APPEAL NO. 991608

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 7, 1999. With respect to the issues before her, the hearing officer determined that the respondent's (claimant) injury did not occur while he was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance, therefore, the appellant (carrier) is not relieved of liability for compensation; and that the claimant had disability as a result of his compensable injury from _____, through the date of the hearing, July 7, 1999. In its appeal, the carrier argues that no evidence supports the hearing officer's determination that the claimant was not intoxicated at the time of his injury or, alternatively, that that determination is against the great weight and preponderance of the evidence. The carrier also challenges the hearing officer's disability determination, a challenge which is premised upon the success of its intoxication argument. In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

It is undisputed that on _____, the claimant was working as a floor hand on a drilling rig. At about 7:40 a.m. that day, a motor near the claimant "began running away with itself." The claimant testified that he and Mr. K, another floor hand, went over to try to "kill" the motor, that there was an explosion, and that a flash fire erupted. The claimant suffered burns on his face and neck. He was taken to an emergency room and was thereafter transferred to a burn unit in city. The claimant stated that he was hospitalized for eight days and was on a respirator for three of those days. He testified that he continues to receive treatment at the burn unit and that he is also treating with a psychiatrist because he has developed psychological problems since the accident and has difficulty sleeping.

In a July 7, 1999, letter, Dr. G, the director of the burn center where the claimant is receiving treatment, stated that the claimant "suffered a 7% total body surface burn from an oil field explosion on _____." In addition, Dr. G stated:

> On arrival it appeared that the burns were of second degree to the face and neck. He was started on vigorous wound care, therapy, and nutrition support program. Fortunately, he did not require any operative procedures. He was extubated from the ventilator 36 hours post injury. He did have one episode of GI bleeding probably related to stress as well as a possible previous history of ulcer problems. This resolved quite easily. He was discharged seven days after his injury and has been followed in our burn outpatient clinic. He is recovering well and will be seen on August 4, 1999. We are in the process of working with the patient as far as scar management and psychological problems related to post traumatic stress disorder.

> [Claimant's] situation is such that we will not be able to determine his date of [maximum medical improvement] MMI, nor his long term disability from this injury. The only thing that we can state at this time is that his injury will require intensive outpatient care for at least 18 to 24 months. We are not sure exactly when he will be able to return to work.

On _____, the claimant arrived at the emergency room at approximately 8:03 a.m. and a urine specimen was collected from him at 9:48 a.m., which was positive for the presence of marijuana metabolites and cocaine metabolites. Dr. W, the toxicology expert retained by the carrier, stated in a report of April 27, 1999, that the "gas chromatography/mass spectrometry (GC/MS) of his urine specimen confirmed the presence of delta-9-carboxy-THC at 481 ng/ml, benzoylecgonine, cocaine metabolite at 3,292 ng/ml and morphine at 2,562 ng/ml." Dr. W explained that the claimant had received morphine in the hospital as part of his treatment, which resulted in the positive findings for opiates. Dr. W opined that "within all reasonable scientific probability" the claimant had lost the normal use of his mental and physical faculties at the time of the accident due to his recent use of marijuana and that his "state of intoxication was further augmented by his recent use of cocaine."

At the hearing, the claimant acknowledged that he had smoked half of a marijuana cigarette on Saturday, (before injury date), and that he had snorted three lines of cocaine on Sunday, (before injury date). He testified that he did not use marijuana or cocaine at any time after those dates and prior to the accident on Tuesday, _____. He stated that he had been smoking marijuana occasionally for four to five years and that he had "done a couple of lines of cocaine" in the two to three weeks preceding _____. He testified that he was not intoxicated at the time of his injury and that he had the normal use of his mental and physical faculties. He explained that he had worked an eight-hour day at the rig on Monday and then had gone home and worked there.

The claimant introduced an affidavit from Mr. B, who was the derrick man on the rig where the accident occurred. Mr. B stated that he rode to the rig site with the claimant, Mr. K, and Mr. P, the driller on the rig. He stated that he did not see any drugs or alcohol being consumed on the morning of _____ either on the ride to the rig site or at the site itself. He stated that the claimant "appeared normal at all times" and that he was "alert and did not appear to be intoxicated in any way." Finally, Mr. B stated that the claimant had full control of his mental and physical faculties, that he was working on the rig as he normally did, and that in Mr. B's opinion the claimant was not intoxicated at the time of the rig fire on _____.

In his affidavit, Mr. P stated that he drove to the rig site on _____, and that he did not observe any drugs or alcohol being consumed that morning. Mr. P stated that the claimant "appeared normal at all times," that he was "alert and did not appear to be intoxicated in any way," and that he had "full control of his mental and physical faculties." In his report, Dr. W states that Mr. P was also injured in the fire on the rig; that he was taken to the hospital; that his urine specimen screened positive for marijuana metabolites; and that the GC/MS "confirmed the presence of delta-9-carboxy-THC at 715 ng/ml."

Finally, the claimant introduced an affidavit from Mr. K. In his affidavit, Mr. K stated that he rode to work on _____ with the claimant, Mr. P and Mr. B; that he did not observe anyone using drugs or drinking alcohol on _____; that the claimant "had full control of his mental and physical faculties"; and that the claimant did not show any signs of being intoxicated. Mr. K was also injured in the fire. His urine specimen screened positive for marijuana metabolites. With respect to Mr. K, Dr. W states that the GC/MS "confirmed the presence of delta-9-carboxy-THC at 167 ng/ml."

The claimant introduced two reports from Dr. B, his toxicology expert. Dr. B stated that he had reviewed Dr. W's report, and that Dr. W's opinion was based upon unsupported assumptions. Dr. B concluded that "it is my opinion that the information available is not sufficient to make any statement regarding whether [claimant] was experiencing any impairment or intoxication at the time of the accident resulting from prior exposure to marijuana or cocaine."

Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury. For purposes of this case, intoxication is defined as not having the normal use of mental or physical faculties from the voluntary introduction of marijuana and cocaine into the body. *See* Section 401.013(a)(2). An employee is presumed sober. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier rebuts the presumption by presenting probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he was not intoxicated at the time of the injury. In this instance, the positive urinalysis with quantitative measurements, along with Dr. W's report, was sufficient to shift the burden to the claimant to prove that he was not intoxicated. Whether a claimant is intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, Dr. W opined that the claimant was intoxicated at the time of the injury. However, Dr. B stated that Dr. W's opinion was premised upon too many unsupported assumptions and opined that there was insufficient information to provide an opinion as to whether the claimant was intoxicated at that time. The carrier argues that Dr. B's report is of no significance because it does not provide an opinion that the claimant had the normal use of his mental and physical faculties at the time of the injury. We find no merit in this assertion. The hearing officer could, and apparently did, consider Dr. B's concerns in assessing the weight and credibility she would assign to Dr. W's opinion. In

addition, the carrier asserts that the evidence from Mr. K and Mr. P that the claimant had the normal use of his mental and physical faculties was not entitled to any weight because both Mr. K and Mr. P also tested positive for the presence of marijuana shortly after the accident. The significance of that factor was a matter left to the discretion of the hearing officer, as the fact finder. In addition, the hearing officer could choose to credit the evidence from Mr. B that the claimant retained the normal use of his mental and physical faculties. The hearing officer was acting within her province as the fact finder in resolving the conflicts and inconsistencies in the evidence in favor of a determination that the claimant retained the normal use of his mental and physical faculties at the time of his injury and, thus, was not intoxicated. Our review of the record does not demonstrate that the hearing officer's intoxication determination is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination. Pool; Cain. The fact that another fact finder could have drawn different inferences from the evidence, which would have supported a different result, does not provide a basis for us to disturb the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The carrier stipulated at the hearing that the claimant did not have the ability to obtain or retain employment at wages equivalent to his preinjury wage from _____, through the date of the hearing, July 7, 1999. Thus, it is apparent that its challenge to the hearing officer's disability determination is premised upon the success of its argument that the claimant was intoxicated. The finding of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16). Given our affirmance of the hearing officer's determination that the claimant was not intoxicated at the time of his injury, we likewise affirm her disability determination.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge