APPEAL NO. 002529

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 October 4, 2000. With regard to the issues before him, the hearing officer determined that the respondent (claimant) was not intoxicated through the voluntary induction of a controlled substance at the time of his injury on _____ (all dates are 2000 unless otherwise noted), and that the claimant had disability from April 5 through the date of the CCH.

The appellant (carrier) appealed certain of the determinations, contending that the claimant tested positive for cocaine metabolites and that a toxicology report concluded that the claimant did not have "the normal use of his mental and physical faculties." The carrier also contends that statements from coworkers were insufficient to prove the claimant was not intoxicated. The carrier bases its appeal regarding disability on the fact that the claimant was intoxicated. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds, citing facts in his favor and urges affirmance.

DECISION

Affirmed.

The claimant was employed as a floor hand by a drilling service company (employer). The claimant arrived at work at about 7:30 or 8:00 a.m. on _____, worked with three coworkers, and after about an hour and a half was injured when a "joint of tubing" which had been screwed together came apart because of defective threads on the pipe and collar. A section of pipe fell, hitting the claimant on the side of his head and falling on his left leg. The hearing officer recites that the claimant "suffered a fracture in 22 places" (our review of the testimony only indicates nine places). It is relatively undisputed that the claimant sustained a severely comminuted fracture of the left femur and that the accident had nothing to do with what the claimant was or was not doing. An ambulance was called and the claimant was taken to the hospital. At some point in time, the claimant was given morphine for pain. A urinalysis performed at the hospital was positive for cocaine metabolites and opiates (the claimant had been given morphine). The hospital lab specimen was sent to a clinical laboratory for further analysis.

A laboratory report dated April 27 showed positive for cocaine metabolites at 1340 nanograms per milliliter (ng/ml). The laboratory report was labeled:

> Specimen analysis was performed without chain of custody handling. These results should be used for medical purposes only and not for any legal or employment evaluative purposes.

Dr. K, a medical toxicologist, in a report dated June 15, discusses his qualifications and how "gas chromatography/mass spectrometry" (GC/MS) works; states that the "cut off level" of cocaine metabolites is 150 ng/ml; that drug abusers "do not tell the truth about their addictions"; that lay observations of drug intoxication are unreliable; and concludes that the claimant was intoxicated using GC/MS testing and applying the definition of Section 401.013(a)(2) using GC/MS testing. Dr. K, in his report, does not say how he arrived at that conclusion or discuss how long after ingestion cocaine metabolites remain in the system and to what degree.

Other factors that were presented to the hearing officer were that the claimant was on federal probation for marijuana possession, which included spot drug tests; that the claimant had tested "clean" on February 2 (and June 9); and that present at the same time of the accident was an independent contractor and the "company man" (a manager for the oil company which employed the employer to do the drilling), who had the authority to fire personnel. Also in evidence were statements from the three coworkers on the drilling rig indicating that the claimant "never acted in a way that indicated he was on drugs." The claimant testified that he did not know how the urine sample tested positive for cocaine metabolites (denied use).

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.

In this case, the hearing officer found that the evidence was insufficient to overcome the presumption of sobriety and shift the burden to the claimant to prove that he was not intoxicated at the time of the injury. The hearing officer, in his brief recitation of the evidence, does not indicate why he so found; however, questioning during the CCH indicated that the initial hospital drug screen only showed a positive test without specific figures and the laboratory results with figures had the disclaimer that there was no chain of custody and the results "should be used for medical purposes only and not for any legal or employment evaluative purposes." The hearing officer could also consider the lack of evidence to show the amount of cocaine in the claimant's bloodstream (and brain) at the time of the accident, or shortly thereafter.

In the alternative, the hearing officer found that if the burden had shifted to the claimant, then the claimant "proved by a preponderance of the evidence that he was not intoxicated at the time of the accident." In so finding, the hearing officer obviously gave

greater weight to the statements of the claimant's coworkers and the inferences that the "company man" would have halted the operation if he had seen anything untoward rather than to Dr. K's report. 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).

In that we are affirming the hearing officer's decision that the claimant was not intoxicated, we also affirm the determinations regarding disability.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge