APPEAL NO. 990749

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 983046, decided February 5, 1999, we reversed and remanded the determinations of the hearing officer that the respondent (claimant) was not intoxicated at the time of his injury and did not have disability, and remanded for further consideration by the hearing officer to insure that the burden of proof was properly placed on the claimant to establish that he was not intoxicated. The hearing officer, reconsidered the evidence and issued a decision on remand in which she again found that the claimant was not intoxicated and had disability from the date of the injury, continuing to the date of the hearing. The appellant (carrier) appeals the determination of nonintoxication, contending that the hearing officer again failed to properly shift the burden of proof and that the determination is otherwise contrary to the great weight and preponderance of the evidence. Disability is appealed on the basis that the injury was not compensable. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The facts of this case and applicable law are contained in Appeal No. 983046, *supra*, and generally need not be repeated. With regard to the point on appeal that the hearing officer did not comply with the remand and properly shift the burden of proof to the claimant to prove he was not intoxicated, we observe that the hearing officer expressly commented that the carrier's evidence was sufficient to raise the defense of the intoxication and that the burden did shift to the claimant to prove he was not intoxicated. Given this statement in the decision and order, we cannot agree that the hearing officer failed to properly apply the law to the facts of this case.

With regard to the factual issue of intoxication, the carrier asserts that the claimant was unworthy of belief in his statement that he did not use marijuana for several days before the accident, that the absence of skid marks at the scene of the accident showed no attempt by the claimant to react to avoid the high speed collision, and that a positive urinalysis done on a specimen taken from the claimant shortly after the accident is much more probative than a negative blood sample taken some six hours after the accident and after a blood transfusion. This latter argument has undeniable common sense appeal, but we note there was no medical evidence addressing whether a blood sample taken after a transfusion would be essentially meaningless. In addition, this argument ignores the other evidence, particularly that of the claimant's expert toxicologist that a urine specimen only shows prior use and not intoxication, and testimony of a supervisor, Ms. C, who said claimant did not appear to be without the normal use of his faculties except for being sick. Even though the testimony of the claimant about marijuana use before the accident was obviously self-serving, it was the responsibility of the hearing officer to evaluate the claimant's credibility. Section 410.165(a). Ultimately, this case came down to a matter of

the inferences to be drawn from the evidence. 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). While clearly other inferences could be made on the basis of the evidence in this case, we decline to substitute our opinion of the credibility and persuasiveness of that evidence for that of the hearing officer and, for this reason, affirm the decision that the claimant was not intoxicated at the time of the accident. We further note that we affirm this determination in the context of our role as an appellate body reviewing the record in this case. This decision should not be construed as blanket approval of the proposition that urinalysis testing can never as a matter of law establish intoxication.

Having affirmed the finding of a compensable injury, we also affirm the finding of disability.

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

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Alan C. Ernst
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Judy L. Stephens
Appeals Judge