

APPEAL NO. 000861

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 1, February 11, and February 28, 2000, to consider whether the claimed injury occurred while the respondent (claimant) was in a state of intoxication from the induction of a controlled substance, thereby relieving the appellant (carrier) from liability for compensation. The carrier disputes for insufficiency of the evidence the finding that at the time of the injury on _____, claimant had the normal use of his physical and mental faculties and the conclusion that because the claimed injury did not occur while claimant was in a state of intoxication, the carrier is not relieved of liability for compensation. Claimant's response urges the sufficiency of the evidence to support the challenged determinations. Claimant has also filed an appeal to call attention to the failure of the hearing officer's order to provide that he is entitled to both income and medical benefits under the 1989 Act. The file does not contain a response to claimant's appeal.

DECISION

Affirmed.

Claimant's appeal states that it is filed out of an abundance of caution to preserve error in the failure of the hearing officer's Decision and Order to provide for such income benefits as to which he may be entitled and that he was advised that a corrective order was requested by the hearing officer. With the file is an Order on Commission's Motion to Correct Clerical Error, dated April 26, 2000, which amends the hearing officer's order to state as follows: "Carrier is ordered to pay income and medical benefits in accordance with this decision, the Texas Workers Compensation Act, and associated rules." Accordingly, the Appeals Panel need not take further action on claimant's appeal.

Not challenged is the finding that on _____, both of claimant's legs were amputated while trying to unclog a cardboard baling machine. It is undisputed that this accident occurred on his first day of work for the employer who had assigned him to work as a temporary employee for (employer) at a trash disposal site.

The carrier has raised an intoxication defense to the claim. Section 406.032(1)(A) provides that an insurance carrier is not liable for payment of benefits if the injury occurred while the employee was in a state of intoxication. In the case of a controlled substance (Section 481.002, Health and Safety Code), as distinguished from alcohol, intoxication is the state of "not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of [the controlled substance.]" Section 401.013(a)(2). In an intoxication case, the sobriety of the injured employee at the time of the injury is presumed but when the carrier rebuts that presumption with probative evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated

at the time of the injury. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991.

Claimant testified that he attended a party on the Saturday night before the accident where he drank four or five beers, used a small amount of cocaine for the first time, and was in the presence of persons smoking marijuana; and that he had the normal use of his mental and physical faculties on _____. Concerning the accident, claimant explained that the cardboard jammed in a cardboard compacting and baling machine; that a coworker told him to get into the machine hopper with a bar and try to dislodge the jammed cardboard; and that while doing so, the machine activated and both his legs were amputated.

The carrier rebutted the presumption of claimant's sobriety by introducing the hospital laboratory report which analyzed a specimen of urine taken from claimant at the emergency room on the date of his accident. This report stated that claimant's urine was positive for the cocaine metabolite benzoylecognine at a level of 756 nanograms per milliliter (ng/ml) and for the marijuana metabolite THC at the detection limit of 50 ng/ml.

Mr. RC testified that he and claimant were roommates; that he was with claimant on the Saturday night before the accident (the following Tuesday) and claimant did not appear intoxicated; and that on Sunday morning claimant seemed normal. He further stated that on the morning of the accident, claimant's eyes, speech, walking, and comprehension were okay and that claimant showed no signs of intoxication and appeared to have the normal use of his mental and physical abilities.

Mr. A testified that on _____, he picked claimant up at 6:00 a.m. and drove him and Mr. RC to the employer's office so that they could be hired by the employer and assigned to work as temporary employees at the work site; that claimant completed the employment paperwork with no apparent difficulty; that at about 6:30 a.m. he drove them to the work site; and that he gave claimant a brief tour of the work site and introduced him to the supervisor, Mr. TC. Mr. A further stated that he noted nothing unusual about claimant's eyes, speech, gait, and comprehension and that he appeared to have the normal use of his mental and physical faculties. Mr. A also indicated he was familiar with some signs of cocaine intoxication and that claimant manifested none of them on the morning of his accident.

Mr. S, the employer's branch manager, testified that he processed claimant for employment on _____; that claimant completed the employment application and watched a safety video with no difficulty, took a safety quiz from a book (making a perfect score), and gave him no reason not to hire claimant.

Mr. FC testified that he was a heavy equipment operator at the work site; that before he finished his shift earlier on _____, he met claimant and Mr. RC; gave them

brooms and shovels; and instructed them to sweep up trash on a concrete slab and clean up behind it. Mr. FC stated that claimant did a good job and "acted normal."

Mr. TC testified that on the morning of the accident, he gave claimant his hard hat and safety goggles; that he talked to claimant several times, telling claimant what tasks to perform; and that claimant "seemed completely normal to me." He stated that claimant's eyes, breath, speech, behavior, walking, and following of instructions were all normal and that, in his opinion, claimant had the normal use of his mental and physical faculties.

Dr. S, the chief toxicologist for the (county), testified that her 1971 doctorate degree is in pharmacology and toxicology; that before assuming her duties in 1983 as the county's chief toxicologist, she was the toxicologist for a medical examiner in another state for nine years; that she has studied the nature of drugs, their effects on the body, their excretion rates, and so on; and that she has been accepted as an expert witness in both state and federal courts. Dr. S stated that no "free" cocaine was detected in claimant's urine and she characterized the amount of the cocaine metabolite detected as a "very low level." Over the carrier's objection, based on her lack of qualifications, Dr. S opined that "there was not sufficient cocaine in [claimant's] system at the time of the accident to have caused impairment." She stated that if claimant ingested cocaine on the Saturday evening before the accident, he would still be excreting the inactive metabolite but would not be impaired and would have the normal use of his mental and physical faculties. Concerning the marijuana metabolite finding, Dr. S stated that she could not comment on whether claimant was under the influence of marijuana at the time of the accident because marijuana has a very long excretion pattern so it would be difficult to tell when it was ingested. She further stated that claimant's blood level of tetrahydrocannabinol, the active ingredient, should have been tested and that claimant probably ingested the marijuana sometime within three weeks of giving his urine specimen. Dr. S further stated that she had read the report of Dr. K and disagrees with his opinion.

Dr. K testified that the finding of 750 ng/ml of benzoylecognine is "significant and well above the 150 ng/ml cutoff level and is indicative of impairment." In his opinion, claimant was impaired from cocaine and, to a lesser extent, from marijuana at the time of the accident. Dr. K further stated that Dr. S does not have the credentials to render an opinion on claimant's drug intoxication because she does "not carry a stethoscope around in her pocket," examine patients, and make diagnoses; and because she does not understand the concept of surrogate markers, has not worked for the FDA, and has not operated a drug testing lab under DOT standards. We find no error in the hearing officer's not sustaining the carrier's objection to Dr. S's opinion testimony for lack of qualifications. The carrier's objection went to the weight to be assigned to Dr. S's expert testimony, a matter for the hearing officer.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508

S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual determination of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could credit not only the testimony of those persons who observed claimant on the morning of the accident but also the expert evidence given by Dr. S. The hearing officer could also consider the lack of evidence to show the amount of cocaine and marijuana in claimant's bloodstream (and brain) at the time of the accident.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge