

APPEAL NO. 001939

Following a contested case hearing held on August 1, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant's (claimant) injury occurred while he was in a state of intoxication relieving the respondent (carrier) of liability to provide benefits. The claimant appeals, arguing that the hearing officer's finding of intoxication was contrary to the evidence. The carrier responds that the decision of the hearing officer was supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarizes the evidence in her decision and we adopt her rendition of the evidence. We will only briefly touch on the evidence most germane to the appeal. This includes the fact that the parties stipulated that the claimant sustained an injury in the course and scope of his employment on _____. The claimant described this injury as taking place when, 30 minutes after arriving at work, he lost his footing and fell approximately five to six feet. The claimant testified he injured his neck, back, and right shoulder in this fall.

The claimant was examined by Dr. R, who diagnosed right AC separation, grade-4, and right humeral head fracture. Dr. R performed a drug test on the claimant approximately one hour after the injury which was positive for cocaine metabolite at a level of 6926. Dr. H testified that this level of cocaine metabolite would result in intoxication depriving the claimant of the normal use of his physical and mental faculties. The claimant testified that he had never used cocaine and that he had the normal use of his physical and mental faculties at the time of his injury. The claimant introduced statements from two coworkers supporting his contention that he had the normal use of his physical and mental faculties at the time of his injury.

The claimant challenges the following findings of fact and conclusions of law in the decision of the hearing officer:

FINDINGS OF FACT

4. Claimant failed to meet his burden of proving that he had the normal use of his mental and physical faculties at all relevant time prior to and including the time of his injury on _____.
5. The Claimant failed to meet his burden that he was not intoxicated at the time of his injury on _____.

CONCLUSIONS OF LAW

3. The claimant injury did occur while the claimant was in a state of intoxication, as defined in the TEXAS LABOR CODE ANN. §401.013, from the introduction of a controlled substance, thereby the Carrier is relieved of liability for compensation.

Section 406.032(1)(A) 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(A)(2) defines intoxication as not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002, Health and Safety Code or a dangerous drug, as defined by Section 483.001, Health and Safety Code. In the present case the hearing officer makes it clear in her decision that she believed that the claimant had introduced cocaine into his body and that the carrier presented sufficient evidence of intoxication to shift the burden of proof to the claimant to show that he was not intoxicated. The claimant did not complain on appeal that the hearing officer improperly shifted the burden of proof and there was clearly sufficient evidence to overcome the presumption of sobriety. The case hinged on whether the claimant had the normal use of his physical and mental faculties at the time of his injury. This was factual determination and there was clearly conflicting evidence on this issue.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard we find no error. The claimant testified that he had the normal use of his mental and physical faculties and this was supported by the statements of his coworkers. Dr. H expressed the opinion that the level of cocaine that was shown by testing would deprive the claimant of the normal use of his physical and mental faculties. It was the province of the hearing officer to resolve the conflicts in the evidence.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge