APPEAL NO. 950698
FILED JUNE 16, 1995

On March 15, 1995, a contested case hearing was held with (hearing officer) presiding 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 appellant (carrier) appeals the hearing officer's determinations that the respondent (claimant) sustained an injury in the course and scope of his employment with the employer, on (date of injury); that the injury did not arise out of the claimant's participation in horseplay; that the injury did not occur while the claimant was in a state of intoxication; that the carrier did not specifically contest compensability on the issue of intoxication; that the claimant has had disability from (day after date of injury), through the date of the hearing; and that the claimant is entitled to temporary income benefits (TIBS). No response was received from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant was injured in the course and scope of employment on (date of injury); however, the carrier contended that it was relieved of liability under the horseplay and intoxication exceptions. The claimant testified that he began working for the employer as a general laborer in the first part of November 1994. He said he smokes crack cocaine about twice a month and that the evening of November 29th he smoked about a quarter of a gram of crack cocaine. He said that prior to November 29th it had been a couple of weeks since he had smoked crack cocaine. He indicated that he had used drugs since the late 1970's and that he had smoked crack cocaine for about a year. He said he worked for the employer for eight to ten hours on November 30, 1994, and that he did not use cocaine on that day or on the day of his injury, (date of injury). The claimant said that on (date of injury), he was picked up by coworkers about 6:30 a.m. and was driven to a jobsite where the crew was putting up scaffolds. He said that the crew was split up and that he and his cousin, BW were left to complete the scaffold. He said he worked for about an hour or an hour and a half handing boards up from the ground to BW who was on the scaffold putting the boards in place on the scaffold. The claimant testified that he decided to give BW a hand getting the boards in place so he climbed up an end of the scaffold to the third tier and stepped off onto a board that was not in place and fell through the scaffold striking his face and landing on his back on the ground. He said he fell 25 to 30 feet to the ground. He said the tiers below the third tier had just two walking boards on them so he was able to fall through the scaffold. He said he attempted to get up and stumbled to the outside of the scaffold.

The claimant further testified that he was taken by ambulance to a hospital and was then transferred to another hospital where he stayed for five days. On December 12, 1994, the claimant was seen by Dr. B who diagnosed soft tissue injuries of the cervical,

thoracic, and lumbar spine, multiple soft tissue contusions, and complaints of visual blurring with atypical diplopia. Dr. B estimated that the claimant could return to limited duty status within 30 days "pending subsequent diagnostic work up." MRIs of the cervical and lumbar spine were reported to be essentially negative. On December 21, 1994, Dr. B noted that the claimant's symptoms were likely due to soft tissue injuries only and he referred the claimant to a physical therapy clinic for a work hardening program and an "intended return to work date of approximately two weeks." The claimant testified that the carrier denied his claim for workers' compensation and therefore he could not see Dr. B again or go to the clinic recommended by Dr. B. He said that he sought treatment at a veteran's hospital and was given physical therapy there but that the therapy was not of the type that had been recommended by Dr. B and did not help him so he stopped going to that therapy in February 1995. Patient notes from the veteran's hospital were in evidence but they are mostly illegible. They do show that the claimant complained of back and neck pain and went to therapy during January 1995 and that a doctor at the hospital diagnosed back and neck strains probably due to the fall on (date of injury).

The claimant testified that he has constant neck and back pain, left leg pain, headaches, blurred vision, and that he broke his nose when he fell on (date of injury). The claimant further testified that he has been unable to work since his injury of (date of injury). He said he managed to get an appointment with Dr. B the day before the hearing because of an interlocutory order issued by the benefit review officer and that Dr. B told him that he didn't know if he could get him into a treatment program and that maybe the best thing for him to do was to try and go back to work on light duty status. He acknowledged that the day of the hearing he spoke to BK, the employer's safety director. He said he talked to BK to try and find out what his job status was because he said he may be able to return to work in two or three weeks. He said he didn't deny that he told Mr. K the day of the hearing that he was ready to go back to work, but indicated that he was concerned about whether the employer had light duty available for him.

There was much questioning regarding exactly where on the scaffold the claimant and BW were when the claimant fell. The claimant testified that BW was on the second tier and that he, the claimant, had climbed to the third tier when he fell through the scaffold. The claimant said the scaffold did not have a ladder other than what he described as a ladder built into the end of the scaffold which he used to climb the scaffold.

The claimant testified that a urine specimen was taken from him at the hospital he was transferred to on (day after date of injury). A laboratory report reflects that on (day after date of injury), at 4:00 a.m. the specimen was taken and that a drug screen revealed that the claimant's specimen tested positive for cocaine. No confirmatory cut-off level, quantitative value of drug found, or confirmatory test is indicated in the report. No expert testimony was presented to interpret the test.

When the claimant was asked whether he was "intoxicated" at the time of his injury, he said he was not. When he was asked whether he was "under the influence of crack cocaine" when his accident occurred, he said he was not. When he was again asked whether he was "under the influence of crack cocaine" at the time of his injury, the claimant said he wasn't under the influence of anything. The claimant agreed that smoking crack cocaine affects a person's ability to function, but said that the effect wears off in five or six hours depending on the dosage. He said he took a second drug test at the request of the employer on December 12, 1994, and that that test was negative. The laboratory report for that test was not in evidence. BK agreed that the drug test done on December 12th was negative. When the claimant was asked whether he was involved in horseplay at the time of his injury, he said he was not.

BW gave two written statements. One statement is dated (date of injury), and in it BW states that the claimant was "climbing up and off scaffold and grabbed loose board or slipped and fell (was not using ladder)." The second statement is undated and in it BW states that on (date of injury), the claimant decided to come up and help him on the scaffold and "when he climbed up, he stepped on a loose board and fell to the ground." BW further stated "he didn't look to me like he was under the influence of drugs." When the carrier questioned the claimant about the authenticity of the last statement, the claimant testified that BW wrote and signed the statement.

DH testified that he was the claimant's foreman on (date of injury), but that he was not present when the accident happened. He said when he arrived at the work site the claimant was lying on the ground outside of the scaffolding talking to paramedics. He said that the claimant seemed to be in pain and had "a little bit of problem there knowing just exactly what happened." He testified that while the claimant seemed to be somewhat disoriented, the claimant was able to respond to questions from the paramedics. He said the scaffold was only two tiers high which made it about 13 feet tall. He also said that the scaffold had a ladder in place about 40 feet from where the accident occurred and that the end of the scaffold is not approved by the Occupational Safety and Health Administration to be used as a ladder because the spaces are too far apart. When DH was asked whether anyone reported to him that the claimant was "acting unusual the morning of the accident," he said no. When DH was asked whether anyone ever indicated to him that they felt the claimant was intoxicated at the time of the injury, DH said no. DH also testified that he talked to TM, who worked for another employer at the work site the morning of the accident, and TM told him that he saw a man slip as he was climbing up the outside of the scaffolding and that the man had not reached the second tier.

In a written statement dated (date of injury), TM stated that the claimant "was climbing up end of scaffold & about 2/3 way up he fell. I do not know what caused him to fall. Was not using ladder."

BK, the safety director, testified that he visited the claimant in the hospital immediately following the accident and that the claimant acted very much in pain, but was basically coherent, and that the claimant had bled from the bridge of his nose. He said that when he questioned BW about the accident, BW told him that he had his back turned and didn't see the accident but he heard the claimant holler and when he looked he saw the claimant outside of the scaffolding lying on the ground. BK said the scaffold had a ladder 30 to 40 feet from where the claimant was and that it is company policy that the ladder is to be used for climbing and not the end of the scaffold. He said the scaffold was two tiers high and about 12 feet tall. When BK was asked whether anyone he talked to at the work site the day of the accident reported that the claimant "was acting in a strange way," BK said no. He also testified that no one reported "unusual behavior" by the claimant on the day of the injury. BK further testified that the morning of the hearing the claimant told him that he was ready to go back to work and wanted to know if he still had a job. Two other employees of the employer gave written statements that the cause of the claimant's accident was the claimant's failure to follow company rules by not using the stationary ladder. The general safety rules of the employer provide that ladders must be in place on all scaffolds to all work levels.

In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated December 22, 1994, the carrier stated "carrier disputes entitlement of benefits for the following reasons: Any injury was solely caused by non-occupational conditions. In addition, claimant's injury resulted in his unsafe work habits, which is considered to be horseplay." No other TWCC-21 was in evidence.

One issue at the hearing was "did the carrier specifically contest compensability on the issue of intoxication pursuant to TEX. LAB. CODE ANN. Section 409.022." The carrier contends that the hearing officer's finding and conclusion that the carrier did not specifically contest compensability on the issue of intoxication are against the great weight and preponderance of the evidence. We disagree with the carrier's contention. Since the TWCC-21 does not mention intoxication and does not contain any word or phrase that could be equated to intoxication, we find the hearing officer's finding and conclusion on the issue under consideration to be supported by sufficient evidence and not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Another issue was whether the claimant had disability from his injury of (date of injury), and if so, for what periods. The carrier contends that the hearing officer's finding that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage due to his injury of (date of injury), from (day after date of injury), through the date of the hearing, March 15, 1995, and his conclusion that the claimant had disability from (day after date of injury), through the date of the hearing, are against the great weight and preponderance of the evidence. We disagree. The claimant testified as to his inability to work due to his injury. It has been held that in workers' compensation cases the issue of

disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.). While the carrier points to Dr. B's statement of December 21, 1994, of an intended return to work date of two weeks, it fails to recognize that that statement was predicated on the claimant attending a work hardening program, which the claimant never had the chance to attend due to the carrier's denial of benefits.

The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's finding and conclusion on disability are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Another issue was stated to be, "was the claimant's horseplay a producing cause of the claimed injury, thereby relieving the carrier of liability for compensation?" The carrier contends that the hearing officer's finding that the claimant was not engaged in horseplay at the time of his injury and his conclusion that the carrier is not relieved of liability because the claimant's injury did not arise out of claimant's participation in horseplay are against the great weight and preponderance of the evidence. Section 406.032 provides in part that a carrier is not liable for compensation if the employee's horseplay was a producing cause of the injury. We find no evidence of horseplay in the hearing record. The claimant's testimony that he climbed the scaffold to help BW stands unrefuted and is corroborated by BW. At most, the evidence may show that the claimant violated a company policy by not using a ladder to climb the scaffold, although the evidence was conflicting on the matter of whether there was a ladder on the scaffold. However, merely violating a rule relating to the manner and method of doing the work does not defeat an employee's right to compensation. Port Neches Ind. School District v. Soignier, 702 S.W.2d 756 (Tex. App. - Beaumont, 1986, writ ref'd n.r.e.); Brown v. Forum Insurance Company, 507 S.W.2d 576 (Tex. Civ. App. - Dallas 1974, no writ). In Liberty Mut. Ins. Co. v. Boggs, 66 S.W.2d 787, 794 (Tex. Civ. App. - Eastland 1933, writ dism'd), the court stated "the violation of instructions does not necessarily remove an employee from the course of his employment. The authorities establish as correct, we think, the proposition that it is only when an employee in violating instructions thereby does an act which is itself outside the course of employment that the violation of instructions becomes material." We conclude that the hearing officer's finding and conclusion that the claimant was not engaged in horseplay are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer was also called upon to resolve the issue of whether the claimant was in a state of intoxication at the time of his injury. The carrier contends that the hearing officer's finding that the claimant had the normal use of his mental and physical faculties when he was injured on (date of injury), and his conclusion that the claimant was not in a state of intoxication when injured are against the great weight and preponderance of the evidence.

Section 406.032 provides in pertinent part that a carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication which applies to this case is the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue. Section 401.013(a). Courts have held that 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. App. - Fort Worth 1989, writ denied). We have observed that while a positive drug test such as in this case 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. *See also* Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 950656, decided June 9, 1995. In Appeal No. 92173, *supra*, we pointed out that our decisions have not required the carrier to present scientific or expert evidence in order to raise a fact question concerning the intoxication exceptions. We then stated "[i]t would seem reasonable, however, that the more persuasive the carrier's evidence relied on to raise the intoxication exception, the more difficult will be the burden of the employee to prove the absence of intoxication to the satisfaction of the factfinder."

Here, when the carrier came forward with evidence of the positive drug test for cocaine, the claimant presented evidence on his behalf to show that he was not intoxicated. This evidence consisted of his own testimony that while he smoked crack cocaine two days before the injury, he was not intoxicated and was not under the influence of cocaine at the time of the injury, and the statement of BW that it did not look to him like the claimant was under the influence of drugs. In addition, the testimony of BK and DH indicated that no one reported that the claimant was acting unusual, strange, or intoxicated on the day of injury, and that while the claimant was somewhat disoriented immediately following his fall, he was basically coherent at the hospital.

As previously noted, the hearing officer is the judge of the weight and credibility of the evidence. An appellate level body is not a fact finder and does not normally pass upon

the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084, *supra*. We conclude that the hearing officer's finding and conclusion that the claimant was not intoxicated at the time of his injury are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

We affirm the hearing officer's decision and order that the claimant was injured in the course and scope of his employment on (date of injury); that he has had disability from (day after date of injury), through March 15, 1995; that the carrier is not relieved of liability under either the horseplay or intoxication exception; and that the claimant is entitled to temporary income benefits for the period of disability found.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge