APPEAL NO. 941400

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 30, 1994, a contested case hearing (CCH) was held in (City 1), Texas, with (hearing officer) presiding, to determine whether the claimed injury occurred while the appellant, claimant herein, was in a state of intoxication, thereby relieving respondent, carrier herein, of liability for compensation.

At this point we note that the Hearing Officer's Exhibit No. 1 identified as "BRC Report and Disputed Issue" was not forwarded with the record. However, the benefit review conference (BRC) report on file with the Texas Workers' Compensation Commission (Commission) and the hearing officer's decision, recorded the disputed issue to be:

Did the claimed injury occur while the Claimant was in a state of intoxication, as defined in Texas Labor Code Ann. § 401.013, from the induction of a controlled substance, thereby relieving the Carrier of liability for compensation?

The transcript of the CCH, however, indicates that the hearing officer "rephrased the issue to: That the claimant sustained a compensable injury on (date of injury), in the course and scope of his employment?" The transcript reflects that the parties agreed that was the disputed issue.

The hearing officer determined that "claimant's injury occurred while the claimant was in a state of [cocaine] intoxication; therefore, Carrier is relieved from liability for compensation." Claimant appealed, reiterating testimony and discussing evidence presented at the CCH, and contending certain of the hearing officer's determinations were either in error or were not supported by the evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant was employed by (employer) as a "lead technician." As such, he testified that he was in a supervisory or management position. On Monday, (date of injury) (all dates are 1993 unless otherwise noted), claimant arrived at work at 5:00 a.m., and "warmed up" the 15 machines that he was in charge of and continued his normal routine. At approximately 9:00 a.m. (Ms. SA) called claimant and reported she was having problems with her machine. Claimant examined the machine, apparently left it in an "automatic" mode, was apparently adjusting the air blast when the injector cycle engaged crushing the tip of the middle finger of claimant's right hand. Claimant testified that he finished repairing the machine, placed a paper napkin or towel on his middle finger and showed his injury to (Mr. FB), another lead technician. Claimant was taken to the hospital

where his middle finger was operated on. Apparently, a drug screening test was performed and, in a report dated October 13th, showed a cocaine metabolite reading of 538 nanograms per milliliter (ng/ml).

Claimant denied using cocaine but conceded that he had been at a party Friday ((3 days before date of injury)), had gotten drunk, passed out, that "there was stuff passed around" at the party in pill form and that he "could have" taken one of these pills. Claimant testified that when he reported for work on (date of injury) he had "normal use of [his] mental and physical faculties." Both Ms. SA and Mr. FB testified that claimant looked and acted "normal" on the morning of (date of injury). Both described intoxication as staggering, slurred speech, red or glassy eyed and both stated claimant did not have those characteristics on the morning in question. Both testified that they did not use cocaine and did not know anyone that did.

Carrier called (Dr. W), who qualified and testified as an expert medical witness on "addictionology." Dr. W testified that claimant had an extremely high concentrate of cocaine metabolite according to the test results considering the cocaine had possibly been in claimant's system for over 48 hours. Dr. W testified that in his expert medical opinion, claimant did not have the normal use of his mental and physical faculties at the time of the accident. Dr. W further testified on the differences between alcohol intoxication (obvious slurred speech, etc.) and cocaine intoxication (agitation, loss of concentration and limited attention span). Dr. W testified that an untrained individual would not be able to "spot that [cocaine] intoxication." Dr. W conceded that there is no "legal definition of intoxication" for cocaine but that "laboratory-wise to be intoxicating levels . . . is 300 [ng/ml]" and that for someone with 538 ng/ml to operate heavy machinery or drive would be "extremely dangerous." A report from (Dr. K), a medical toxicologist who examined claimant's test results, also expressed the opinion that a person with claimant's cocaine level would be considered intoxicated.

Claimant, in his appeal, as at the CCH, emphasized that he had worked four hours on the day in question, had performed numerous acts requiring physical dexterity and that two witnesses had testified that he appeared "normal." Claimant cites Texas Workers' Compensation Commission Appeal No. 91048, decided December 2, 1991, as controlling. Although the facts are similar (ingestion of cocaine at a party 30-54 hours before the accident, severing of three fingers in a table saw and evidence of cocaine usage by a urine test) the Appeals Panel affirmed the hearing officer's decision in that case that the injured employee was <u>not</u> intoxicated. The expert medical evidence of intoxication was weak in that case, with the expert stating intoxication could not be determined with "any scientific certainty." The injured employee, on the other hand, offered an expert medical opinion that the employee "did not suffer loss of the normal use of mental and physical faculties." The Appeals Panel stated it "is limited to the expert evidence before this hearing, and our decision is based on what is available before us without endorsing such expert opinion." Consequently, the weight of the expert medical evidence was very different in Appeal No. 91048 than in the instant case.

The 1989 Act provides in pertinent part that the term "intoxication" means the state of not having the normal use of mental or physical faculties resulting from voluntary introduction into the body of a controlled substance or controlled substance analogue. Section 401.013(a)(2)(B). Section 406.032(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. A claimant need not prove he was not intoxicated as the court will presume sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct). However, when the carrier presents 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 Lloyds Insurance Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied). The hearing officer apparently determined that the laboratory test result showing claimant had a 538 ng/ml level of cocaine metabolite, together with the expert medical opinions regarding intoxication, was sufficient evidence of intoxication to shift the burden of proving otherwise to the claimant. We do not disagree.

Claimant seeks to meet his burden of proving that he was not intoxicated by his own testimony regarding opening the plant, starting the equipment, and working with heavy machinery, as well as the testimony of Mr. FB and Ms. SA that he appeared normal and that he was performing his regular duties. Claimant also refers to a statement from his supervisor that claimant was not hyper or thirsty and his eyes were not dilated. As the Appeals Panel noted in Texas Workers' Compensation Commission Appeal No. 941099, decided September 30, 1994, a decision on remand of Texas Workers' Compensation Commission Appeal No. 94673, decided July 12, 1994, a case also involving cocaine intoxication, 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. . . . 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.

The evidence in the instant case is even stronger than Appeal No. 94673 because of the expert medical testimony of Dr. W and the extensive written opinion from Dr. K. To rebut claimant's contentions that his physical and mental faculties were not impaired, based on Mr. FB's and Ms. SA's testimony, Dr. W testified that a person on cocaine might appear perfectly normal and a nonexpert would be unable to detect cocaine intoxication.

Dr. W testified that a normal "outward appearance does not necessarily correlate to impaired brain function." The hearing officer had claimant's testimony, the witnesses testimony and the expert medical testimony and opinions on which to base his decision. The hearing officer clearly gave greater weight to the expert medical evidence than claimant's evidence that he appeared normal and was performing his regular duties, in determining claimant was intoxicated.

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). We find the hearing officer's decision to be supported by sufficient evidence based on the testimony of Dr. W and the written report of Dr. K.

We are satisfied that the evidence is sufficient to support the challenged findings and conclusions, which 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). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The decision and order of the hearing officer are hereby affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge