APPEAL NO. 990586

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 March 3, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the claimant was injured in the course and scope of his employment on _____. The hearing officer determined that the carrier was relieved of liability for the injury because the claimant was in a state of intoxication when he was injured. The claimant appealed, contended that the evidence established that he had the normal use of his mental and physical faculties when he was injured, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he was not intoxicated when he was injured on _____. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

It is undisputed that the claimant sustained a minor injury on (prior date of injury); that a drug test administered that day showed that the claimant tested positive for the cocaine metabolite with 9,235 nanograms per milliliter (ng/ml); that the cocaine metabolite screening cutoff is 300 ng/ml and the confirmation cutoff is 150ng/ml; that the claimant's employment with the employer was terminated; that on June 17, 1998, the claimant asked for another test, hoping to get his job back; that another test was administered that day; that the test results showed 246 ng/ml for the cocaine metabolite; that the claimant was permitted to return to work on July 13, 1998; that he fell from a scaffold on _____, when the scaffold rolled away from a wall he was working on; that he sustained serious injuries; that he was taken to a hospital, was treated, and gave a urine sample for a drug test that day; that the results showed 84,484 ng/ml for the cocaine metabolite and 85 ng/ml for the marijuana metabolite; and that the marijuana metabolite screening cutoff is 50 ng/ml and the confirmation cutoff is 15 ng/ml.

The claimant denied the use of marijuana. He testified that he used cocaine because his friends told him to use it; that he had used cocaine for about four months before he was injured; that he was injured on a Tuesday morning at about 9:00 a.m.; that the Saturday and early Sunday morning before that day, he snorted four lines of cocaine and drank beer; that the cocaine did not have any effect on him; that he felt that he had full use of his mental and physical faculties when the scaffold moved; that he was well the morning he was injured; that he was not hung over when he went to work on that morning; that he did not tell anyone that he was hung over that morning; and that he was not able to jump from the scaffold like the other worker did because he was pushing on the Sheetrock and was in a corner with walls on two sides of him. Mr. B, the safety coordinator for the employer, testified that he requested the drug test after each time the claimant was injured;

that he and Mr. P, a claims investigator for the carrier, saw the claimant at the hospital; that the claimant told them that he had done four lines of cocaine on the Saturday before he was injured, that he used marijuana on Sunday; and that he was hung over the morning of the accident. Mr. P's testimony was consistent with that of Mr. B and also indicated that the claimant told them that he drank a lot of beer the weekend before he was injured in July. Mr. H testified that he worked with the claimant on the scaffold on the day the claimant was injured; that they began working at about 6:00 a.m.; that the claimant worked normal; that he did not act strange; that the claimant did not appear to be intoxicated; that he, Mr. H, drinks alcoholic beverages but does not use drugs; that he does not know what intoxicated means; that the claimant did not tell him that he was hung over; and that the claimant did not jump because he was against the walls. Mr. G-T testified that he drove the claimant to work on _____; that the claimant appeared to be normal and did not act strange; that he does not use marijuana or cocaine and does not know what effect they have on people; and that he did not see the claimant get hurt.

The carrier called Dr. R to explain the results of the drug test taken on _____, but Dr. R was not permitted to testify because the carrier did not advise the claimant that Dr. R was a potential witness. In her Decision and Order, the hearing officer wrote that it was reasonable to believe that such high levels of the cocaine metabolite with an admission by the claimant that he had used cocaine without an explanation of why the level was so high was enough to shift the burden to the claimant to prove that he had the normal use of his physical and mental faculties at the time he was injured. Texas Workers' Compensation Commission Appeal No. 94673, decided July 12, 1994, and the decision after the remand, Texas Workers' Compensation Commission Appeal No. 941099, decided September 30, 1994, involved a case in which the test results revealed 7,240 ng/ml for the cocain metabolite, neither party presented expert evidence on whether the test results showed that the claimant was intoxicated at the time of the injury, and the Appeals Panel affirmed a decision after the remand that the test results shifted the burden to the claimant to prove that he had the normal use of his physical and mental faculties, that he did not meet his burden of proof, and that he was intoxicated. In the case before us, the hearing officer did not err in determining that test results of 84,484 ng/ml of the cocaine metabolite shifted the burden of proof to the claimant.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In her Decision and Order, the hearing officer stated that the claimant's testimony was less than credible. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of 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, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's determination that the claimant was intoxicated when he was injured is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the decision of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge