APPEAL NO. 990274

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 6, 1999. He determined that the appellant (claimant) sustained a lumbosacral strain injury in the course and scope of his employment on _____; that the injury was not caused by the claimant's willful intention to injure himself; that the claimant was unable to earn his preinjury wage from the date of the injury through the date of the CCH; and that the claimant was intoxicated from marijuana ingestion on the date of injury, thus relieving the carrier of liability for compensation. The claimant appeals the intoxication determination, arguing that it is against the great weight and preponderance of the evidence. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The findings of a work-related injury; no intent to harm; and inability to earn the preinjury wage have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The claimant worked as a machine operator/supervisor. He arrived for work at approximately 6:00 p.m. on _____, and was advised that a group of employees would be required to submit to a urinalysis drug test. The claimant said he had smoked marijuana in the recent past, about two to three weeks before while on vacation, but had stopped and was "ready" to take the test because he felt he could pass it. He said he wanted to get the test over with so he could start work. He also said he had worked for the employer for 18 years and had a prior back injury (and scar, presumably from an operation) and thought the employer was just being "mean" in implementing the drug testing. He further said that he was upset that the supervisor in charge seemed to flippantly say that anyone who did not pass the test would be fired. He provided the urine specimen and returned downstairs to his workstation. He said he was anxious to start work so as he was hurrying, he tripped over a mop. He denied saying to those standing around at the testing station that he was going downstairs "and get sick."

The carrier introduced evidence that the urine specimen taken just before the fall tested positive for marijuana metabolites at 435 nanograms per milliliter (ng/ml). The report of the test results in evidence reflected that the screening cutoff was 50 ng/ml, and the confirmation cutoff was 50 ng/ml.

Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury. For purposes of this case, intoxication is defined as not having the normal use of mental or physical faculties from the voluntary introduction of marijuana into the body. *See* Section 401.013(a)(2). An employee is presumed sober. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of the

injury. The positive urinalysis with quantitative measurements was sufficient in this case to shift the burden to the claimant to prove that he was not intoxicated. Whether a claimant is intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995.

The claimant attempted to meet this burden through his own testimony that although he smoked marijuana within the previous three weeks he was not intoxicated; the affidavits of five coworkers saying that he was not intoxicated at the time of his injury; and, presumably, the testimony of Mr. R, a coworker and supervisor who said that the claimant was angry and "venting" about having to submit a urine specimen, that he had observed people under the influence of marijuana in the past, and that he did not observe anything unusual in the claimant. The hearing officer did not find the affidavits credible because they were essentially identical in saying that the claimant had normal use of his mental and physical faculties and was not acting erratically on the day of the accident and three of the affiants tested positive in the drug testing and were subsequently terminated from their employment. Mr. R also testified that when the claimant fell he was "screaming" that it was the supervisor's fault that he injured himself, presumably because the supervisor directed the drug testing. The hearing officer also considered the claimant's own behavior, which he described as involving "emotional outbursts" and raising his shirt to display his scars from a prior injury as not the conduct of someone with the normal use of their mental and physical faculties.

We stress in this case that the drug test contains quantitative results. Ideally, it would have been better had the carrier introduced into evidence, in addition to the test report, some expert evidence relating these levels to intoxication. However, with the case in the posture that the burden shifted to the claimant to prove sobriety, we are unwilling to conclude that lack of such expert evidence was fatal to the carrier's case or somehow mandates a reversal. Indeed, to do so would effectively nullify the effect of burden shifting. *See* Texas Workers' Compensation Commission Appeal No. 983046, decided February 5, 1999, and Texas Workers' Compensation Commission Appeal No. 982576, decided December 16, 1998, for a discussion of the cases. The hearing officer simply did not believe the claimant's evidence that he was sober at the time of the accident. The hearing officer was the sole judge of the weight and credibility of the evidence. He found the claimant's evidence on the intoxication issue unpersuasive and lacking in credibility. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer. Rather, we consider the evidence sufficient to support the finding of intoxication.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge