APPEAL NO. 961625
FILED OCTOBER 2, 1996

On August 6, 1996, a contested case hearing (CCH) was held. The CCH 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 CCH were: (1) whether the respondent's (claimant's) injury occurred while he was in a state of intoxication; (2) whether the claimant sustained a compensable injury on _____; and (3) whether the claimant had disability resulting from the injury. The appellant (carrier) appeals the hearing officer's decision that the claimant was not intoxicated at the time the injury occurred on _____, that the claimant sustained a compensable injury on _____, and that the claimant had disability beginning February 16, 1996, and continuing through the date of the CCH. No response was received from the claimant.

DECISION

Affirmed.

The claimant testified that he began working for the employer in May 1991. He testified that, since at least 1991, he has smoked six or seven marijuana cigarettes a week, that he smokes marijuana in the evening after work, but not every day, and that he does not smoke marijuana on the way to work or at work. According to documents in evidence, the claimant tested positive for marijuana in drug tests given in May 1991 and in December 1992. SJ, the employer's controller, testified that the claimant also testified positive for marijuana in 1994. SJ testified that the claimant works as a technician and is a good worker. A memorandum in evidence from August 1994 indicated that the employer offered to pay for the claimant to go to a drug treatment program. The claimant said that on _____, at about 9:00 a.m., his supervisor asked him to help move some racks weighing between 400 and 600 pounds. He said he told the supervisor that he thought it would take two workers to do that job and that another worker got on a forklift. The claimant said that he bent over, grabbed the bottom of a rack, lifted up, and pulled it away from the wall in order for the forklift to get to it. He said that when he did this his back popped and that he immediately went to SJ and told him that he had hurt his back and needed to see a doctor. SJ testified that at about 10:00 or 10:30 a.m. on _____ the claimant told him he had hurt his back and that he sent the claimant to the company doctor, Dr. O. The claimant said that another worker took him to Dr. O. The claimant said that Dr. O gave him a shot for pain, which did not help him, and released him to return to work. According to a letter from a physical therapist, the physical therapist saw the claimant on _____, but the claimant did not return for follow-up appointments. The claimant explained that he did not return to Dr. O's physical therapy because he was in pain and so he went to Dr. Z on February 16th. He said that Dr. Z told him that he had pulled muscles and that he wanted to do an MRI scan but the carrier did not approve the test. The claimant also said that Dr. Z took him off work on February 16th and has not released him to return to work. He said he is still under Dr. Z's care. SJ said that the claimant has not gone back to work for the employer since _____. The claimant stated that he went to physical therapy at Dr. Z's

direction until the carrier wrote him a letter saying that it would not pay for further medical treatment or therapy until their dispute over the injury was over.

The hearing officer found that the claimant injured his back in the course and scope of his employment on _____, and that, due to the back injury, the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage beginning February 16, 1996, and continuing through the date of the CCH. Whether the claimant was injured in the course and scope of his employment and whether he had disability as a result of that injury were fact questions for the hearing officer to determine from the evidence presented. The general rule is that in workers' compensation cases the issues of injury and disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the hearing officer's findings that the claimant injured his back in the course and scope of his employment on _____, and that he has been unable to obtain and retain employment at wages equivalent to his preinjury wage due to the back 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With 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 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 as defined by Section 481.002, Health and Safety Code. Section 401.013(a). There is no dispute that marijuana is a controlled substance.

Courts have held that a claimant need not prove he was not intoxicated as there is a presumption of sobriety. Bedner 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). In Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, a case involving the issue of marijuana intoxication wherein we affirmed a hearing officer's decision that the claimant was not intoxicated at the time of the 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 further stated in that decision 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."

According to a laboratory report in evidence, the claimant gave a urine specimen at 11:42 a.m. on _____, which, according to the other evidence, was not more than two

hours after the accident occurred. The report indicates that the claimant's urine tested positive for marijuana and that the cutoff level for a positive finding was 50 nanograms per milliliter (ng/ml). Another part of the same report indicates that the claimant tested positive for marijuana at greater than 135 ng/ml. The top part of the report states "see confirm" with respect to testing for marijuana, and under the heading "see confirm" the report states that that term "indicates that an additional analysis is required. Confirmation testing is in process." No confirmation test report was in evidence. In a letter dated April 11, 1996, Dr. O stated that the claimant came to the clinic on _____, with a back injury, that x-rays were normal, that the claimant had some muscle spasms, that a drug test was done on that day, and that the drug test was "positive for marijuana over 135 nanograms present in specimen." Dr. O also stated that "this would indicate regular use of marijuana as this is quite high." In addition, Dr. O stated that "this level of marijuana in the system could possibly have been a contributing factor to him injuring himself, as he would not be able to function normally with this amount of drug in his system." Dr. O did not state in his letter what his own observations of the claimant were on _____ with respect to the claimant's mental and physical faculties, and, except for the letter of April 11, 1996, and drug and alcohol test reports (alcohol test was negative), no medical report for the claimant's visit to Dr. O on _____ was in evidence. The claimant testified that he was not intoxicated when he went to work on _____ and that he was not "under the influence" of marijuana when he got to work. As previously noted, SJ, the employer's controller, testified that the claimant reported the injury to him on the day it occurred between 10:00 and 10:30 a.m. SJ was asked whether the claimant had "full control of his mental and physical faculties at the time." SJ answered that "for the short period of time that I saw him, he appeared to be normal." SJ confirmed that he had observed the claimant immediately after the injury.

The hearing officer found that at the time the claimant was injured he had the "normal use of his mental and physical faculties," and he concluded that the claimant was not intoxicated at the time the injury occurred on _____. We agree with the carrier's contention that the evidence it submitted on intoxication was sufficient to shift the burden of proof to the claimant to prove that he was not intoxicated at the time of the injury. Texas Workers' Compensation Commission Appeal No. 960196, decided March 12, 1996. We also agree that no causal connection between intoxication and the injury need be shown in order for the intoxication exception to apply. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995. In addition, we agree with the carrier's assertion regarding the test to be used in determining normal use of mental and physical faculties, that is, in Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, we stated that "in determining normal use, the evidentiary test is whether a person could or could not use his faculties in a manner that a normal, non-intoxicated person would be able to, as opposed to establishing what the specific person's normal abilities were." However, we disagree with the carrier's contention that the evidence showed that the claimant was always intoxicated at work and its implied assertion that the hearing officer did not base his finding of normal use on that of a normal, non-intoxicated person. We also disagree with the carrier's assertion that the claimant needed to provide medical evidence that he was not intoxicated in order to meet his burden of proof. Appeal No. 950266, *supra*. The claimant testified that he was not intoxicated. More

importantly, SJ, who talked with the claimant shortly after the injury, testified that the claimant appeared to be normal. Such evidence supports the hearing officer's finding that at the time the claimant injured his back he had the normal use of his mental and physical faculties. Texas Workers' Compensation Commission Appeal No. 951856, decided December 21, 1995; Appeal No. 950266, *supra*.

The hearing officer is the trier of fact in a CCH and is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer can believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer resolves conflicts in the evidence and determines what facts have been established from the conflicting evidence. Appeal No. 950084, *supra*. An appellate level body is not a fact finder and does not normally pass upon the credibility of the witnesses or substitute its own judgment for that of the trier 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). 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We conclude that the hearing officer's finding that the claimant had the normal use of his mental and physical faculties when injured is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. That finding supports the hearing officer's conclusion that the claimant was not intoxicated when injured.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Judy L. Stephens
Appeals Judge