APPEAL NO. 950553
FILED MAY 23, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 26, 1994. The decision and order in this case were issued by Hearing Officer. Addressing the disputed issues, the hearing officer determined that the appellant (claimant herein) sustained injuries to his neck and spine in the course and scope of his employment on _____; that he did not have disability as a result of these injuries; and that at the time of his injuries, the claimant was in a state of intoxication from the use of marijuana, and for this reason, the respondent (carrier herein) was relieved of liability for benefits. The claimant appealed the determinations of intoxication and no disability arguing essentially that the carrier failed to prove the claimant was intoxicated and that a doctor who released him to full duty after the injuries misread x-rays which showed fractured vertebrae. The carrier replies that the decision and order of the hearing officer were correct, supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The claimant testified that he worked, on and off, as a day laborer for the employer who was involved in the building demolition business. He said he reported for work about 4:00 p.m. on _____, at the customer's location. Shortly thereafter, he said he slipped and fell from a dumpster injuring his head, neck and spine and suffered a memory loss. Although the most current medical report in evidence from Dr. D, the claimant's treating doctor, diagnosed cervical disc herniation with some compression of the neural foramen, which Dr. D concluded is the "etiology of his neck pain, headaches, interscapular pain and problems with the left arm," the claimant continued to assert at the hearing that he fractured at least two vertebrae in his fall. The claimant has not worked since this injury and testified that he is unable to work because of the pain the injury still causes. He also stated that Dr. D is recommending surgery and for this reason does not want the claimant to work. The claimant was released to return to work without restriction on March 29, 1994, by Dr. B who is described by the claimant as the company's doctor.

The claimant arrived at a local emergency room (ER) at about 6:00 p.m. the day of the fall where a drug and alcohol screening test was requested by the employer. The claimant provided a urine specimen at approximately 10:00 p.m. The specimen was confirmed positive for marijuana on March 29, 1994. In his testimony, the claimant admitted to using marijuana on occasion in the past, but did not recall the last time he used it other than that he did not use marijuana on the day of the accident or for a "few days" before. He insisted that he was not intoxicated as a result of his use of marijuana on the day of the accident and said that if he had shown signs of intoxication he would not have been allowed to work that day. In a letter of April 19, 1994, Dr. B wrote that based on the results of drug testing, "[i]t is my medical opinion that the presence of Marijuana in

[claimant's] body would cause some degree of impairment of his normal mental and or physical ability."

Based on this evidence, the hearing officer determined that the claimant sustained neck and spine injuries on_____, in the course and scope of his employment; that he did not have disability as a result of these injuries; and that at the time of the injuries he did not have normal used of his mental and physical faculties as a result of voluntary ingestion of marijuana and therefore the carrier was relieved of liability for compensation in connection with these injuries.

Section 401.013(a)(2)(B) defines intoxication as the state of not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. A carrier is not liable for compensation for an injury if the injury occurred while the employee was in a state of intoxication regardless of whether or not the intoxication was a producing cause of the injury. Section 406.032(1)(A) and Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991. Because the law presumes sobriety at the time of an injury, a claimant does not have to prove he or she was not intoxicated unless the carrier produces prima facie evidence that the claimant was intoxicated. Once this occurs, the burden shifts to the claimant to prove non-intoxication at the time of the injury. Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992. Whether the claimant was intoxicated, as defined above, as a result of marijuana use was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1992.

There was no dispute in this case that marijuana is a controlled substance. The claimant's positive urinalysis test results were sufficient evidence to shift to the claimant the burden of proving he was not intoxicated at the time of his injuries. *See* Texas Workers' Compensation Commission Appeal No. 94673, decided July 12, 1994. Thus, we find no merit in claimant's contention on appeal that the carrier failed to prove intoxication because the claimant bore the burden of proving non-intoxication after carrier had produced prima facie evidence of intoxication. The claimant denied he was intoxicated at the relevant time, but admitted that he was a marijuana user, as his financial conditions permitted, and contended that no supervisor or anyone in a position of authority noticed he was intoxicated. The carrier introduced the opinion of Dr. B that, given the test results, it was probable that the claimant was intoxicated. The hearing officer was the sole judge of the weight and credibility to be afforded this evidence. Section 410.165. As fact finder, he could believe all, part or none of the testimony or evidence. We will reverse a hearing officer's decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Having reviewed the record in this case, we conclude that the decision and order of the hearing officer that the claimant was intoxicated at the time of his injuries is supported by sufficient evidence and we decline to reverse it on

appeal.

The claimant also argues on appeal that the hearing officer erred in finding no disability because Dr. B was uninformed about the seriousness of his injuries and that the pain is keeping him from working. The claimant has the burden of proving disability. Whether the claimant has disability is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer resolved this factual question against the claimant. In doing so he obviously was unpersuaded by the claimant's testimony that he could not work because of his injury. Although reference is made in some medical reports to fractures, it is not clear whether the fractures referred to were the result of these current injuries. No evidence was introduced from Dr. D placing the claimant in a limited or off-work status and Dr. D's latest report of the claimant's condition is consistent with other reports that do not reflect a fracture-type injury. We find the evidence sufficient to support the determination of no disability.

The decision and order of the hearing officer are affirmed. The carrier is not liable for benefits in this case.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

With the utmost of respect for the opinions of my colleagues I am compelled to comment on a matter which at best is improper procedure and at worst reversible error. My colleagues circumspectly recite that the decision in this case was "issued" by Hearing Officer. In fact, the case was heard by hearing officer 1 and the decision was subsequently written (we assume after reviewing the record, although that is not on the record either) by hearing officer 2. The Appeals Panel has noted, with approval, a procedure, where a successor hearing officer (hearing officer 2 in this case) may write a decision due to "exigent circumstances" when the original hearing officer (hearing officer 1 in this case) is precluded from proceeding. Texas Workers' Compensation Commission Appeal No.

950462, decided May 11, 1995. The successor hearing officer, in such a case, gives written notice to the parties and obtains their agreement to proceed.

The Appeals Panel in general, and this panel in particular, have given great deference to the hearing officer as the sole judge of the evidence (Section 410.165(a)) and in the hearing officer's ability to believe all, part or none of the testimony of any witness and judge credibility, because the hearing officer had the ability to see the witness, hear the witness' testimony and observe the witness' demeanor. In this case, although credibility was certainly an issue, hearing officer 2 did not see the witness and was in no better position to judge the witness' credibility than we are on the Appeals Panel.

The Appeals Panel has specifically addressed this point in Texas Workers' Compensation Commission Appeal No. 941669, decided January 5, 1995, and stated:

> We have recognized there will be the occasional, unavoidable circumstances where the original hearing officer is not available to conclude a case. *See* Texas Workers' Compensation Commission Appeal No. 93683, decided September 24, 1993; Texas Workers' Compensation Commission Appeal No. 94971, decided September 8, 1994. When the exigency arises that a different or substitute hearing officer authors and renders the decision and order in a case, we are faced with determining whether witness credibility is in issue. If there is no testimony or issue involving credibility of witnesses, we have allowed a decision by a substitute hearing officer to stand. Texas Workers' Compensation Commission Appeal No. 941512, decided December 23, 1994. However, where witness credibility is clearly a focal issue in a case, the importance of the fact finder being in a position to gauge the demeanor, reactions and emphasis of a witnesses' testimony takes on a much more important function in the hearing process. We have held that under such circumstances, another hearing may be required. Texas Workers' Compensation Commission Appeal No. 941549, decided January 2, 1995; Texas Workers' Compensation Commission Appeal No. 941592, decided January 3, 1995.

Although credibility is clearly a focal point in this case, my colleagues argue that another hearing is not required because the claimant did not specifically raise that issue in his appeal. My problem with that argument is that in this case we have a pro se claimant with a broad handwritten appeal. I speculate that this claimant, or for that matter most unrepresented claimants, do not even remember the name of the hearing officer who heard their case, as one hearing officer would appear to be much like any other hearing officer. To this end I would urge the ombudsman to review the decision and order with an unrepresented claimant, and in cases where credibility is an issue and a successor hearing officer has rendered a decision without informing the parties and obtaining an agreement to proceed, advise the claimant that another hearing may be required.

I am concurring in this decision because there is precedent that an issue which is not raised on appeal will not be considered, Texas Workers' Compensation Commission Appeal No. 93683, decided September 24, 1993 and because my review of this case indicates that the decision is not so clearly wrong or so manifestly unjust to warrant a dissent.

_____
Thomas A. Knapp
Appeals Judge