APPEAL NO. 950910
FILED JULY 19, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 8, 1995, a contested case hearing (CCH) was held. The issues were:

1. Did the claimed injury occur while the Claimant was in a state of intoxication, as defined in Section 401.032 of the Texas Labor Code, from the induction of a controlled substance, thereby relieving the Carrier of liability for compensation?

2. Did the Carrier specifically contest compensability or waive its right pursuant to Texas Labor Code 409.021-409.022?

3. Did the Claimant have disability resulting from the injury sustained on _____, and if so, for what period?

The hearing officer determined that claimant was not intoxicated at the time of his injury on _____ (all dates are 1994 unless otherwise noted), that carrier had adequately ("sufficient and specific enough") disputed compensability based on a defense of intoxication and that claimant had disability from _____ (DOI) to the date of the CCH.

Appellant, carrier, appeals contending that the hearing officer erred in his determinations that claimant was not intoxicated at the time of his fall, and hence had sustained a compensable head and body injury, and that claimant had disability. The hearing officer's determinations on adequacy of the contest of compensability are not appealed and have become final and, therefore, will not be discussed. Respondent, claimant, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant, a 30-year-old steel worker, testified that on _____ he was "bridging" on a steel girder 20 feet above ground when he stepped on a loose bar joist and fell to the ground. The general uncontroverted testimony was that claimant had arrived for work at approximately 7:00 a.m. and had worked steadily until the time of the accident at 11:00 a.m. After the fall claimant was taken to the hospital where he had brain surgery and was subsequently in a coma for a week. Claimant's wife arrived at the hospital and, when requested, refused to consent to having blood or urine drug screening tests performed. Claimant's treating doctor also specified that blood for drug screening was not to be drawn without consent. Nonetheless, urine was obtained and, three days after the injury, (laboratory) urinalysis testing showed positive for THC metabolite to the extent of 61

nanograms per milliliter (ng/ml). Claimant suffered a severe head injury and injuries to his left shoulder and left hand.

Claimant testified that the last time he had used marijuana was on Saturday and Sunday, before the _____ accident. Claimant testified that he had missed work on Tuesday and Wednesday with flu-like symptoms and that although he reported for work on Thursday, he (and others) was unable to work because of high winds and inclement weather. Claimant testified that he went fishing instead. Claimant denies using marijuana that day. Claimant stated that on Friday he got up, got dressed, his wife drove him to work and he arrived a little before 7:00 a.m. when he commenced working. Statements from several coworkers and claimant's foreman, (OS), all stated that they had observed claimant the morning of the accident and that he appeared "normal," was "working fine" and did not appear impaired. Claimant's wife testified and supported claimant's testimony.

JD, a coworker, testified that claimant had told him that he was "laid up in bed getting high, smoking pot" on Tuesday and Wednesday before the Friday accident. JD said that he and claimant had "probably" smoked marijuana the previous Monday at lunch time. JD testified that on Friday claimant "was running late" and looked "pale." JD, on cross-examination, testified that claimant appeared normal while "working up in the air" on Friday before the fall.

Expert evidence was presented by the claimant in form of testimony by Dr. S, a board certified forensic toxicologist and the chief toxicologist for the Tarrant County Medical Examiner. Dr. S testified as to the distinction between tetrahydrocannabinol (THC) and the THC metabolites. Specifically, Dr. S testified that THC, the active ingredient in marijuana which causes the euphoric effects of marijuana intoxication, lasts only from four to eight hours and the body is cleared of THC within eight hours. This can only be detected by a blood test (which was not performed on claimant). Dr. S testified that THC metabolite is an inactive end product of THC which does not cause intoxication and is slowly excreted through urine over a period of three days to six weeks after the marijuana use. Dr. S stated that a person can test positive for THC metabolite and be completely unimpaired. Dr. S stated that a urinalysis showing THC metabolite only shows marijuana usage at some time but does not necessarily indicate intoxication. Dr. S is supported in her opinion and theory by Dr. H, the director of the laboratory which did the urinalysis testing. Dr. H stated "[t]he presence of THC metabolite in the urine cannot be used as a basis to extrapolate actual time of use, time of intoxication, duration of intoxication or level of intoxication." Dr. H further stated "[a] urinalysis does not measure intoxication." Carrier presented medical evidence from Dr. R, a retired physician, who opined that based on claimant's "canabinoid level" (Dr. S testified that term is an incorrect scientific term for THC metabolite) of 61 ng/ml, the coworker's (JD) testimony that claimant was "laid up" smoking pot for two days, "[t]here is no doubt that within reasonable medical certainty at the time of the accident [claimant] was significantly intoxicated by marijuana." Dr. R gives no rationale or scientific basis for his conclusion. Dr. S testified that Dr. R should have retired before

making his statement and was not familiar with current thinking on marijuana intoxication.

The evidence in the record in evidence outlines claimant's medical condition and a report dated February 17, 1995, makes the following recommendations:

> 1. Neuropsychological testing. Neuropsychological testing is mandatory if we are going to specifically and accurately determine [claimant's] true strengths and weaknesses as related to cognition and language.
>
> Again, he lacks the medical resources to proceed with this evaluation and neuropsychological testing should be done prior to any kind of head injury out-patient treatment and/or consideration for vocational potential. I suspect that his cognitive deficits presently preclude any type of gainful employment.
>
> 2. Formal out-patient brain injury therapy. [Claimant] continues to be in need of out-patient brain injury rehab services to maximize his functional recovering as to the physical and cognitive sequela of his brain injury. Obviously such treatment must precede any kind of specific vocational rehabilitation services.

There is no evidence that any doctor has released claimant for work and claimant testified that he is unable to work, unable to drive a car, has difficulty speaking, has memory loss and that his right side "drags." Carrier argues claimant does not have disability because "he had not sought work or attempted to work . . . since he was released from the hospital. . . ."

The hearing officer, in the discussion portion of his decision, commented:

> I found the Claimant's testimony credible and supported that he did not use marijuana after the Sunday before the accident. . . . [Dr. S's] discussion of THC versus THC-metabolite was also supported in the evidence and contradicted and damaged [Dr. R's] conclusion that the Claimant was intoxicated.
>
> * * * *
>
> Without question the Claimant suffered a severe head injury and has disability up through and including the date of this hearing.

Carrier challenges the hearing officer's determinations that claimant was not intoxicated at the time of his fall.

Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992, a marijuana intoxication case, set out the parameters to be used in drug intoxication cases. Section 406.032 provides certain exceptions where an insurance carrier is not liable for compensation and includes when the injury "(A) occurred while the employee was in a state of intoxication." That part of the definition of intoxication as provided in Section 401.013 (formerly Article 8308-1.03(30)) which is applicable to a controlled substance such as marijuana is ". . . 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."

Citing a prior case, Appeal No. 92424, *supra*, noted that:

> A claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). However, even if otherwise within the scope and course of employment, if a claimant is intoxicated, the 1989 Act precludes his recovery for an injury. In this regard, 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), March *infra*. Nonetheless, 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 Lloyd Insurance Co., 773 S.W.2d 785 (Tex. Civ. App.-Fort Worth 1989, writ denied); Texas Employer's Insurance Association v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1949, writ ref'd n.r.e.).

In the present case there was some conflicting evidence in that the urinalysis showed 61 ng/ml, Dr. R's opinion that claimant was intoxicated and JD's testimony that claimant looked "pale" the morning of the accident. On the other hand, there is claimant's testimony, supported by his wife, statements from OS, the foreman, and coworkers that claimant appeared normal and, apparently most persuasive, the testimony of Dr. S distinguishing between THC and THC metabolite, the length of time THC (as opposed to the THC metabolite) stays in the body. Dr. S's testimony that THC metabolites can show marijuana use but not intoxication is supported by Dr. H. In resolving conflicts in the testimony and evidence, it is the hearing officer, as the trier of fact, that is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). 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). The hearing officer could, and apparently did, believe the testimony of Dr. S, as supported by Dr. H, over the conclusory

statement of Dr. R that claimant was intoxicated. We will not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence as in this case. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

Carrier argues that the hearing officer did not consider or give proper weight to the fact claimant's wife refused to consent to a blood test when requested and predicts dire consequences if "the Commission has effectively foreclosed Carriers and Employers from establishing intoxication in these type cases by condoning the obstruction of evidence. . . ." Carrier is inferentially asking the Appeals Panel to establish that refusal to submit to a blood test equates to a positive finding of intoxication. We note that the Appeals Panel is not the proper forum to make legislative changes to the 1989 Act and it is the function of legislature or the Texas Workers' Compensation Commission, through rule making procedure, to make such a change. In the absence of such authority, we decline to make such a ruling that carrier inferentially requests.

On the issue of disability, we only note that there is abundant evidence to support the hearing officer's determination that claimant has disability as defined in Section 401.011(16). There was virtually no evidence that claimant had the ability to obtain and retain employment at wages equivalent to the preinjury wage as noted in the cited medical reports and claimant's testimony. In fact, in a workers' compensation case, disability may be established by testimony of the claimant alone. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) and Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). In this case claimant's testimony is amply supported by medical documentation.

When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635

(Tex. 1986). We do not so find in this case and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

CONCURRING OPINION:

I reluctantly concur. *See* Texas Workers' Compensation Commission Appeal No. 94194, decided April 4, 1994. In my view, the urinalysis testing did no more that shift the burden to the claimant to prove he was not intoxicated. With all due respect to Dr. S, it "stretches the imagination" to conclude that the presence of 61 ng/ml of the THC metabolite in the claimant's urine some three days after the accident provides no basis to believe the claimant was intoxicated at the time of the accident. *See* Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992. Surely, one can project, with the same degree of generalization that Dr. S uses to support her contrary conclusion, that the claimant, an admitted committed user of marijuana even on work days, was in fact intoxicated at the time of the accident. I consider such a conclusion a reasonable inference from the evidence. However, the hearing officer chose not to make this inference and found the claimant's self-serving denial of use a day or two before the accident credible. What persuades me that there is sufficient evidence to support the decision of the hearing officer, is the foreman's testimony that he did not consider the claimant intoxicated. If he believed the claimant was intoxicated, I assume he would not have allowed him to work in a dangerous situation. The lesson of this case, in my opinion, is that management personnel and carriers who would seek the protection of Section 406.032 of the 1989 Act must make a conscientious effort to know the common effects of illicit drugs, be able to recognize intoxication and be prepared to take steps to prevent an intoxicated worker from jeopardizing his or her safety.

_____
Alan C. Ernst
Appeals Judge