APPEAL NO. 000267

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 January 6, 2000. With regard to the issues before him, the hearing officer determined that claimant was intoxicated, as defined by Section 401.013, on _____ (all dates are 1999 unless otherwise noted); that claimant's injury was not compensable because he was intoxicated; and that claimant did not have disability because he had not sustained a compensable injury.

Claimant appealed, reiterating from his personal knowledge how much water soluble cocaine would have to be ingested within 30 minutes to constitute intoxication, and otherwise stressing evidence that he was not intoxicated at the time of his injury, that the had not "voluntarily" introduced cocaine in his body, and that he had disability because work restrictions had been imposed before he was terminated. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, urging affirmance.

DECISION

Affirmed.

Claimant was employed by a temporary staffing agency (employer) and assigned to work at a computer manufacturing facility (company) as a "material handler." Claimant testified that his duties consisted of opening boxes and cartons of computer parts using a box cutter or sharp knife. Claimant testified that his normal shift was from 4:00 p.m. to midnight or 12:30 a.m. and that sometime between 4:00 p.m. and 5:00 p.m. on _____, while opening cartons, his knife slipped and he cut himself in the lower part of his left hand. Claimant was wearing safety gloves and it was his testimony that this was a freak accident because the safety glove would usually protect the hand from cuts. Claimant reported the incident, was sent to the company first aid station, and eventually was sent to a clinic for treatment. While at the clinic, a routine drug screen urinalysis was taken at 7:55 p.m. (about three hours and 10 minutes after the injury). That drug screen sample was sent to the laboratory and, in a report dated August 30th, tested positive for cocaine metabolite and was confirmed in a separate test at a level of 4726 nanograms per milliliter (ng/ml) with the cutoff value on the retest being 150 ng/ml. The laboratory test and documentation were sent to Dr. K, a medical toxicologist, who, in a report dated December 7th, commented that the urine specimen was collected three hours and 10 minutes after the accident; that a "very high level of 4726 ng/ml of urine of cocaine metabolites was measured"; that "testimony of fellow employees . . . [regarding intoxication] has proven to be generally unreliable," citing a study that 75% of mothers who abuse drugs during pregnancy are untruthful about their drug use; and concluded that, under the definition of intoxication found in Section 401.013(a)(2) of the 1989 Act, claimant meets the criteria at the time of his workplace accident on _____ of not having the normal use of his

mental or physical facilities at the time of his workplace accident on [sic] from detection of cocaine metabolite by proper state-of-the-art specific and confirmatory testing by GC/MS (gas chromatography/mass spectrometry) at a DHHS certified laboratory from a urine specimen proximately collected in time (3 hours and 10 minutes after the accident) with proper consent and chain of custody procedures.

After claimant was seen at the clinic on _____, claimant was treated and released to return to work with restrictions of no use of the left hand. Claimant was called at home on August 30th and terminated due to the positive drug screen. Claimant continued to be treated at the clinic and apparently received some medical and income benefits. A report dated September 15th from Dr. C at the clinic indicates a healed laceration and "complaints of musculoskeletal pain and paresthesias of unclear etiology." Claimant asserts that he has continuing disability.

Claimant testified that two days prior to the accident (date) he had attended a party where he had refused some offered cocaine and that subsequently someone mixed him a drink and secretly spiked the drink with cocaine. Claimant said that he began to get numb, that he went home and rested the next day (date), and that he went to work on _____. In order to show that he was not intoxicated and had the normal use of his mental or physical faculties, claimant presented a statement that he (claimant) had prepared and had been signed by three "coworkers." The statement said:

> To Whom it may concern, on _____ [claimant] was performing his usual duties in normal capable fashion, prior to his accident at 4:45 at the . . . location. He was functioning normally.

The note was signed by a company supervisor, a security guard, and a temporary coworker on November 16th. (It is undisputed that the security guard only saw claimant enter the premises and did not see him working.)

The hearing officer, in his Statement of the Evidence, commented that the drug screen result of 4726 ng/ml "was sufficient to raise the question of intoxication and shift to the Claimant the burden of showing that he was not intoxicated at the time of the injury." Section 406.032 provides that a carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Section 401.013 includes in the definition of intoxication the state of not having the normal use of mental or physical faculties resulting from the introduction into the body of a controlled substance. It was not contended that cocaine is not a controlled substance or was otherwise prescribed by the claimant's doctor. An employee is presumed to be sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts that 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 that he was not intoxicated at the time of the injury. *Id.* In this case, the hearing officer found that the drug screen showing the 4726 ng/ml cocaine metabolite was sufficient

to shift to the claimant the burden of proving he was not intoxicated. We hold there was sufficient evidence, namely the drug screen and Dr. K's report, to support the hearing officer's finding.

Claimant seeks to meet his burden of proving that he was not intoxicated through his testimony that he was not intoxicated and the statement prepared by claimant and signed by three of the workers at the company site. 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. In this case, the hearing officer heard claimant's testimony regarding how he inadvertently ingested cocaine in a spiked drink two days prior to the accident, and the circumstances of the accident and considered the statements of the other workers. On the other hand, the hearing officer could consider the report of Dr. K, unequivocally stating that claimant could not have had the normal use of his mental and physical faculties based on the 4726 ng/ml cocaine metabolite still in his system. There is conflicting evidence in the record as to whether claimant was intoxicated. However, it is the hearing officer, as the finder of fact, that is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). The hearing officer was within his province in weighing Dr. K's opinion more heavily than claimant's testimony and the statements claimant prepared for the other workers. It is for the hearing officer, as the trier of fact, to resolve conflicts and contradictions in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Claimant raises the issue that he did not "voluntarily" introduce the substance into his body. (*See* Section 401.013(a)(2).) Carrier counters that claimant voluntarily drank the spiked drink and that the 1989 Act states the substance must be introduced "voluntarily," not "knowingly." Carrier further points out that if this type of defense is approved, then the intent of the law could be circumvented in that many drug-intoxicated employees could claim they unknowingly ingested the drug. We do not feel compelled to rule on this point in that the hearing officer commented that claimant's testimony regarding how the cocaine got into his system was "somewhat problematical," which indicted that he gave it little, if any, weight. In any event, we will affirm the hearing officer's decision on any theory supported by the evidence. *See* Daylin v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied). We interpret the hearing officer's comment to mean that he did not accept claimant's version of the inadvertent consumption of cocaine.

In that we are affirming the hearing officer's decision that carrier is relieved of liability for compensation because claimant was intoxicated, we likewise affirm the hearing officer's decision that claimant did not have disability as that term is defined in Section 401.011(16).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge