APPEAL NO. 991476

Following a contested case hearing held on May 11, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that, since the claimed injury occurred while the appellant (claimant) was in a state of intoxication, as defined in Section 401.013, from the voluntary introduction of a controlled substance, the respondent (carrier) is therefore relieved of liability for compensation. The parties stipulated that claimant did not have disability resulting from the injury sustained on _____. Claimant has appealed the hearing officer's findings on the intoxication issue. The carrier urges, in response, that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

Claimant testified that he underwent back surgery in 1986; that his back "goes out" from time to time; and that while working in the employer's counting room counting coins on _____, his back "went out again." He said that he has been taking pain medication for chronic pain for 20 years; that on September 2nd, he took two different muscle relaxers as well as pain medication (Hydrocodone) but had the normal use of his faculties and was not intoxicated; that after his injury, he was administered a drug test, which was positive for marijuana; and that he does not see how it was possible to test positive since he does not use marijuana. Claimant introduced copies of pharmacy records reflecting prescriptions of Hydrocodone, Carisoprodol, and Diazepam by various doctors, filled at various pharmacies, in the June to October 1997 period. According to the benefit review conference report, claimant took the position that he was not intoxicated at the time of the incident but rather was medicated with prescription drugs.

The carrier introduced a report from (lab report) dated September 4, 1997, reflecting that claimant's urine specimen, collected at 11:30 a.m. on _____, was analyzed by gas chromatography/mass spectrometry (GC/MS) and determined to be positive for Oxazepam (mild tranquilizer), Temazepam (sleeping pill), Nordiazepam (valium), and marijuana at 44 nanograms per milliliter (ng/ml) with the reference range being 15 ng/ml.

The carrier also introduced a report reflecting that on September 1, 1997, while working for another employer, claimant reported hurting his low back when he fell from a ladder while replacing a light bulb. Claimant was asked about this incident on cross-examination and stated that he did not recall it.

Claimant argued to the hearing officer that the 40 ng/ml was an insufficient amount of marijuana to shift the burden of proof to claimant to prove that he was not intoxicated and that expert testimony was required. The carrier argued that the lab report was sufficient probative evidence of intoxication to shift the burden to claimant to prove that he was not intoxicated.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication in Section 401.013(a) includes the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. The law presumes that a claimant was sober at the time of an injury; however, the carrier can, with probative evidence of intoxication, rebut this presumption and shift the burden to the claimant to prove that he or she was not intoxicated. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. Regarding the quality of the carrier's evidence of intoxication to shift the burden of proof, in Texas Workers' Compensation Commission Appeal No. 92224, decided July 16, 1992, a marijuana intoxication case involving disparate results in blood and urine tests, the Appeals Panel stated as follows:

> [W]e have never held nor implied that a carrier must present scientific evidence and/or expert testimony in order to raise the intoxication exception. That does not detract from the matter that evidence offered to raise the issue of intoxication and erase the presumption of sobriety thereby shifting the burden back to claimant, must have some probative value and not be so weak as to be meaningless or amount to no more than a mere scintilla.

The Appeals Panel has often recognized that a positive urinalysis test result will generally suffice to shift the burden of proof to a claimant to establish that he or she was not intoxicated at the time of the injury. *See* Texas Workers' Compensation Commission Appeal No. 970115 (Unpublished), decided February 12, 1997, and the cases cited therein.

The hearing officer found that following the injury on _____, claimant submitted to a drug screen test; that a confirmatory test by GC/MS was performed and the result was positive for marijuana at 44 ng/ml with the cutoff level being 15 ng/ml; that the positive drug screen test is sufficient probative evidence of intoxication to shift the burden of proof to claimant to show that he had the normal use of his mental and physical faculties at the time of the injury on _____; and that claimant did not have normal use of his physical and mental faculties at the time of the injury.

Whether an employee was intoxicated at the time of the injury is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995; Texas Workers' Compensation Commission Appeal No. 93002, decided February 19, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex.

662, 244 S.W.2d 660 (1951). The hearing officer could consider the lack of evidence introduced by claimant concerning the status of his mental and physical faculties at the time of the injury. The carrier directed the hearing officer to Texas Workers' Compensation Commission Appeal No. 970935, decided July 7, 1997, a cocaine intoxication case. In that case, the Appeals Panel reversed and rendered a decision that the carrier was not liable due to the claimant's intoxication, noting that the claimant presented no evidence to meet his burden to show that he was not intoxicated at the time of the injury and that his opinion that he was not intoxicated was not proof that he had the normal use of his physical and mental faculties at the time of the injury.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge