APPEAL NO. 002846

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on November 16, 2000, resolved the sole disputed issue at the hearing by finding that at the time of his on-the-job injury on _____, the appellant's (claimant) voluntary use of one or more controlled substances deprived him of the normal use of his mental and/or physical faculties and by concluding that he was intoxicated at the time of his on-the-job injury. The claimant appeals, asserting that his testimony and that of two coworkers met his burden to prove that he had the normal use of his mental and physical faculties at the time of the injury; that the opinion of medical toxicologist Dr. K, upon which the hearing officer relied, refers to the subtlety of the signs of drug-induced impairment which may not be detected by lay persons; and that "subtle impairment" is not the standard for intoxication. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged determination.

DECISION

Affirmed.

It was not disputed that the claimant's left thumb was severely injured on _____, when he crawled beneath a conveyor belt on a rubber baling machine to clear a piece of rubber without first going to a nearby switch and turning the machine off; and that the drug screen test of his urine specimen, obtained at the emergency room approximately three hours after the injury, was positive for both marijuana and cocaine metabolites. The claimant does not contend that there was insufficient probative evidence of drug intoxication to rebut the presumption of his sobriety and shift the burden to him to prove that he had the normal use of his mental and physical faculties. *See* Texas Workers' Compensation Commission Appeal No. 992886, decided February 4, 2000, and Texas Workers' Compensation Commission Appeal No. 000267, decided March 23, 2000. However, he does contend that his testimony and that of two coworkers established his sobriety.

The claimant testified that he is 38 years of age and has used cocaine since his college days; that he snorted from two to five lines of cocaine at a party on July 19, 1999, which extended into the early morning hours of July 20, 1999; and that a little more than 24 hours passed before he went to work at 5:30 a.m. on _____. He contended that he had the normal use of his physical faculties at the time of the accident. He also stated that coworkers routinely cleared the conveyor, as he did, without shutting it down though he conceded that shutting the conveyor down would be the safest procedure. The claimant also presented the testimony of a coworker who said he noticed nothing unusual about the claimant on the day of the accident and that the claimant appeared to have the full use of his faculties.

According to Dr. K's report and testimony, after an initial drug screen test reflected the presence of cocaine and marijuana metabolites in the claimant's urine specimen,

confirmatory testing for the cocaine metabolite, with a cutoff level of 150 nanograms per milliliter (ng/ml), revealed the presence of more than 2000 ng/ml of the cocaine metabolite. It also revealed the presence of 22 ng/ml of the marijuana metabolite which Dr. K did not consider in reaching his conclusions. Dr. K indicated that the claimant's cocaine metabolite level was more than 10 times the screening cutoff level and that a person with that amount of the metabolite would be impaired and not have the normal use of his or her mental and physical faculties. He also said that signs of such impairment can be subtle, that persons do not need to "look" intoxicated to be impaired, and that he would not expect untrained persons to be able to detect cocaine intoxication. Dr. K's report concluded that the claimant did not have the normal use of his mental or physical faculties.

Intoxication, if proven, is an exception to the liability of the carrier. Section 406.032(1)(A). Intoxication is defined as not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage, a controlled substance, or a controlled substance analogue. Section 401.013(a)(2). Whether a claimant was intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995. 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)). We are satisfied that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge