APPEAL NO. 941441

Following a contested case hearing held in (city), Texas, on September 13, 1994, the hearing officer, found that on (date of injury), the respondent (claimant) "had the normal use of his physical and mental faculties and was able to perform his duties in a satisfactory manner." Based on this finding the hearing officer concluded that claimant's injury did not occur while he was in a state of intoxication as defined in the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.013 (1989 Act). The appellant (carrier) asserts on appeal that the evidence is insufficient to support such finding and conclusion. Claimant did not appeal from the determination that he did not have disability under the 1989 Act nor did he respond to the carrier's appeal.

DECISION

Affirmed.

Claimant, a welder-fabricator, testified that he was injured at work on (date of injury). His project that day was to weld together various joints of pipe to fabricate a coil. He said he was operating an overhead hoist transporting joints of pipe over to the sawhorses (where he welded the joints together) when his right boot got stuck in some pipe on the floor causing him to stumble and fall. He said he broke his fall with his right wrist injuring it and in the process also twisted his right knee. Claimant surmised the accident was not witnessed. He said he continued working and twice that day went into the office of his supervisor, Mr. V, the plant manager, to report the injury, but no one was present. He said he worked on (day after injury) and that about 3:00 p.m. he reported to the secretary in Mr. V's office that he had something in his eye and he also reported his right knee and wrist injury of the previous day. A short time later, Mr. V in accordance with the employer's policy took, claimant to be examined by a doctor. Dr. S, claimant's doctor, examined claimant, diagnosed bruised tendons and muscles in the wrist and knee, and returned claimant to work. As a part of that examination and pursuant to the employer's policy, a urine sample was collected for drug analysis. After returning to work, Mr. V advised claimant his employment was terminated because a random drug test the employer administered to claimant on March 22nd was positive for marijuana.

The carrier raised the intoxication defense with documentary evidence and contended that at the time of his accident on (date of injury), claimant's mental and physical faculties were impaired by marijuana. As was stated in Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, while sobriety is presumed, once a carrier presents evidence of intoxication, raising a question of fact, a claimant has the burden to prove he was not intoxicated at the time of the injury. Claimant, who described himself as a casual, recreational user of marijuana, testified that he had last smoked marijuana on March 12, 1993. In a transcript of his interview by the carrier on March 28th, claimant said his marijuana smoking on March 12th consisted of taking a few puffs from a "one hit pipe." Carrier introduced a laboratory report stating that claimant's urine sample taken on March 22, 1994, tested positive for marijuana use and contained 108 nanograms per milliliter (ng/ml) of cannabinoids. Tetrahydrocannabinol is

the active and proscribed ingredient in marijuana. *See* Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991. Claimant's (day after injury) urine sample tested positive for marijuana with the cannabinoids level at 73ng/ml. No expert evidence was presented concerning the relationship between these cannabinoid levels and claimant's relative impairment on (date of injury), if any.

Claimant insisted his faculties were not impaired and that he was not intoxicated on (date of injury). He introduced statements from coworkers Mr. G and Mr. B stating that while in claimant's company at work on (date of injury), after 3:30 p.m., they did not see claimant exhibit any unusual behavior or show signs of being under the influence of any intoxicating substances. Claimant conceded that Mr. G and Mr. B were "fishing buddies." A statement from coworker Mr. L stated that while at work on that date he did not see claimant exhibit signs of being under the influence of any intoxicating substance or exhibit unusual behavior. Claimant testified that Mr. L was building a coil next to him on (date of injury) and would have been the closest coworker to him that day. Claimant denied being intoxicated at work on (date of injury) and stated he had no trouble performing his work on that day. His work consisted of reading the blueprint for the coil, transporting the various joints of pipe to the sawhorses using an overhead crane, and assembling and welding the pieces of pipe to construct the coil.

Mr. V testified that his job included checking the welds and otherwise inspecting the work on items being fabricated in the plant. He said that on (date of injury) he observed claimant to appear to be confused while reading the blueprint and looking at the pipe joints after constructing the first piece, so he went over to claimant's work area and consulted with him on the project. Afterwards, claimant completed the project with no problems, though Mr. V said he felt claimant did the work slower than he would have expected considering that claimant had once before fabricated a coil. Claimant explained that the numbers on the joints of pipe did not conform to the numbers on the blueprint and that he had to otherwise identify the pipe joints to arrange the assembly. Mr. V also felt that claimant would not have ordinarily walked into a piece of pipe on the floor. Claimant explained the incident saying he was looking up at the crane while walking and stumbled into the pipe. Mr. V also testified that, notwithstanding that claimant was operating welding equipment and an overhead hoist throughout the day on (date of injury), he did not consider claimant to be presenting a safety problem.

Section 406.032(1)(a) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. 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 drug. Section 401.013(a)(2). As was noted in Appeal No. 91006, *supra*, the 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)."

The disputed issue of intoxication presented a question of fact and the hearing

officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). We find the evidence sufficient to support the challenged finding and conclusion. In addition to claimant's testimony, there were the statements of three coworkers who saw claimant at work and observed no indication of intoxication. The plant manager thought claimant to be confused at the outset of the job but observed no further difficulty after consulting with claimant nor did he regard claimant to be presenting any safety concerns. The hearing officer could credit claimant's explanations concerning the misnumbering of the pieces of pipe and his stumbling into the pipe while looking upwards at the moving hoist. Compare this evidence and that in Appeal No. 91006, *supra*, with the absence of evidence of sobriety aside from the employee's testimony, which caused the Appeals Panel to reverse in Appeal No. 91018, *supra*. *And see* Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, and the cases cited therein. *And compare* Texas Workers' Compensation Commission Appeal No. 941400, decided December 2, 1994, where the hearing officer found evidence of cocaine intoxication based on expert medical testimony, in spite of witnesses' testimony that the injured employee looked and acted "normal." We do not find the hearing officer's finding and conclusion so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge