

APPEAL NO. 000562

On March 6, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that respondent (claimant) sustained a compensable injury on _____; that the injury did not occur while claimant was in a state of intoxication; and that claimant had disability from November 3, 1999, through February 18, 2000. Appellant (carrier) requests that the hearing officer=s decision on all issues be reversed and that a decision be rendered in its favor. No response was received from claimant.

DECISION

Affirmed.

Section 401.011(10) defines Acompensable injury.@ Claimant testified that he was working for employer plastering a ceiling on Tuesday, _____, when the scaffolding board he was standing on broke and he fell five feet to the floor injuring his left ankle. Claimant was seen by Dr. R on _____ after his fall and was diagnosed as having a left ankle sprain. Claimant then treated with Dr. B for his left ankle complaints. X-rays of his left ankle were normal. The hearing officer found that claimant sustained an injury in the course and scope of his employment.

Section 401.011(16) defines Adisability.@ Dr. R wrapped claimant=s ankle and prescribed crutches and pain medication. Claimant said that he used the crutches for four to six weeks. Dr. R wrote on November 5th that claimant could return to modified duty. Claimant began treating with Dr. B on November 19th and Dr. B wrote on several occasions that claimant was unable to return to work until his left ankle condition improved. Dr. B noted some improvement in claimant=s ankle condition. Claimant said that Dr. B released him to return to work with restrictions on February 18, 2000. Claimant said that the only work he has done since his injury was for two days about two weeks before the CCH when he worked four hours on one day and six hours on another day. Claimant said that he began looking for work in January 2000 because he needed to support his family. Claimant said that as of the date of the CCH, he felt he was physically able to work. The hearing officer found that due to the injury of _____, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from November 3, 1999, through February 18, 2000.

Section 401.013(a) defines Aintoxication.@ Section 406.032 provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Claimant testified that he did not smoke marijuana on _____. He said that the only time in his life that he had smoked marijuana was during a break at work on Friday, October 29, 1999, when a foreman offered him some of a marijuana cigarette. He said he smoked very little of the marijuana on October 29th. Claimant said that he began work on _____ at 7:30 a.m. and that the accident occurred at about 2:50 p.m. He said that none of

his supervisors questioned his activities. A report of drug test results on a urine specimen of claimant's taken on _____, after his accident reports that claimant tested positive for marijuana at 32 nanograms per milliliter. Carrier states that claimant did nothing more than testify that he was not intoxicated at the time of his injury and cites several Appeals Panel decisions for the proposition that a claimant's testimony alone is not sufficient to establish that claimant was not intoxicated. The hearing officer found that carrier rebutted the presumption of sobriety, but that claimant met his burden to prove that he was not intoxicated at the time of his injury. She found that claimant had the normal use of his mental and physical faculties at the time of his injury. Texas Workers= Compensation Commission Appeal No. 991181, decided July 14, 1999, a drug intoxication case, considered several of the decisions cited by carrier and declined to hold that as a matter of law a claimant's testimony is insufficient to prove a lack of intoxication. Texas Workers= Compensation Commission Appeal No. 000167, decided March 10, 2000, a drug intoxication case, also reviewed several of the decisions cited by carrier and then cited several decisions that declined to follow the proposition that a claimant's testimony is not probative evidence on the issue of intoxication.

The hearing officer decided that claimant sustained a compensable injury on _____; that the injury did not occur while claimant was in a state of intoxication as defined by Section 401.013 from the introduction of a controlled substance and thus carrier is not relieved of liability; and that claimant had disability resulting from his injury of _____, from November 3, 1999, through February 18, 2000. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers= Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge