APPEAL NO. 950122

On December 13, 1994, a contested case hearing was held in_____, Texas, with the hearing record being closed on January 3, 1995. _____ presided 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) was Margo's Carpet & Floors (employer) a subscriber to workers' compensation insurance on _____; (2) was the respondent's (claimant's) back injured in the course and scope of employment on or about _____; (3) did the claimed injury occur while the claimant was in a state of intoxication; and (4) assuming the claimant sustained a compensable injury, did the claimant have disability, and if so, for what period. The hearing officer concluded that the employer was a subscriber to a policy of workers' compensation insurance issued by the appellant (carrier) on _____; that the claimant injured his back in the course and scope of his employment on _____; that the claimant was not injured while in a state of intoxication; and that the claimant had disability from July 21, 1994, to August 2, 1994. The hearing officer also concluded that the claimant did not have good cause for failing to attend the hearing. The hearing officer ordered the carrier to pay workers' compensation benefits to the claimant in accordance with her decision and the 1989 Act. The carrier disagrees with certain findings of fact and conclusions of law and requests that we reverse the hearing officer's decision and render a decision in its favor or remand the case. No response was filed by the claimant.

DECISION

Affirmed.

Neither the claimant nor anyone representing the claimant appeared at the hearing on December 13, 1994. The hearing officer noted that an ombudsman was present at the hearing to assist the claimant if he appeared, that the claimant's attorney had withdrawn from representing the claimant on December 9, 1994, and that attempts to contact the claimant on the morning of the hearing had been unsuccessful. The carrier was represented by an attorney. The carrier's attorney stipulated that on _____, the employer was a subscriber to a policy of workers' compensation insurance issued by the carrier. The hearing officer advised the carrier that she was going to include in the record as hearing officer exhibits certain documents the claimant had filed with the Texas Workers' Compensation Commission. She listed each exhibit that she was going to include in the record as a hearing officer exhibit and then asked the carrier if it had any objections and the carrier stated that it had none. Among the exhibits included in the record as hearing officer exhibits are the claimant's sworn answers to the carrier's interrogatories, the carrier's sworn answers to the claimant's interrogatories, and various medical records and other documents which the claimant had exchanged with the carrier prior to the hearing.

In his answers to interrogatories the claimant stated that on _____, at approximately 3:00 p.m. to 4:00 p.m, he was hanging wallpaper in the master bath area at_____, San Antonio, Texas; that he was about three to four feet up on the ladder when he started to slide; that he tried to avoid falling and losing the wallpaper but fell backwards on his left side; and that he injured his back. In a document entitled "Diary of Incident at Work," which is dated_____, and is signed by the claimant, the claimant stated that on _____he had an accident while hanging wallpaper in the master bathroom, that he did not complete the job, but that he went to the employer on that day and they paid him for the work completed on the bathroom and kitchen area. A copy of a check from the employer to the claimant dated _____, in the amount of $325.39 was in evidence.

Medical records showed that the claimant went to the emergency room of the _____in_____, Texas, on_____, complaining of back pain after falling off a ladder at work on _____. In a report dated July 25, 1994, Dr. Z (Dr. Z) diagnosed acute lumbar contusion and acute coccyx contusion, noted that the claimant had been resting at home with minimal success, prescribed pain medication, and stated that the claimant would be off work until seen by Dr. E (Dr. E) in one week. In another report dated July 25, 1994, Dr. Z stated that the claimant would be unable to work until he was released by a doctor.

While at the hospital on _____, the claimant consented to drug testing and blood and urine specimens were collected from him on that date. A laboratory report dated _____, which the carrier introduced into evidence, reported that the urine sample collected from the claimant on _____, tested positive for cocaine metabolites, that the initial test level was 300 ng/ml, and that the confirmatory test level by "GC/MS" was 150 ng/ml.

Other medical records showed that the claimant returned to the hospital on _____, complaining of more back pain and requesting more pain medication so he could sleep. In a report dated _____, Dr. Z noted that the claimant had been resting since his injury, but that he still had back pain and left leg pain. Dr. Z diagnosed acute lumbar contusion with sprain and prescribed more pain medication. According to another report, Dr. E examined the claimant on _____, and the claimant told Dr. E that he injured his back when he fell off a ladder while hanging wallpaper on _____. Dr. E noted that the claimant told him that he tried to recover from his injury on the weekend following the injury but the pain became worse so he went to the hospital and that "he has not worked since that time." Dr. E diagnosed "facet syndrome associated with the fall." He reported that the claimant was to work in an eye level position with no bending or hyperextending, that he was sending the claimant to physical therapy, and that recovery time would be two to six weeks. In a report dated _____, Dr. E noted that the

claimant could resume work on August 20, 1994. Dr. E noted on August 26, 1994, that the carrier was controverting the claim and that it would not pay for anything.

The carrier introduced into evidence an affidavit of RS (RS) in which RS stated that he is a superintendent for Centex Homes (builder); that the builder hired the claimant's employer to install wallpaper in a home on _____ in _____, Texas; that he was responsible for inspecting the work performed by the employer; that on _____, he noticed that the wallpapering work had not begun; that he contacted the employer on _____and informed the employer that the assignment had not been begun; and that on _____, the claimant did wallpaper work at the home for a brief period of time. The carrier also introduced into evidence an exhibit it described as internal office notes of the employer for several different dates. The exhibit itself does not indicate who made the notes and many of the notes are illegible. From what we can make of the notes, it appears that they may state that the claimant was to have performed wallpaper work on Wednesday, _____, at the location he stated he was injured at in his answers to interrogatories, but that the work was not performed until _____

The hearing was held on December 13, 1994, and on December 14, 1994, the hearing officer sent the claimant a letter advising him that the record would remain open until January 3, 1995, to allow the claimant an opportunity to show good cause for not attending the hearing. The letter was returned to the Commission unclaimed and the hearing officer closed the record on January 3, 1995. She concluded that the claimant did not have good cause for failing to attend the contested case hearing. We observe that in a recent decision, Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, we reviewed a case wherein the hearing officer found that the claimant did not have good cause for failing to attend the hearing, but allowed the claimant to present evidence on the merits of the case at the hearing where she took evidence regarding good cause for failing to attend the hearing. On appeal of that case the carrier asserted that the claimant's evidence on the disputed issue should not have been considered by the hearing officer. We disagreed and affirmed the hearing officer's decision in favor of the claimant. *See also*, Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995, and Texas Workers' Compensation Commission Appeal No. 95083, decided March 1, 1995.

The carrier does not contest the hearing officer's findings that the claimant's employer on _____, was the employer; that on that date the employer had workers' compensation insurance with the carrier; and that a drug screen was conducted on _____, which revealed the presence of cocaine. The carrier disagrees with the following findings of fact and conclusions of law:

FINDINGS OF FACT

4.On _____, the Claimant was standing on a ladder attaching wallpaper to the wall on the Employer's job site.

5. The claimant's acts of attaching wallpaper at the Employer's job site furthered the business interests of the Employer.

6. The Claimant fell from the ladder, landing on his left side and back, injuring his lower back.

7. The Claimant did not work from_____, to _____, because of the pain in his back.

8. The Claimant sought medical treatment on _____, and was told he could not work until released by the doctor.

10. No evidence was presented to show that the Claimant had used cocaine or was not in full possession of his faculties on _____.

11. The Claimant was given a light duty release on _____.

CONCLUSIONS OF LAW

4. The Claimant injured his back in the course and scope of his employment on _____.

5. The Claimant was not injured while in a state of intoxication.

6. The Claimant had disability from July 21, 1994, to _____.

The carrier contends that the hearing officer has no authority to "submit evidence into the record on behalf of or for the benefit of a party who is not present at the Contested Case Hearing," that "it was impossible for the Claimant to submit any evidence" because he did not attend the hearing, and that the hearing officer should be "precluded from ruling in favor of the Claimant based solely on exhibits introduced into evidence by the Hearing Officer." It is obvious from the Statement of the Evidence portion of the hearing officer's decision that in making her findings of fact she relied on the claimant's sworn answers to the carrier's interrogatories and on medical records and other documents which the claimant exchanged with the carrier and which the hearing officer admitted into evidence as hearing officer exhibits, as well as the carrier's exhibits.

As previously noted, when the hearing officer asked the carrier if it had any objections to the hearing officer's exhibits, the carrier said it had none. It has been held that evidence which is admitted without objection cannot be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334, 336 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.). It has also been held that, ordinarily, in passing on the correctness of a trial court's ruling in admitting evidence, the appellate court will consider the ruling in the light of the objection made in the trial court, and the complaining party will not be heard to present reasons for excluding the evidence other than those made in the trial court. Marsh v. State of Texas, 276 S.W.2d 852, 854 (Tex. Civ. App.-San Antonio 1955, no writ). Since the carrier did not object to the admission of the hearing officer's exhibits at the hearing, we do not consider its objections to the introduction or use of those exhibits for the first time on appeal. We observe that Section 410.163(b) provides, in part, that "[a] hearing officer shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made."

The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The claimant also has the burden to prove that he has disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and 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 to determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986).

In this case the sworn statement of the claimant conflicted with the sworn statement of RS as to whether the claimant was injured while working for the employer on _____. The hearing officer apparently gave more weight to the claimant's statement then she did to the statement of RS. The medical records reflected that the claimant was off work due to his injury. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the finder of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Having reviewed the record we conclude that sufficient evidence supports the hearing officer's findings that the claimant injured his back when he fell from a ladder while doing wallpaper work in the furtherance of

the employer's business at the employer's job site on _____, and her findings that the claimant was off work due to back pain and that he was not released to light duty work until _____. We further conclude that those findings are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In regard to the intoxication issue, 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. The definition of intoxication that applies to this case is found in Section 401.013(a) and is as follows: "intoxication" "means the state of: . . . . (2) 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." Cocaine is a controlled substance as defined by Section 481.002 of the Health and Safety Code.

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 cor.). 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). The Appeals Panel has 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.

We have also observed that 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 injury. Texas Workers' Compensation Commission Appeal No. 941099, decided September 30, 1994. In Appeal No. 941099, *supra*, we affirmed a hearing officer's decision that the claimant was intoxicated at the time of his injury where the claimant tested positive for cocaine metabolite (7240 ng/ml) the same day as the injury and there was no expert opinion evidence on intoxication. In Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, a case involving the issue of marijuana intoxication wherein we affirmed the hearing officer's decision that the claimant was not intoxicated at the time of injury, we observed that "the Texas Legislature has not established a presumptive or conclusive standard for determining drug intoxication, as opposed to the provisions regarding alcohol intoxication." We stated in that case that "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."

In the instant case the only evidence the carrier presented to rebut the presumption of sobriety and raise a question of fact on intoxication was the laboratory report which showed that a urine specimen collected from the claimant five days after the date of injury tested positive for cocaine metabolites. It is clear from the hearing officer's discussion of the evidence that she did not consider the test results sufficient evidence to raise a question of fact that the claimant was intoxicated five days earlier when he was injured at work. As previously noted, the hearing officer is the sole judge of the weight to be given to the evidence. Under the particular circumstances of this case we cannot conclude that the hearing officer erred in giving no or little weight to the laboratory report considering the remoteness in time from the injury to the collection of the urine specimen to be tested. We similarly cannot conclude that her Finding of Fact No. 10 is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, *supra*.

The two Appeals Panel decisions cited by the carrier are clearly distinguishable from the facts of the instant case. In Texas Workers' Compensation Commission Appeal No. 91012, decided September 11, 1991, we affirmed a hearing officer's decision that the claimant was intoxicated at the time of injury where the claimant was found to have an alcohol concentration of .221 about one hour after the injury (an alcohol concentration of 0.10 or more is defined as intoxication under Section 401.013(a)(1)) and a toxicologist testified that the claimant would have had an alcohol concentration of over 0.10 at the time of the accident. In Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, we reversed a hearing officer's decision that the claimant was not intoxicated at the time of his injury where a urine sample was taken on the day of the injury, the sample tested positive for tetrahydrocannabinol (THC) with a quantitative result of 86 ng/ml, and a forsenic pathologist testified that the claimant was intoxicated. The instant case does not involve alcohol intoxication, a specimen taken the day of the injury, nor the opinions of experts regarding intoxication.

We conclude that the challenged findings of fact are supported by sufficient evidence and that those findings support the hearing officer's conclusions that the claimant injured his back in the course and scope of his employment on _____; that the claimant was not in a state of intoxication when injured; and that the claimant had disability from _____, to _____. We further conclude that the challenged findings and conclusions are not against the great weight and preponderance of the evidence.

We next consider the carrier's contention that the claimant should have been "assessed an administrative violation" pursuant to Section 410.156, because he failed to attend the hearing without good cause. Section 410.156(a) provides that a party commits a violation if the party, without good cause as determined by the hearing officer, does not attend a contested case hearing, and that a violation under this subsection is a Class C

administrative violation. Under Section 415.022(3), a Class C administrative violation is punishable by an administrative penalty not to exceed $1,000. However, Section 415.021(d) provides that a penalty may be assessed only after the person charged with an administrative violation has been given an opportunity for a hearing under Subchapter C of Chapter 415. Hearings under Subchapter C are conducted in the manner provided by the Administrative Procedure Act (APA). Section 415.031 provides that any person may request the initiation of administrative violation proceedings by filing a written allegation with the director of the division of compliance and practices. Thus, even though the hearing officer concluded that the claimant did not have good cause for failing to attend the contested case hearing, it would appear that a penalty may be assessed only after the person charged with an administrative violation is given an opportunity for an APA hearing and that an administrative violation proceeding is initiated by filing a written allegation with the director of the division of compliance and practices. Consequently, we find no merit in the carrier's contention regarding assessment of an "administrative violation."

The carrier points out that the hearing officer indicates in her decision that she signed it on January 4, 1994, which would not be possible since the hearing was held on December 13, 1994. As this is obviously a typographical error, we correct the decision to show that the hearing officer's decision was signed on January 4, 1995.

As corrected as to the date of signing of the decision, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge