APPEAL NO. 991181

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 3, 1999. With regard to the issues before him, the hearing officer determined that claimant's injury did not occur while claimant was intoxicated, that carrier is not relieved of liability on that basis, and that claimant had disability from _____ (all dates are 1998 unless otherwise noted), through the date of the CCH.

Carrier appealed, drawing certain inferences from the testimony and, basically, arguing that "a claimant's testimony in and of itself is insufficient to prove a lack of intoxication," as a matter of law, citing Texas Workers' Compensation Commission Appeal No. 981662, decided September 3, 1998. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that the drug screen was insufficient to shift the burden of proof and that claimant did produce evidence "that he was not intoxicated at the time of the injury." Claimant urges affirmance.

DECISION

Affirmed.

Claimant was employed as a laborer by (employer). The procedure was that claimant would check in at the employer's premises and would then be assigned to a job site. Claimant testified that he checked in with the employer at about 6:30 a.m. on _____, waited a half hour or so to get his assignment, and was then assigned to an apartment construction project. Claimant's testimony is inconsistent and vague as to when he arrived at the construction site, and carrier speculates that claimant may have smoked or otherwise ingested marijuana on the way; however, there is absolutely no evidence to support that speculation. Based on claimant's testimony, he apparently arrived at the construction site at about 8:00 a.m. and worked hosing down a driveway for about an hour before a supervisor directed him to go up in one of the apartments and help throw some lumber down. Claimant testified that he, a coworker, and the supervisor walked up to the third floor and that, as he was throwing a "2x4" off the balcony, he slipped and fell off the balcony which did not have a railing. Claimant fell about 25 to 30 feet, landing in some dirt. It is undisputed that claimant sustained a fractured pelvis and fractures to the left tibia and fibula. Claimant was admitted to the hospital and was discharged three days later on (3 days after date of injury). Claimant testified that the next day, (4 days after date of injury), he went to the employer's premises to get his paycheck and was told that he would first have to undergo a urinalysis drug screen. That test showed a positive result for cannabinoids in the amount of 142 nannograms per milliliter (ng/ml).

The drug screen test, along with some questions, were sent to Dr. K, carrier's toxicologist, for review and comment. In a report dated March 18, 1999, Dr. K discusses drug testing in general and as applied to this case, including that claimant's testing "found merijuana [sic] metabolities (THC) were present at a level of 142 ng/ml, an intoxicating

level." Dr. K goes on to conclude that the test specimen collected on (4 days after date of injury) " does not extend back to the date of injury of _____, which was 4 days earlier than the collection day." Dr. K further states:

> This marijuana intoxication produced physical and mental impairment in [claimant]. Whether his addictive continuous use indeed included the date of injury of _____, 4 days earlier than the date of collection is reasonably possible, but not probable.

Dr. K goes on to define the difference between "possible" and "probable":

> The urine specimen collection 4 days after the date of injury reduces the likelihood of intoxication with associated impairment from probable (greater than 50%) to possible (leas [sic] than 50%) unless continuous use can be shown or inferred.

In short, Dr. K could not say, within reasonable medical probability, that claimant was intoxicated on _____ at the time of his accident.

We find claimant's testimony to be disturbingly vague and inconsistent. When asked how many times a month he uses marijuana, claimant replied, "two weeks." Carrier, on cross-examination, succeeded in getting claimant to admit he uses marijuana three or four times a week or every other day. At other times claimant said he used marijuana only on weekends. Claimant adamantly testified that he had not used marijuana for two weeks prior to the accident but was unable to explain how that reconciled with his testimony of use every other day. Claimant also gave a statement to carrier's adjuster that said he had not used marijuana after his release from the hospital, while his testimony at the CCH was that his aunt took him to a party the evening he was released from the hospital, where he "smoked five joints" of marijuana. There is also conflicting testimony of what claimant may have said to Mr. E, employer's manager, on _____, after his fall while he was in the hospital. However, all of these contradictions and inconsistencies were pointed out to the hearing officer and the hearing officer, in his Statement of the Evidence, recites this testimony. We have often noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The hearing officer correctly applies the law as it pertains to drug intoxication. In summary, Appeals Panel decisions have held that an employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once the carrier has rebutted the presumption, the employee has the burden of proving he was not intoxicated at the time of the injury. *Id.* An insurance carrier is not liable for compensation if an employee's injury occurred while he was in a state of intoxication. Section 406.032(1)(A). In determining whether an employee has met his burden to prove he was not in a state of intoxication, the term "intoxication," in pertinent part, means "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)(2).

The hearing officer found that the burden of proving that claimant was not intoxicated had shifted to claimant stating:

> In this case, even though the drug screen was done several days after the accident the Carrier provided a review of that drug test by a medical toxicologist. Carrier also provided testimony from [Mr. E] that when the Claimant was informed that a drug test was going to be required he stated, 'It is going to come up dirty. I've used earlier.' That evidence taken together was sufficient to shift the burden to the Claimant to prove that he was not intoxicated at the time of the injury.

The hearing officer's finding on this point is supported by the evidence.

The evidence presented by claimant that he was not intoxicated included his testimony denying use on the previous day or the day of the accident and Mr. E's testimony that claimant would not have been sent out to the job site if he had been intoxicated. Mr. E also talked to the supervisor who was present when claimant fell but the supervisor had apparently said they were very busy that morning and it would be "hard to say" whether or not claimant was intoxicated. The hearing officer also points out that claimant had been at work for an hour performing other duties without incident before he fell and that the site supervisor had the authority to remove claimant from the job site if the supervisor felt claimant was intoxicated and unable to perform his duties. Based on this evidence, the hearing officer found that claimant met his burden to prove that he was not in a state of intoxication at the time of the accident.

Carrier, in its appeal and at the CCH, cites and relies heavily on a proposition in Appeal No. 981662, *supra*, which states "a claimant's testimony in and of itself is insufficient to prove a lack of intoxication," also citing Texas Workers' Compensation

Commission Appeal No. 970935, decided July 7, 1997. Both of those cases, authored by the same Appeals Panel judge, cite and rely on Appeal No. 91018, *supra.* First, we note that the base case, Appeal No. 91018, does not say what it is cited as holding. In Appeal No. 91018, a marijuana intoxication case where the employee tested 86 ng/ml the day of the injury, the decision recited: "There was no testimony or evidence describing [the injured employee's] duties, how he performed them or even whether he performed in a normal manner that morning with normal use of his mental or physical faculties." Appeal No. 91018 went on to say:

> Without the probative evidence of intoxication through the ingestion of marijuana brought forth by the [carrier], the [claimant's] testimony would sufficiently prove up his case. Although the scientific test and the testimony of the expert may not be conclusive, United States Fidelity and Guaranty Company v. Whiting, 597 S.W.2d 504 (Tex. Civ. App.-El Paso 1980, no writ), . . . when weighed against the [claimant's] lack of evidence to establish that he was not intoxicated, the [claimant's] evidence is insufficient and the [claimant] has failed to meet his burden of proof.
>
> With the burden on the [claimant], he is the one who must come forward with sufficient evidence to show a state of "having the normal use of mental or physical faculties . . . " under the circumstances. In this regard, the [claimant's] evidence is lacking as to whether he had the normal use of his mental or physical faculties on the date of the injury or whether he was or appeared to be acting or performing normally. On the other hand, the [carrier] offered probative expert testimony that with the level of THC in the [claimant's] system, a person would certainly be impaired and would not have the normal use of mental or physical faculties. McCray v. State, 365 S.W.2d 9 (Tex. Cr. App. 1963).

Appeal No. 91018, *supra*, was cited in Appeal No. 970935, *supra*, a cocaine intoxication case which stated:

> The claimant did not present any evidence to meet his burden of proof to show that he was not intoxicated at the time of the accident. The claimant testified at the CCH that he smoked crack the Friday before the injury and that he was not intoxicated when he took the drug screen. Nevertheless, his opinion as to whether he was intoxicated is not proof he had the normal use of his mental and physical faculties. Although he testified that he did not have any problem driving the forklift, neither he nor any other witness testified that, at the time of the injury, he could operate it as he operated it before. Neither the claimant nor any other witness testified that he had the normal use of his mental and physical faculties. . . .

From Appeal No. 970935, *supra*, comes the quantum leap to Appeal No. 981662, *supra*, and the proposition that "an employee's testimony regarding his lack of intoxication at the time of an injury, by itself, and not corroborated by any other witness, is insufficient to meet his burden of proof," citing Appeal No. 91018, *supra,* and Appeal No. 970935. From that background, carrier would have us hold that as a matter of law a claimant's testimony, unless corroborated by other testimony and evidence, is insufficient to prove a lack of intoxication. We decline to so hold. While claimant, indeed, could have produced other evidence and/or written statements to meet his burden of proof, his failure to do so does not, as a matter of law, preclude his proving lack of intoxication by his testimony alone.

Interestingly, Appeal No. 981662, *supra*, cites Texas Workers' Compensation Commission Appeal No. 971971, decided November 10, 1997, for the same proposition that claimant must have corroborating evidence to prove lack of intoxication. In fact, Appeal No. 971971 states:

> Whether an employee was intoxicated at the time of the injury is a factual matter for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. There is conflicting evidence in the record as to whether the claimant was intoxicated. However, the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer was within her province to weigh Dr. R's opinion more heavily than the statements of the claimant's coworkers. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, *supra.*

We hold that to be the correct standard. The hearing officer, in this case, gave greater weight to claimant's testimony and the inferences that claimant was not intoxicated as well as Dr. K's reports that he could not say within a reasonable degree of probability (more than 50%) that claimant was intoxicated and did not have the normal use of his faculties, than to evidence, testimony, and inferences to the contrary. We find the hearing officer's decision to be sufficiently supported by the evidence. Although we may view claimant's testimony with some skepticism and another fact finder could well have reached a different result under the same evidence, that is not a sound basis to substitute our judgment for that of the fact finder on factual issues. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The record contains ample medical evidence, including off-work slips and claimant's testimony, to support the hearing officer's findings of disability.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

We are not convinced that the carrier provided sufficient evidence to shift the burden to claimant to prove that he was not intoxicated at the time of the accident. We are especially concerned about reliance on the results of a drug screen test that was based on a urine specimen taken four days after the accident. However, we do concur in the affirmance of the hearing officer's decision in favor of the claimant on the issues of intoxication and disability and in the well-reasoned decision of Judge Knapp that it is for the hearing officer, as the trier of fact, to determine the weight and credibility to be given to the evidence, including the testimony of a claimant.

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge