APPEAL NO. 002824

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 16, 2000. The hearing officer held that the respondent's (claimant) stipulated injury was compensable and that the claimant was not in a state of intoxication when injured. He found that the claimant had disability from July 22 through September 19, 2000, when he returned to work.

The appellant (carrier) has appealed, arguing that the hearing officer erred by rejecting its expert's testimony on intoxication. The claimant recites evidence in favor of affirmance.

DECISION

We affirm the hearing officer's decision.

The claimant was employed as a foreman by (employer). He fell down some partially completed stairs on _____, sustaining multiple injuries. These facts were not disputed by the carrier.

The claimant testified that earlier that morning, his supervisor felt ill and left him in charge of assigning and coordinating work on the site. He also testified as to two other face-to-face discussions he had with supervisors that morning. Finally, the claimant presented an unsworn statement from a coworker with whom he worked that day. Although the handwriting in the statement was in a different script from the signature, no objection was made to the statement. The text of the statement indicates that the claimant appeared and acted normally. When the claimant was taken for medical treatment, he voluntarily gave a urine sample, and said he felt he would have had nothing to hide. The test was performed within two hours after the accident. The results tested at 1420 ng/ml. of THC (marijuana metabolites). The screening cutoff was shown at 50 ng/ml.

The claimant said he had attended a birthday party the previous Saturday night where THC marijuana was in use, and that he "may have" smoked some, although he could not recall how much because he also had a lot of alcohol to drink. He denied that he had used marijuana on more than a very occasional basis.

Dr. K testified and set out the credentials he had in the specialty area of medical toxicology, encompassing 22 years. He said that he was considered a national expert. Dr. K said that the tested level was very high, more than one would expect after smoking a single joint, and not consistent at all with mere passive exposure. He said that at 100 ng/ml, a person would be five percent impaired. Dr. K said that the impairment would be delayed cognition of recent memory or reaction time, which would be fairly uniform although manifested differently in individuals. Dr. K refrained from using the term "intoxicated" when asked if the claimant was in that state; he said that intoxication as a

term referred more properly to alcohol. When Dr. K was asked if it would be possible for individuals to observe normal behavior in a person with the claimant's tested level of metabolites, Dr. K responded in two ways: that effects of various substances would manifest differently so that a layperson would not necessarily recognize a drug-impaired person as intoxicated in the same way that an alcohol-impaired person could be identified, and that regardless of such observations, the laboratory tests should take precedence. He compared this to the situation where the lab results would identify a person who drank at a certain level as intoxicated regardless of how they appeared.

The hearing officer asked the doctor to verify if it were true that marijuana would remain at a high level for some period after the initial use. Dr. K stated that such considerations were "irrelevant." He did, as the hearing officer stated, refuse to answer questions posed to him about how long after smoking marijuana that a level as high as the claimant's would still be indicated. The clear import of Dr. K's testimony on this question was that as long as the claimant had a test result of 1400 ng/ml, it would not matter how long ago he had smoked it.

As we have pointed out in the past, the definition of "intoxication," such that a carrier will be relieved of liability for an on-the-job injury, is different for alcohol and other substances. Intoxication is effectively "deemed" at a certain tested concentration for alcohol only. Notwithstanding Dr. K's assertion that laboratory results should always take precedence over evidence of a person's conduct, the legislature has not so provided for other controlled substances, dangerous drugs, or inhalants. Any exposure to these substances must also result in not having "the normal use of mental or physical faculties" as a result of introduction of such substance into the body.

We cannot credit one of the reasons that the hearing officer cites for rejecting Dr. K's opinion: that Dr. K's opinion is less persuasive because he failed to explain the basis for his opinion that the claimant's tested level of metabolites was "high." Dr. K stated what the cutoff for testing and experiencing some impairment was (100 ng/ml). He also said that a 1400 level was higher than smoking a single joint. An expert who cites, as does Dr. K in his report, that he has 22 years of experience in the field as well as special-related training and certifications may reasonably be held to be opining on the basis of such experience and training. In our opinion, Dr. K sufficiently explained why he would consider the claimant's tested level in the high range.

However, we do agree that expert opinion as to the duration of metabolites in the body after exposure is important information for assessing 1) how recently a person was exposed to the intoxicating substance and 2) the credibility of evidence about normal use of mental and physical faculties. Such information lends an important context to interpreting bare test results. Without such information, the hearing officer is left free to believe and credit testimony and evidence indicating that the claimant had the normal use of his faculties on the day of the accident. Thus, the hearing officer's first cited reason for rejecting Dr. K's testimony is the one which supports the hearing officer's weighing of the evidence in this case.

Finally, although an expert who testified as to a person's "impairment" could reasonably be interpreted as saying that the person did not have the normal use of his mental and physical faculties, this testimony, in conjunction with Dr. K's insistence that the laboratory results would take precedence over observations of others, could well have persuaded the hearing officer that Dr. K was not aware of the different treatment of alcohol intoxication and drug intoxication under Section 401.013.

High-tested levels of drugs in an injured worker's system soon after an accident should always be considered seriously by the trier of fact; employers are required, after all, to have drug abuse policies in place and are subject to sanction from the Texas Workers' Compensation Commission if they do not. Sections 411.091 and 411.092. But the trier of fact is also obligated to review evidence beyond laboratory results for non-alcoholic substances. While different inferences could have been drawn in this case, the hearing officer's decision is not so against the great weight and preponderance of the evidence so as to compel our reversal. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Therefore, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge