APPEAL NO. 991268

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. 990603, decided April 26, 1999, we affirmed that part of the decision and order which found that the respondent's (claimant) inability to earn his preinjury wage after _____, was not a result of a work-related injury on that date. We reversed and remanded the determination of the hearing officer that the claimant was not intoxicated at the time of his injury and remanded this issue for further consideration to insure that the hearing officer properly assigned the burden of proof. No hearing on remand was held. In a decision and order on remand, the hearing officer, again found that the claimant was not intoxicated at the time of the injury and that the claimant did not have disability. The appellant (carrier) appeals the determination that the claimant was not intoxicated, arguing error as a matter of law and that the evidence was insufficient to support this determination. The appeals file contains no response from the claimant.

DECISION

Affirmed.

Essential facts and applicable law are contained in our prior decision and need not be repeated extensively here. The claimant worked a 4:30 p.m. to 12:30 a.m. shift. He said the injury occurred about 6:30 p.m. on _____. He was taken to the hospital, where, he said, he remained until about 9:30 p.m. He then returned to the job site and was told to go home. He said he was given no pain medication at the hospital. At home he took aspirin for a headache, but this did not work. So, at about 4:00 a.m. on (a day after date of injury), he went around the corner to a relative's house and obtained a marijuana cigarette. He smoked the marijuana; in his words, "it killed the pain in my head," and he went to sleep. Later that day, he reported to work, presumably at the usual time, and was ordered to undergo a urinalysis. He said that specimen was taken between 2:30 and 3:00 p.m. It was reported positive for marijuana at the 61 nanograms per milliliter (ng/ml) level.

The claimant denied that he ever smoked marijuana before. He insisted he was not intoxicated at the time of the injury for the simple reason that he only smoked the marijuana after the injury. Mr. K, his job site supervisor, stated in a recorded interview with the claimant's attorney that he, Mr. K, did not believe the claimant was intoxicated because he had been able to swing a sledgehammer and carry heavy loads that day and was "fine." Mr. K said he knew what the indicators of marijuana intoxication were, without ever saying what they were, and defined intoxication as the inability to work.

The carrier introduced not only the report of the urinalysis, but the opinion of Dr. K, a toxicologist and medical doctor, that, based on the levels detected in the urine, the claimant was intoxicated "at the time of his workplace accident." He also commented that personal assertions of non-marijuana use "have generally proven to be unreliable." A coworker also

provided a written statement that, in his opinion, the claimant was not "mentally fit" at the time of the injury "due to drugs or alcohol."

In his first decision and order in this case, the hearing officer commented that the "evidence presented is insufficient to establish that claimant was intoxicated at the time of the injury." In Appeal No. 990603, *supra*, we stated that we were unable to tell whether the hearing officer found that the carrier's evidence shifted to the claimant the burden of proving nonintoxication. In his decision on remand, the hearing officer commented that the urinalysis was taken the day after the accident and that the claimant testified, credibly in the hearing officer's opinion, that he used marijuana only in the interlude after the injury and before the testing. He then stated that the "carrier raised the issue of intoxication" through the report of Dr. K but, because the marijuana was taken after the injury, the carrier, through Dr. K's report, "failed to adequately raise the issue of intoxication given the facts of this case." The carrier argues again on appeal that the hearing officer erred in "impliedly" continuing to place on the carrier the burden of proving intoxication. It further argues that whether the claimant smoked marijuana after the accident has no bearing on whether the carrier presented some evidence to shift the burden to the claimant to prove nonintoxication.

We cannot agree that the carrier failed to "adequately" raise the issue of intoxication through the report of Dr. K. Dr. K stated in his report that the urinalysis test results supported the conclusion that the claimant was intoxicated from marijuana use at the time of the injury, which was less than 24 hours before the specimen was provided. Recently, in Texas Workers' Compensation Commission Appeal No. 991181, decided July 14, 1999, we addressed the issue of marijuana intoxication in the context of a specimen provided some four days after the injury. The specimen was positive at the 142 ng/ml level. In that case, Dr. K commented that it was "reasonably possible, but not probable" that the test results showed intoxication at the time of the injury. The hearing officer ultimately found that the claimant was not intoxicated. The author judge seemed to agree that these test results shifted the burden of proof to the claimant to prove nonintoxication. Two concurring judges were "not convinced" that the evidence was sufficient to shift the burden to the claimant. This decision is readily distinguishable from the case now before us, where the time lag between the testing and the accident was less than 24 hours, not four days, and Dr. K affirmatively asserted an opinion that the claimant was intoxicated at the time of the injury. In Texas Workers' Compensation Commission Appeal No. 950656, decided June 9, 1995, we affirmed the determination of the hearing officer that a positive urinalysis taken some 28 to 30 hours after the injury and a toxicologist's opinion that this was consistent with either pre- or post-injury usage of marijuana did not shift the burden to the claimant. We also distinguish this case and believe that the carrier did provide sufficient evidence to shift the burden to the claimant to prove nonintoxication in the form of Dr. K's unequivocal assertion of intoxication at the time of the injury. The hearing officer's determination otherwise is against the great weight and preponderance of the evidence.

The hearing officer provided an alternative analysis "assuming the Carrier properly raised the issue of intoxication." He found the claimant's testimony about never using marijuana in his life until 4:00 a.m. the day after the accident for its curative powers credible. He also found credible Mr. K's comments that, to him, the claimant did not appear intoxicated. The carrier, relying on Texas Workers' Compensation Commission Appeal No. 970935, decided July 7, 1997, argues on appeal that the claimant's own opinion is not probative evidence of nonintoxication. We rejected this argument in Appeal No. 991181, *supra*, where we held that a claimant could prove nonintoxication "by his testimony alone." The carrier also contends that the lack of a reference to the appearance of intoxication in the medical records and Mr. K's opinion should be given little weight, not least because Mr. K does not understand the correct definition of intoxication. Ultimately, whether the claimant was intoxicated at the time of the injury was a question of fact for the hearing officer to decide. As was stated in Appeal No. 991181, *supra*, "[a]lthough 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. [Citation omitted]." Similarly, the hearing officer was free to give Mr. K's opinion the credibility he felt it deserved and was not bound as a matter of law to consider the medical treatment records dispositive one way or the other on the issue of intoxication. Section 410.165(a). 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 find the evidence sufficient to support the determination of the hearing officer that the injury did not occur while the claimant was in a state of intoxication.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge