APPEAL NO. 94194

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held December 9, 1993, in (city), Texas, to determine the issue of whether or not the claimed injury occurred when the respondent, hereinafter claimant, was in a state of intoxication, thereby relieving the appellant, hereinafter carrier, of liability for compensation. The carrier appeals hearing officer (hearing officer) finding of fact that the claimant had the normal use of his mental and physical faculties at the time of his injury, and his conclusions of law that the claimant was not intoxicated at the time of his injury and in the course and scope of his employment, entitling him to medical and income benefits. The claimant in response points to evidence in the record which supports the hearing officer's decision.

DECISION

We affirm the hearing officer's decision and order.

Claimant, who was a d hand for (employer), injured his hand on (date of injury), while working on a drilling rig. The hearing officer's rendition of the facts is not challenged by either party and is quoted herein:

[Claimant] was attempting to clear the line for the geolograph, an instrument which determines the depth of the drill bit. A line runs from the device through the roof of the doghouse (work shed) to the top of the derrick and then down the drill string (drill pipe). A spring loaded spool on the device takes up slack line and keeps tension on the line. The line had slipped off a pulley or guide in the doghouse and line was being taken up in jerks.

Claimant stated he kicked the drum a couple of times and it pulled in more line each time. When it would not take in any more line, he attempted to pull some slack off the pulley. The drum kicked while he was doing so and his hand was pinned and injured. According to claimant, slack had evidently developed in the line and was sitting on the roof of the doghouse without his knowledge. When he pulled some line off the drum, he freed some of the line above allowing the drum to kick. Claimant stated he had replaced the line on the guide this way many times previously.

Claimant's employer had a no-drug policy that included random drug testing. The previous day, (date) claimant had submitted to a drug test which was positive for alcohol and cocaine. (The results of this test, which showed an alcohol concentration of .062 and the presence of cocaine metabolite at greater than 5000 ng/ml, were not available to employer until after claimant was injured.) Approximately two hours after the injury occurred a second test was taken which showed the presence of cocaine metabolite at 1495 ng/ml.

The claimant testified that he had been a recreational user of cocaine on a once a month basis for two years or possibly longer. He maintained, however, that the presence of cocaine at the time of the accident was due to his having used a Tylenol 3 as a poultice for a toothache three days earlier; he contended he kept the Tylenol in a bottle that had previously contained cocaine and that the tablet probably "soaked up" the cocaine, although he also said there was not a visible amount of cocaine in the bottle. (The claimant testified a doctor had prescribed the Tylenol 3, although according to a statement in his deposition a friend had given it to him.)

The claimant, who had worked in the oil field for 10 or 12 years, said in response to cross examination that he knew the geolograph was malfunctioning and that there was a risk involved in putting his hand between a pulley and a cable in such situation; however, he said he had done the same thing numerous times before and had never gotten hurt. (Mr. PR), the tool pusher who was claimant's supervisor, testified that the proper and usual procedure to correct this type of malfunction was to shut everything down and use two people, one to hold the spring and one to pull the line on the inside. The claimant stated that it would be better to use two people, if two were available, but that he had "done it by myself all the time." When asked about Mr. PR's statement that claimant told him, after the accident, that "he knew better than to do that," claimant said he could not recall whether he made that statement. Mr. PR also said he drove claimant to the hospital and that following the accident claimant's speech was clear and he had no trouble walking or giving information to medical staff. The claimant stated in his deposition that in his experience it would be impossible to visibly tell whether someone was high on cocaine. He also stated he had never experienced a change in his mental or physical faculties from cocaine use.

(Mr. RR), a driller who was working on the same rig as claimant on the day of injury, testified through an interpreter that when the line became fouled he told the claimant to wait before grabbing the line, and he stated his belief that the accident would not have happened if claimant had waited. He too testified that the repair job took two people, one to take up the slack. Mr. RR drove to work with claimant the morning of (date of injury) (approximately a one-hour drive) and worked on the rig with him that day. He said he did not observe claimant acting strange at any time, but said that during the workday he was on the ground while claimant was 60 or 70 feet in the air. Two other co-workers said in transcribed statements that they rode to work with claimant but slept during the ride, and that they observed nothing unusual about claimant's behavior although they did not work directly with him during the day.

Carrier called as an expert witness D (Dr. B), a toxicologist who is the director of a drug testing laboratory. Dr. B stated that in his opinion it would have been scientifically impossible for claimant to register the levels of cocaine reflected in the drug tests in the manner described by claimant (i.e., by particles of cocaine adhering to the tablet), and hypothesized that claimant had used "a fairly large amount." A December 8, 1993, letter from Dr. B which was a carrier's exhibit at the hearing listed as the effects of cocaine use depletion of normal brain transmitters, self-confidence and egocentricity from chronic use, fatigue, depression and irritability from withdrawal, pre-occupation from the desire to

experience another "rush," and residual effects such as decrements in reaction time and as shown by testing, which effects can be noted for three or more months following abstinence. Dr. B explained that, with regard to acute effects, each incident of ingestion results in the occurrence of micro-hemorrhages with an associated loss of competency "shortly after using it;" he also said repeated use causes a cumulative effect "where you can have, initially, the small brain hemorrhages and lose a certain portion of your function, and then recover it, but you never get back to 100 percent." He described the affects on ability as including the ability to think and use judgment, as well as reaction time. In Dr. B's opinion, at the time of the injury the claimant did not have his normal use of mental or physical faculties, based upon a combination of organic, residual, and withdrawal effects of cocaine use.

In response to questions from the hearing officer, Dr. B said, with regard to the decrease in cocaine metabolite between the two drug tests, "I can't say that it is not consistent with not having used cocaine in the last 24 hours." He stated that the intoxicating effect of cocaine occurs about 20 minutes after use and lasts only a short period of time, and that the depression occurs several hours after use.

The hearing officer stated in his discussion of the evidence and in findings of fact that the indicated levels of cocaine metabolite on the day of the injury and the day prior to the injury (which tested positive at 1495 ng/ml and greater than 5000 ng/ml) are consistent with normal elimination of cocaine from the system without additional ingestion of cocaine during the 24 hours prior to the injury, and that the claimant did not use cocaine for at least 24 hours prior to the injury. (The carrier contends that the foregoing findings are improper and should not have been included since they do not encompass ultimate issues.) The hearing officer also found, and this is challenged by the carrier on appeal, that the claimant had the normal use of his mental and physical faculties at the time of his injury.

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(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. 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). 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. Civ. App.-Fort Worth 1989, writ denied).

The carrier contends on appeal that the finding of fact and conclusions of law supporting no intoxication are not supported by the evidence or are, in the alternative, against the great weight and preponderance of the evidence. In support, carrier summarizes evidence adduced at the hearing, including the cocaine levels of the pre- and post-accident drug tests; claimant's testimony as to his cocaine use, including ingestion three days before the accident; Dr. B's testimony as to the organic (including micro

hemorrhaging) and withdrawal effects of cocaine use, and Dr. B's opinion that claimant did not have the normal use of his mental or physical faculties due to such effects; Dr. B's testimony that it is not uncommon for people in performing their usual jobs to be able to function even though they may be intoxicated, the effects of which may show up when the employee encounters a more complex situation; the fact that claimant had fixed similar problems before with the geolograph without getting hurt, and the testimony by two other employees that the usual course of action is to use two employees; and the fact that, while neither of these employees observed claimant in a seemingly intoxicated state, they were not working in close proximity with him on the day of the accident.

While not entirely clear from the hearing officer's decision, it is presumed that his findings of fact concerning claimant's cocaine metabolite level are equivalent to finding the carrier sufficiently presented evidence of intoxication to shift the burden of proving otherwise to the claimant. (The evidence of intoxication could also include claimant's testimony that he ingested cocaine, regardless of how it occurred.) That being the case, we must examine the evidence to see whether it sufficiently supports the hearing officer's determination that the claimant nevertheless was not intoxicated because he had the normal use of his mental and physical faculties at the time of the injury.

This case is factually similar to Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992. In that case the claimant, also an oil field worker, was injured when he slipped and fell after forgetting to re-attach a safety belt. The claimant acknowledged he had smoked marijuana a few days before the accident, and a drug test showed claimant testing positive for THC, the active metabolite in marijuana. Statements of coworkers indicated the claimant was not impaired at the time of injury, and his treating physician stated the claimant was functioning normally when he examined him (he also stated that neurological examination showed no medical evidence that claimant was under the influence of drugs). In affirming the hearing officer's determination that the claimant was not intoxicated, the Appeals Panel stated that the hearing officer was entitled to accept the claimant's testimony on the issue. That decision also stated:

> While the presence of a laboratory report indicating a 67 nanogram level of THC in the claimant's system some six days following his claimed smoking of a single marijuana cigarette stretches the imagination, there is no overwhelming evidence to the contrary. However, the ultimate matter is whether the claimant was intoxicated at the time of the accident, that is, whether he was in the state of not having the normal use of his mental or physical faculties resulting from the ingestion of marijuana. Clearly, the claimant used marijuana, and had it in his system on the date of the accident. However, the evidence is, at best, in conflict as to whether this measured up to intoxication, as defined in the 1989 Act. The hearing officer resolved the matter in the claimant's favor, and there is sufficient evidence to support that resolution.

Likewise, in this case we have reviewed the evidence and find it sufficient to support the hearing officer's determination. The hearing officer, as sole judge of the relevance and

materiality of the evidence and of its weight and credibility, Section 410.165(a), was entitled to believe the claimant's rendition that on the date of injury he was acting in the same manner in which he always had acted, and Mr. PR's statement that claimant was talking and walking normally. He may also have placed more reliance upon Dr. B's testimony regarding the short-term effects of cocaine use and his opinion that claimant had not ingested cocaine within the prior 24 hours, versus his opinion concerning long-term cumulative effects. We will not reverse the decision of the hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

With regard to carrier's arguments concerning allegedly improper findings of fact, we have noted earlier that the findings as to the results of claimant's drug test were relative to the question of whether the carrier had raised the issue of intoxication. Regarding the remaining finding, that claimant did not use cocaine for at least 24 hours prior to the injury, we cannot say that it was improper insofar as it may have bearing upon the ultimate issue of whether the claimant in fact was intoxicated. We find no error on the hearing officer's part in making these findings.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Alan C. Ernst
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The key issue on appeal is whether there is sufficient evidence to support the hearing officer's decision that the claimant, at the time of his injury, "had the normal use of his mental and physical faculties." Putting aside all the evidence concerning claimant's levels of cocaine metabolite before and after the injury, as well as the claimant's veracity as to the manner in which the cocaine was ingested--evidence which is really only relative to whether the carrier has met its burden to raise the issue of intoxication, and not

directly dispositive of whether the claimant actually was intoxicated--I believe there is insufficient evidence to support the hearing officer's ultimate determination. Both claimant's co-worker and his supervisor stated that the repair job required two people, that it was usual to use two people, and that to do otherwise was dangerous. The claimant's testimony appeared to be that he was performing the repair task in his usual manner, that he had done so 20 or 30 times before, and that he had never before been injured; in other words, evidence of prior carelessness meant that on the day of injury his actions were not due to any impairment from drugs. It is true that both Mr. RR and Mr. PR testified that they did not observe claimant acting in a strange or abnormal way, but they qualified their statements by saying they did not work in direct proximity with claimant on the day of injury. (Claimant himself testified that use of cocaine was visibly difficult to detect.) It was Dr. B's testimony that the cumulative effects of cocaine use (which according to claimant, he had engaged in for at least two years) includes impaired judgment and reaction, most notably where an individual departs from his usual job duties. In my opinion, the hearing officer's determination of no intoxication was based on slim evidence, with the great weight of the contrary evidence preponderating against the decision. (I believe Appeal No. 92591, *supra*, can be distinguished by the presence of strong evidence, including medical evidence, to support that hearing officer's decision that the claimant was not intoxicated.) I would reverse the hearing officer's decision and order.

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Lynda H. Nesenholtz
Appeals Judge