On January 14, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the contest of compensability was based on evidence which could not reasonably have been discovered earlier thereby allowing the appellant (carrier) to reopen the issue of compensability; and (2) whether the respondent (claimant) was intoxicated at the time of his injury. The hearing officer determined that the carrier was not entitled to reopen the issue of compensability of the injury and had waived its right to dispute the compensability of the injury because the carrier failed to contest the compensability of the injury within 60 days of its first written notice of injury and because its contest of compensability after the 60-day period was "not based on evidence which could not reasonably have been discovered within sixty days of carrier's first notice of injury." The hearing officer further determined that the claimant was not intoxicated at the time he sustained a compensable injury on (date of injury). The carrier disagrees with the hearing officer's decision and requests that it be reversed and a decision rendered in its favor.

DECISION

The hearing officer's decision and order are affirmed.

FACTS

The claimant testified that about four years prior to his work-related accident of (date of injury), he had been treated with chemotherapy and that since that treatment he has been taking various prescription medications and over-the-counter medications for pain. On July 28, 1992, the claimant had a pre-employment drug screen test for employment with the employer, 9employer). The test was negative for all drugs screened including amphetamine and benzodiazepine.

The claimant further testified that on (date of injury), he was injured while working as a painter for the employer when he stepped off the back of a flat-bed truck at work and twisted his knee. The claimant said the accident happened immediately after his return from lunch. A report from a rehabilitation specialist indicated that the claimant has been diagnosed with a torn medial meniscus. The claimant said he has not worked since the accident.

The afternoon of the injury the claimant was taken to the (the clinic) where he consented to have a blood or urine sample analyzed for the presence of alcohol and controlled substances. On the consent form, the claimant listed several prescription drugs and nonprescription drugs he had taken in the last 30 days. A urine sample was collected at about 5:15 p.m. on the date of the accident and in a laboratory report dated August 17, 1992, it was reported that the claimant had tested positive for amphetamines and for benzodiazepines. The positive results were confirmed by "GC/MS" confirmatory method.

In a letter to the employer dated September 18, 1992, the clinic advised the employer of the positive drug screen done on (date of injury), and that the clinic had been unsuccessful in trying to contact the claimant. The clinic further advised the employer that it had checked with (Dr. T) a toxicologist, about the drug screen and that "the drug screen is positive for true amphetamines." The clinic further advised that the claimant had listed no medication which would cover the positive amphetamine finding, but that the positive benzodiazepines finding "would be covered by the diazapan listed by [claimant]." The clinic then stated that "since all medications have to be verified by prescriptions, and [claimant] will not return our calls, we have to report this drug screen positive for amphetamines and benzodiazepines."

The claimant testified that he had not taken amphetamines on the day of the accident or at any time prior to or after the accident and that he was unaware of any prescription or nonprescription medication he was taking that had amphetamines in it. The claimant further testified that at the time of his accident none of the prescription or nonprescription medications he was taking had any effect on him, either physically or mentally.

According to notations in the claim file activity log kept by the carrier's adjustor, the adjustor talked to the claimant on October 2, 1992, about his drug test and at that time the claimant told the adjustor that he did not know why he tested positive for amphetamines and also told her about several prescription medications he was taking prior to the accident. Another notation dated October 5, 1992, indicated that the adjustor talked to (TT), a registered nurse and rehabilitation specialist, on that date and that TT informed the adjustor that "nothing he's [claimant] taking would be considered amphetamines." TT also indicated that she was going to talk to (Dr. W) about the case the next day (October 6th) and "see if he [claimant] had a false/positive test" and that TT would call the adjustor immediately after her visit with Dr. W.

In a letter from TT to the carrier's adjustor dated October 15, 1992, TT stated that:

> As discussed on October 6, 1992, I was able to speak with [Dr. W] regarding [claimant's] positive urine test. [Dr. W] felt that, other than a remote chance that fairly recent chemotherapy may cause a positive for amphetamines, none of the drugs listed by [claimant] could cause a positive urine test. [Dr. W] stated that there were no known over the counter drugs or foods one could eat that would cause a urine test to be positive for amphetamines.

TT added that she had made numerous unsuccessful attempts to meet with the claimant and that she had written him a letter stating she would like to meet with him on October 20, 1992.

In a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) dated November 2, 1992, the carrier reported that its first written notice of injury was received on August 21, 1992, and that the reason it was refusing or disputing payment of the claimant's claim was that:

Carrier has just received claimant's results of a drug test taken on date of injury. Drug test is positive for amphetamines. Claimant took a drug test on date of hire on 8-3-92 and it was negative. Carrier is investigating liability for compensation exceptions Section 3.02 # 1. Definition of intoxication also includes controlled substance. No legal prescription has been provided for use of amphetamines.

In a letter dated March 30, 1993, (Dr. S), the doctor who examined the claimant at the clinic on the date of the accident, wrote that at the time of the claimant's examination, the claimant did not display restlessness, irritability, tremor, diaphoresis, hyperreflexia, flushing or mydriasis which Dr. S stated are early signs of amphetamine toxicity. Dr. S further stated that the claimant's positive urine drug screen indicated that the claimant was using amphetamines, but it did not indicate that he was or was not intoxicated. Dr. S further stated that "[claimant's] lack of clinical signs of amphetamine intoxication at the time of his exam indicates that he was not intoxicated at the time of the exam. This does not indicate whether he was or was not intoxicated on amphetamines at the time of his accident, but merely that he had been using amphetamines."

The record is unclear as to the time period between the accident and Dr. S's examination of the claimant, although the carrier contends that based on a medical report of Dr. S that was not in evidence, the time period was over four hours. In a transcription of a recorded statement, the claimant indicated that his accident occurred at about 12:30 p.m. when he got back from lunch; that it was not until he climbed stairs that afternoon that his leg started "burning;" and that he reported the injury to his foreman and was taken to the clinic. He did not state at the hearing or in the recorded statement the time of Dr. S's examination on the day of injury.

In a letter dated May 21, 1993, Dr. W wrote that the claimant's urine specimen tested at 2,122 ng/ml for amphetamine and that the concentration was well above the cut-off level of 500 ng/ml to report a specimen positive for amphetamine. Dr. W further stated "[t]his concentration can be considered to be at an amount that would induce an amount of impairment so he would not have the normal use of his mental and physical faculties." Dr. W is a Professor at the Department of Pathology at the University of Texas Health Science Center in (city), Texas, and is certified in toxicology.

In an amended TWCC-21 dated May 26, 1993, the carrier again reported that it first received written notice of injury on August 21, 1992, and stated that the reason it was refusing or disputing payment of the claimant's claim was that:

Carrier's investigation confirms that the claimant was intoxicated at time of injury (Art. 8308-1.03(30)) and therefore the injury is not compensable (Art. 8308-3.02). See expert medical report attached from [Dr. W].

In a Request for Setting a Benefit Review Conference (BRC) dated May 26, 1993, the carrier stated that it was alleging that the claimant was intoxicated and that it was not

liable for benefits. The carrier further stated that it was voluntarily paying benefits to the claimant and was seeking authorization to terminate payments immediately. The BRC was held on November 22, 1993. The benefit review officer recommended that the claimant was not intoxicated at the time of the accident and that the carrier's contest of compensability was based on newly discovered evidence.

REOPENING ISSUE OF COMPENSABILITY

In regard to the issue of reopening the issue of the compensability of the claimant's injury, the hearing officer found that the carrier received its first written notice of injury on August 21, 1992; that within 60 days of August 21, 1992, the carrier possessed information which would lead a person to believe that the claimant might have been intoxicated at the time of his injury of (date of injury); and that the carrier did not contest the compensability of the claimant's injury until November 2, 1992, a date which is more than 60 days after August 21, 1992. The hearing officer concluded that the "carrier's contest of compensability was not based on evidence which could not reasonably have been discovered within sixty days of carrier's first notice of injury. Therefore, carrier is not entitled to reopen the issue of compensability and has waived its right to dispute the compensability of claimant's injury."

Subsections (c) and (d) of Section 409.021 provide as follows:

(c)If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

(d)An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

The carrier contends that the hearing officer erred in her findings and conclusion regarding the issue of reopening the issue of the compensability of the claimant's injury because the claimant did not list amphetamine as a drug he used on the consent form for the drug screen and because the claimant failed to cooperate with the carrier in determining whether the positive finding of amphetamine use on the drug screen was erroneous or reliable.

The carrier received written notice of the claimant's injury on August 21, 1992. Thus, under Section 409.021(c) it had until October 20, 1992, which was the 60th day after the date of notice, to contest the compensability of the injury. Failure to contest the compensability of the injury during that 60-day period results in a waiver of the right to contest compensability unless the carrier is allowed to reopen the issue of compensability

of the injury upon a finding of evidence that could not reasonably have been discovered earlier pursuant to Section 409.021(d).

In this case, the record establishes that the carrier knew about the results of the drug screen test and knew that Dr. W felt that the drugs listed by the claimant would not result in a positive finding for amphetamine well within the 60-day period to contest compensability and certainly knew of these things no later than October 6, 1992. Yet, the carrier failed to contest compensability on the basis of intoxication until November 2, 1992, some 13 days after its 60-day period had elapsed. In its appeal, the carrier agrees with the hearing officer's finding that it did not contest compensability of the injury until November 2, 1992. No question is before us on appeal as to the sufficiency of the TWCC-21 of November 2, 1992, to contest compensability of the injury. The basis of the carrier's contest of compensability on November 2, 1992, was the positive drug test for amphetamine and the claimant's failure to provide a legal prescription for amphetamine. According to the record, both of these things were known to the carrier well within the 60-day period for contesting compensability. The results of the drug test were known by the carrier no later than October 2, 1992, and there is no indication in the record that the claimant ever had a prescription for amphetamine or that he ever asserted that he had such a prescription.

The carrier can not point to any evidence that came to its knowledge after the 60-day period and that was made a basis of its contest of compensability on November 2, 1992, that was not known to it within the 60-day period for contesting compensability. And, the carrier has not shown that it based its contest of compensability after the 60-day period for contesting compensability on evidence that could not reasonably have been discovered within the 60-day period for contesting compensability because the evidence on which it contested compensability could not only have been discovered within that period but in fact was discovered.

In our opinion, the evidence sufficiently supports the hearing officer's conclusion that the carrier's contest of compensability was not based on evidence which could not reasonably have been discovered within 60 days of the carrier's notice of injury and her further conclusion that the carrier is not entitled to reopen the issue of compensability and has waived its right to dispute the compensability of the claimant's injury. Simply put, the facts upon which the carrier disputed compensability after the 60-day period were known to it within the 60-day period and thus the carrier has not shown that it based its contest of compensability after the 60-day period upon a finding of evidence which could not reasonably have been discovered earlier. We further conclude that the hearing officer's findings and conclusions on the issue of reopening the issue of compensability are not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993.

INTOXICATION

The hearing officer also found that on (date of injury), the claimant sustained an injury while he was engaged in the exercise of his regular job duties with the employer, and that

at the time of his injury on (date of injury), the claimant possessed the normal use of his mental and physical faculties. The hearing officer concluded that the claimant was not intoxicated at the time of his injury of (date of injury). The carrier contends that the evidence does not support the hearing officer's findings and conclusion on the issue of intoxication.

Section 406.032 provides in pertinent part that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. That part of the definition of intoxication as set forth in Section 401.013(a) which applies to this case is "the state of: . . . not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of: . . . (B) a controlled substance or controlled substance analogue, as defined by Section 481.002, Health and Safety Code." Basically, Chapter 481 of the Health and Safety Code is the Texas Controlled Substances Act and amphetamine is listed as a controlled substance in that act. The carrier contends that the drug test and the opinion of Dr. W establish that the claimant was intoxicated at the time of his injury as a result of the voluntary introduction into his body of the controlled substance of amphetamine.

The carrier does not assert that the claimant was intoxicated at the time of his injury as a result of the voluntary introduction into his body of benzodiazepine possibly because of Section 401.013(b) which states in pertinent part that2 the term "intoxication" does not include the loss of normal use of mental or physical faculties resulting from the introduction into the body of a substance: (1) taken under and in accordance with a prescription written for the employee by the employee's doctor. There was evidence that the positive testing for benzodiazepine resulted from the use of diazapan which had been prescribed for the claimant by a doctor.

In this case, the carrier brought forth sufficient evidence to raise the issue of intoxication and it was the claimant's burden to prove that he was not intoxicated at the time of injury. The hearing officer had to weigh the positive drug test for amphetamine and the opinion of Dr. W against the claimant's testimony and the opinion of Dr. S. Also, the hearing officer had to consider the time lapse between the time of injury and the time of Dr. S's examination in determining what weight to give to Dr. S's opinion. It is readily apparent from the hearing officer's discussion of the evidence that she appropriately placed the burden of proof on the claimant to show that he was not intoxicated and that she did weigh the conflicting evidence and decided that Dr. S's opinion was persuasive notwithstanding that perhaps several hours passed between the time of the accident and Dr. S's examination wherein Dr. S found that the claimant lacked clinical signs of intoxication.

The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-(city) 1964, writ ref'd n.r.e.). Having reviewed the record, we cannot conclude that the hearing officer's conclusion that the claimant was not intoxicated at the time of injury is not supported by

sufficient evidence, nor can we conclude that the conclusion is so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong. In any event, if the hearing officer erred in finding that the claimant was not intoxicated at the time of his injury, it would not change the outcome of this decision in favor of awarding workers' compensation benefits to the claimant because of our affirmance of the hearing officer's findings and conclusions that the carrier is not entitled to reopen the issue of compensability and that the carrier waived its right to dispute the compensability of the claimant's injury. *See* Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge