APPEAL NO. 000167

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 December 30, 1999. With respect to the issues before him, 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 controlled substances, 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 August 24, 1999, through December 30, 1999, the date of the hearing. 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. The parties resolved an issue concerning the claimant's average weekly wage by stipulating that it is $360.00.

DECISION

Affirmed.

It is undisputed that on Monday, _____, the claimant was working as a Class A helper, tying rebar and helping pour concrete for a construction company. The claimant testified that on that date he was removing forms from around a concrete wall that had been poured the previous Friday, when the ladder on which he was standing slipped, causing him to fall 10 to 12 feet to the ground. The claimant stated that he injured his left lumbar foraminotomy at L3-4 and excision of the disc at L3-4.

The claimant was taken to the hospital shortly after his injury on _____. Pursuant to the employer's policy he was required to provide a urine specimen. The screening test at the hospital was positive for the presence of marijuana metabolites and cocaine metabolites. The specimen was sent to a laboratory for confirmatory testing, which was positive for marijuana metabolites at 37 nanograms per milliliter (ng/ml) and cocaine metabolites at 619 ng/ml. The claimant acknowledged that during the evening of Friday, (the Friday before the date of injury) he smoked marijuana, after having drunk six to seven beers. He testified that the cocaine must have been present in the marijuana cigarette he smoked because that was the only drug that he ingested. The claimant testified that he left the bar where he had smoked marijuana at about 1:00 a.m. on Saturday morning and that a friend drove the claimant to his mother's home, where the claimant was living at the time. The claimant testified that he slept for about 12 hours and then he spent the rest of the day on Saturday "just laying around." He testified that he did not use any drugs on Saturday but acknowledged drinking a six-pack of beer. He stated that he went to bed at about 8:00 p.m. on Saturday; that he got up early on Sunday; that he

stayed home and watched football on Sunday; and that he did not ingest any drugs or drink any beer.

The claimant testified that on Monday morning he began working at 7:00 a.m. and that his accident occurred at about 11:00 a.m. He stated that he had removed the forms from one wall and had started to remove the forms from another wall, when the ladder slipped causing him to fall. The claimant testified that he worked with another employee and his foreman, Mr. W, on _____; that he drove to work without incident on the morning of _____; and he worked for four hours, likewise without incident. The claimant testified in response to questioning from the hearing officer that he worked side-by-side with Mr. W on the morning of the _____ and that Mr. W did not notice that the claimant was intoxicated or send him home from work. The claimant testified that he had the normal use of his mental and physical faculties at the time of his accident; that he was able to work appropriately; and that he had no difficulty performing his job duties. On cross-examination, the claimant denied that on Monday he was still under the effects of the drugs he had ingested on Friday. Specifically, the claimant testified "I wasn't drunk. I wasn't high. I wasn't nothing. I was fine."

Neither the claimant nor the carrier introduced a statement from the claimant's foreman, Mr. W, concerning whether the claimant was intoxicated on _____. However, the claimant introduced a written statement from Mr. Z, his stepbrother, who worked with the claimant on _____. Mr. Z stated that he and Mr. W worked with the claimant on _____ prior to his accident and that the claimant "was not under any influence" of drugs or alcohol at that time.

The carrier called Dr. K, a toxicologist, to testify by telephone at the hearing. Dr. K testified that the drug screen of the claimant's urine done on _____ was positive for marijuana and cocaine metabolites and that the confirmatory testing was positive for cocaine at 619 ng/ml and for marijuana at 37 ng/ml. Dr. K opined, based on reasonable medical probability, that the claimant did not have the normal use of his mental or physical faculties at the time of his injury due to his ingestion of cocaine and marijuana. Dr. K stated that he was relying mostly on the presence of the cocaine to support his conclusion that the claimant was intoxicated within the meaning of the Texas Labor Code because it was present at a much higher level than the marijuana; nonetheless, he testified that the level of marijuana metabolites found in the claimant's system would have an "additive effect" on the cocaine. Dr. K further testified that individuals who observe a person who is intoxicated due to cocaine use are unlikely to know whether or not a person is intoxicated. Dr. K testified that it was "certainly possible" that the claimant ingested the cocaine on Friday, (the Friday before the date of injury), as he testified. In addition, Dr. K stated that while the "initial high," the euphoric effect noticed by the user, goes away within 18 to 24 hours after the drug is ingested, he maintained that the intoxicating effect persists longer, such that the user may not realize that he is intoxicated.

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 controlled substances, cocaine and marijuana, 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 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 injury. In this instance, the hearing officer properly determined that the positive urinalysis with quantitative measurements, along with Dr. K's testimony, 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. K opined that the claimant was intoxicated at the time of the injury. However, the claimant testified that he was not intoxicated and likewise submitted the statement of Mr. Z, who opined that the claimant "was not under the influence" of any drugs on the morning of _____ prior to his accident. In finding that the claimant was not intoxicated at the time of his injury, the hearing officer noted that the claimant had driven to work on the morning of _____ without incident and that he had also worked some four hours, without incident, before his accident occurred. The hearing officer was acting within his province as the fact finder in considering those factors, in conjunction with the passage of over 48 hours since the claimant's acknowledged drug use, to draw an inference that the claimant had the normal use of his mental and physical faculties at the time of his injury and, thus, was not intoxicated. The carrier cites Texas Workers' Compensation Commission Appeal No. 981662, decided September 3, 1998, and Texas Workers' Compensation Commission Appeal No. 970935, decided July 7, 1997, for the proposition that the claimant cannot testify to his own sobriety. In several subsequent cases, Appeal Nos. 981662 and 970935, have been effectively rejected. In Texas Workers' Compensation Commission Appeal No. 991181, decided July 14, 1999, the Appeals Panel stated "[w]hile 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." Appeal No. 991181 reaffirmed that the question of whether an employee was intoxicated at the time of the injury is a factual matter for the hearing officer to resolve. Similarly, in Texas Workers' Compensation Commission Appeal No. 991268, decided August 4, 1999, we stated that we had subsequently rejected the notion that the claimant's testimony is not probative evidence of sobriety. *See also* Texas Workers' Compensation Commission Appeal No.

991357, decided August 11, 1999 (Appeals Panel has "declined to hold that, as a matter of law, a claimant's testimony is insufficient to prove a lack of intoxication."). Appeal Nos. 991181, 991268, and 991357 declined to follow the proposition that the claimant's testimony is not probative evidence on the issue of intoxication and we also decline to determine that the claimant's evidence of sobriety in this instance was insufficient as a matter of law. Our review of the record does not demonstrate that the hearing officer's determination that the claimant was not intoxicated at the time of his injury 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 on appeal. Pool; Cain.

The success of the carrier's disability argument 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:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge