APPEAL NO. 001672

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 June 21, 2000. The hearing officer determined that the respondent (claimant) was injured on _____, and was not in a state of intoxication when he was injured. The hearing officer further found that the claimant had disability from his injury from _____, until the date of the CCH.

The appellant (carrier) appealed, arguing that the claimant has minimal injuries, at best, and that his inability to continue working was due to his termination for having cocaine in his system. The carrier argues that the claimant was, in fact, intoxicated when injured. There is no response from the claimant.

DECISION

We affirm.

The claimant said he was 39 years old. He had been employed since December 1999 as a trash collector for (employer). He said that his normal work hours were from 6:00 to 6:30 a.m. until 5:00 or 6:00 p.m. However, the claimant said that his accident happened at about 6:00 or 7:00 p.m. on the evening of _____. He said that he got inside the "hopper" in order to relieve himself and when the truck accelerated, he fell back. A witness helped him up and laid him down by the side of the road.

The claimant said he took Tylenol 3 with codeine that night and the next morning. He was sent to a doctor the next day by the employer. The claimant was told he was "busted on the inside" around his neck and lower back. (Medical records show cervical and lumbar strain.) He was taken off work for a little more than a week and sent back to work, but he then called his doctor to report that the trash was too heavy for him to lift. He worked one-half day.

A drug screen taken on _____ came back positive for cocaine. He was terminated for testing positive. The claimant contended that he was not "on drugs" at the time of the accident. However, he said that he had been "around" cocaine because he had been mixing and cutting it on January 30, 2000, for about six hours. He also said that he was unaware that he would be given a drug test if injured.

The claimant said he was on parole. He had not given the carrier the name of his parole officer because his parole officer had nothing to do with his work-related injury. Although apparently involved in processing the cocaine, he contended he did not take drugs. He said that random drugs tests were performed with respect to his parole.

Although the claimant said he had only worked about one-half day since the injury, there was no testimony concerning whether he was unable after his termination to obtain and retain employment due to his injury. The claimant's medical records show he was released with restrictions on _____ and 14, 2000. He then was treated by Dr. K, who prescribed therapy for six weeks, three times a week, beginning February 23, 2000. Dr. K maintained the claimant on restricted work until April 28, 2000, when he took him off work entirely.

The carrier's evidence was documentary. A drug screen indicates that it was only "positive" and if there is a limit shown on this test, it was not highlighted for the record. An unidentified consultant filed a report that Tylenol 3 would not cause a positive cocaine test result and that the presence of cocaine "could have" contributed to his accident. This reviewer noted the lack of a specified amount above the testing threshold on the drug screen report.

The carrier bears the burden of presenting evidence of intoxication at the time of the injury, as defined in Section 401.013. The burden of proof may then shift to a claimant to show that he had normal use of his faculties. The hearing officer in this case found that the claimant had normal use of his faculties at the time of injury. To present a "positive" drug screen test result without more merely gives the hearing officer a fact to weigh, with the risk of an outcome such as currently under appeal. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a).

An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The fact that the finder of fact may appear to believe evidence that another could find incredible is not the basis upon which we will reverse a decision. There is

sufficient support for his findings on all issues before him. We, accordingly, affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge