APPEAL NO. 000672

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 8, 2000. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____; whether the claimed injury occurred while the claimant was in a state of intoxication; and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury on _____; that the injury occurred while the claimant was in a state of intoxication, thereby relieving the respondent (carrier) of liability; and that the claimant had disability as a result of the claimed injury from September 1, 1999, and continuing. The claimant appeals, contending that he was not in a state of intoxication at the time of the injury and that the finding to the contrary is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. He argues that chain of custody procedures were not followed for handling his urine sample. The carrier responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed by (employer) on _____, as a lineman, a profession he had followed for several years, when he sustained a serious electrocution injury. He had been picked up to be taken to work around 6:30 that morning. He was working up in a "bucket," engaged in rewiring. He could not recall much about the accident. He briefly described the procedure which should have been followed, including covering a hot wire with rubber "guts" and additional insulation over the guts. The claimant said that the hot wires were held apart. He said that the only way one could be shocked is actual contact with a wire rather than "arcing."

The claimant agreed that after putting on the guts he had removed his rubber gloves in order to better manipulate an arm rod. He agreed that it was proper procedure, and his employer's rule, to keep such gloves on at all times, but said it was common practice to take them off. He could not recall how he came to be electrocuted near the end of his workday.

Claimant was unconscious when he was taken to nearby (S Hospital). Various bodily fluids were drawn, including urine, which was tested positive for cocaine metabolites (448 nanograms/milliliter). Because of this, the test was sent to a larger commercial laboratory which performed a different test with similar results. Both the report of the commercial laboratory and S Hospital note that chain of custody handling was not done and that the results should be used only for medical purposes and not for legal or employment purposes.

The claimant was later transferred to the (burn center), where he said he woke up. He said he found out later there was a patient at the burn center with the same last name and similar first name. Claimant stated at the CCH that he had not only not had cocaine that day,

but never before. In a transcribed statement with the adjuster, taken September 14, 1999, the following question and answer is recorded:

> Q: Do you know when the last time was that you'd ever used cocaine?
>
> A: No sir. I mean, occasionally yeah, I would take it for headaches and that's all they would give me, that codeine stuff and that . . . that's not actual cocaine, no way.

No questioning was pursued along these same lines at the CCH, and claimant said he had not been to the doctor or dentist in a long time before his accident. The claimant had been taking therapy at one point every day of the week but that was reduced. He said that he had not worked since the date of the accident but believed that he would currently be able to work, although he still had trouble with one of his burned arms.

A coworker, Mr. M, who was up in a second bucket on the day of the accident, gave a statement that claimant was not wearing his rubber gloves and Mr. M shouted at him to put them on but claimant never listened. He also said that he beckoned claimant to come into a location he thought might be safer, with the hot wire in front of claimant rather than behind. Mr. M said he saw the accident happen; he said that claimant had failed to put the insulator over the guts and his arm rod touched some exposed hot wire. Mr. M said there were no signs that claimant had been using alcohol or drugs that day.

Mr. C, a supervisor, testified that he had earlier seen claimant wearing his rubber gloves and that it was proper procedure to always wear them. He agreed it was hard to manipulate the arm rod with the gloves on. He said that while he had seen some workers occasionally wear leather gloves, this should not be done. Mr. C was not in the immediate area when the accident happened. He said that he did not observe claimant to be obviously intoxicated or under the influence of drugs, although he agreed he was not trained to spot this.

Mr. O, director of the lab at S Hospital, testified that when samples were taken, they were immediately labeled with identifying information, including a bar code, which was maintained with the sample at all times. He said that incidents where samples had been mixed up at his laboratory were less than one tenth of one percent. Mr. O generally described all S Hospital guidelines as being in place to assure integrity of samples. He said that the sample was sent to the commercial laboratory at the request of S Hospital. A factor in chain of custody not being followed was that claimant was unconscious and could not give consent. Also, full chain of custody testing was more expensive.

The carrier presented the opinion of Dr. A, who opined that the claimant's level of metabolites indicated current usage. He opined that the claimant was in a state of acute intoxication at the time of his accident. Later asked whether a medication given to claimant at S Hospital could have caused the reading of high cocaine metabolites, he said that it could not

have done so. Dr. A also noted that the other test results from the same sample, showing abnormal serum electrolytes and elevated enzymes consistent with muscle injury, were consistent with an individual who had sustained a massive electrical burn. Because of this, Dr. A felt certain that the sample was indeed from claimant.

We cannot agree that any asserted gaps in the chain of custody necessarily mandated the hearing officer to reject the test results. Chain of custody of a sample tested for drugs need not rise to the level required in criminal cases. In a workers' compensation case, failure to observe a chain of custody procedure will go to the weight and credibility, not the admissibility, of drug test results. March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785 (Tex. App.- Fort Worth 1989, writ denied). Texas Workers' Compensation Commission Appeal No. 982889, decided January 27, 1999 (Unpublished);Texas Workers' Compensation Commission Appeal No. 972195, decided December 10, 1997 (Unpublished). While the trier of fact should have sufficient evidence to assure the connection of the tested sample to the injured worker, that existed in this case through other testing indicative of electrocution as well as Mr. O's description of the procedures observed by the lab at S Hospital.

In reviewing the entire records here, we cannot agree that the hearing officer lacks sufficient support for her decision. She had the opportunity to observe the demeanor of the claimant while he denied any use of drugs. While it was asserted that there may have been confusion in identity with another person, little proof was offered to bolster this beyond what claimant said he "heard" while at the burn center (not the place where the urine sample had been drawn). The hearing officer could also consider the failure to follow safety procedures as bearing on whether the claimant had normal use of his faculties when the accident occurred. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge