APPEAL NO. 002199

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 August 8, 2000. The issues at the CCH were whether the respondent (claimant) had disability as a result of his injury of _____; and whether the claimed injury occurred while the claimant was in a state of intoxication. It was agreed at the CCH that the claimant sustained an injury to his head, mid to low back, and right lower extremity on _____, in the course and scope of his employment.

The hearing officer determined that the claimant was not in a state of intoxication at the time of his injury, and that he had disability for the period from January 6, 2000, until the date of the CCH.

The appellant (carrier) appeals and notes that while it was "unfortunate" that it did not have figures as to the level of cannabinoids in the claimant's blood, the mechanism of injury is self-evident proof of intoxication. The claimant responds that the evidence overwhelmingly supports the hearing officer's decision.

DECISION

We affirm the hearing officer's decision.

The hearing officer has summarized the pertinent evidence in a thorough way and we will incorporate this by reference with only a brief summary here. The claimant fell from a walkway up on a billboard on which he was working. The walkway broke under his weight. There was considerable testimony about the need to be “tied on” to a support cable or beam on the billboard while working, and the inference was raised that the claimant was not “tied on” at the exact moment he fell. However, there was also witness testimony that he was observed to be “tied on” in the seconds before he fell; that the billboard in question had a reputation for being unsafe, with insufficient places to “tie on”; and that no worker stayed “tied on” 100% of the time due to the need to move around. There was further testimony that the claimant had to move farther down one end of the billboard to signal a crane operator who was moving a board. The testimony from the two people with whom the claimant worked for four to five hours before the accident said that he had normal use of his faculties and did not appear abnormal in any way.

The claimant said that he smoked marijuana about two weeks before the accident and would only smoke it two or three times a year, when around others who were smoking. This smoking occurrence was before his vacation in December 1999. The employer's safety manager, who did not personally investigate the scene, said that through safety drug training, he learned that marijuana can still be detected in the bloodstream 30 days after use. It was his opinion, based on training he had received, that a person was intoxicated during this time. The safety manager said that there was a “zero tolerance” drug policy at the workplace but that the claimant had, in fact, been terminated for not being “tied on” when he fell.

The drug test report submitted by the carrier is striking in the lack of any measured level on the copy in evidence. It merely states "positive" next to "cannabinoid." Neither was any expert evidence presented by the carrier which would give a context to these bare test results in terms of whether the claimant had the normal use of his faculties at the time of the injury. Rather, as noted by the hearing officer, the carrier merely argued that the fact the claimant was not "tied on" (leaving aside conflicting evidence on this point) spoke for itself as to the claimant's state of mind at the time he fell.

The claimant said that while his back was fairly healed, he was still off work due to his head injury. He stated that he had memory problems, blurriness in his right eye, and headaches. He had not worked since the date of the accident, which resulted in a 30-day hospitalization.

We agree with the hearing officer's analysis that the burden of proof did not shift to the claimant but that, even if it did, he had proven that he had the normal use of his faculties. There is no presumed level of intoxication for marijuana exposure in Section 401.013. Therefore, the hearing officer was faced with analyzing whether the claimant had the normal use of his mental or physical faculties resulting from the introduction of marijuana into his body. There was no testimonial evidence that he had anything but the normal use of his faculties. Likewise, whether the claimant had the inability to work primarily due to his injury, as opposed to termination by the employer, was another fact call for the hearing officer to make.

Negligence is no bar to collection of workers' compensation. Section 406.031. We are disinclined to conclude from the fact that there may have been carelessness that led to an injury that the injured worker was also necessarily intoxicated. 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 in those cases where 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.). That is not the case here, and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge