapsed since the last use of cocaine, which is the scenario to which the claimant testified. It therefore appears that carrier has adequately rebutted the presumption of sobriety. The hearing officer is not persuaded by claimant's testimony of his own sobriety, and is likewise not persuaded by the testimony of claimant's co-workers since one had no personal knowledge of the accident made the basis of this case, and the other may not have been adequately informed as to claimant's mental faculties, in addition to his physical faculties, on the date in question. Therefore, a decision in favor of carrier is appropriate.

On the issue of intoxication, the hearing officer had before her the admittedly uninterpreted drug screen results, claimant's own testimony of his own mental and physical faculties, and his coworkers' testimony. She also had claimant's testimony regarding the regularity of his drug use, as well as the statements given to Ms. M and Ms. M's testimony as to the effects of such use and the length of time the effects lasted. The hearing officer also had the inferences drawn by Ms. W and Dr. W. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Where there is contradictory evidence the fact finder can 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.). Further, it has been held that any ultimate fact may be proven by circumstantial as well as by direct evidence and that the fact finder may draw reasonable inferences and deductions from the evidence adduced. Employers Mutual Liability Insurance Company v. Strother, 358 S.W.2d 753 (Tex. Civ. App.-Waco 1962, writ ref'd n.r.e.). Any conflicts in the evidence as to the claimant's physical and mental state on the day of the injury were for the hearing officer to resolve. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Based upon the record below, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer's decision and order are therefore affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge