APPEAL NO. 002980

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 December 8, 2000, the hearing officer resolved the two disputed issues by determining that the respondent (claimant) sustained a compensable injury on _____, and that the injury did not occur while the claimant was in a state of intoxication from the induction of a controlled substance. The appellant (carrier) appeals, asserting that the hearing officer erred by finding that the claimant sustained a compensable injury on _____; by improperly shifting to the carrier the burden to prove the claimant's intoxication; and by admitting the report of Dr. S as "expert" evidence. The claimant's response counters that the evidence of the claimant's injury at work is uncontroverted; that the carrier failed to introduce sufficient, probative evidence of intoxication to shift to the claimant the burden of proving his sobriety at the time of the injury; and that even if the burden of proof was shifted from the carrier to the claimant, the claimant satisfied that burden.

DECISION

Affirmed.

The claimant, who worked as a warehouseman for the employer before his employment was terminated, testified that he smoked marijuana on Sunday, August 13, 2000, but felt no lingering effects by _____; that his 12-hour work shifts then started at 7:30 p.m. and ended at 7:30 a.m.; that at around 1:00 a.m. on _____, while tying some boxes together with string, the ring knife he wore on a right-hand finger and used to cut string slipped to the side and cut his right hand as he pulled the string ends tightly together. He said a supervisor drove him to a hospital for treatment and while there he submitted a urine specimen for drug screening. The hospital records reflect that a laceration on the back of the claimant's hand was sutured. The report of the drug test results reflects that the claimant's specimen was positive for marijuana with an "initial test level" of 50 ng/ml and a "confirmatory test level" of 15 ng/ml level. The carrier indicated at the hearing that it was disputing the injury so that it could raise the intoxication exception to liability. *See* Sections 406.032(1)(A) and 401.013(a)(2). The evidence that the claimant cut his hand at work on _____, is unrefuted and the hearing officer's determination that the claimant sustained a compensable injury on that date is sufficiently supported by the evidence and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

In his written statement, Mr. V, a coworker, stated that he was with the claimant all day on _____, until the claimant left for work and that the claimant was not under the influence of any drugs or alcohol. In his written statement, Mr. B, a coworker, stated that he drives the claimant to and from work, that he has not noticed any drug or alcohol use by the claimant, and that on the day of the accident the claimant was not under the influence of any type of drug or alcohol and his work performance was not abnormal.

Over the strenuous objection of the carrier (grounded on lack of foundation, competence, speculation, and relevance) the hearing officer admitted the October 25,

2000, report of Dr. S, a chiropractor, who stated that he had reviewed the drug test report; that the report did not assign a "value" to the claimant's "positive" test when, normally, there is "an indication of the level of toxicology found in the sample"; that he questioned the ability to judge the claimant's diminished mental and physical capacity without knowing the values; that he has had similar cases in the past as well as contact with both medical doctors and chiropractors on this matter; and that the level of this test is very important and that without it, it is his opinion that no one can determine whether there could have been any effect on the normal use of the claimant's mental or physical faculties.

In his report of October 11, 2000, Dr. H stated that he reviewed the records and it is possible the claimant actively used marijuana prior to, at the time of, or surrounding the reported incident; that the claimant's use of marijuana would be inconsistent with his ability to work safely; and that it is at least 51% possible that the illegal medication consumed by the claimant "surrounding the incident would influence at the very least in part [his] ability to work safely." Dr. H testified at the hearing on direct examination that the confirmed level of the marijuana metabolite was 15 ng/ml, which indicates active, not passive, use; that intoxication is a "spectrum" and that the claimant was within the spectrum; and that the claimant's intoxication was a "very real possibility" and a "reasonable conclusion." However, upon examination by the hearing officer Dr. H stated that he could not determine how recently the claimant had used marijuana; that without knowing the claimant's "upper level" of marijuana and having information about his behavior, he could not state that the claimant was intoxicated beyond a possibility; and that if the facts were that the claimant used marijuana on August 13, 2000, and did not thereafter use it before his accident on _____, and if his test resulted in a confirmed marijuana metabolite level of 15 ng/ml, then he could not make a statement about intoxication. It is not clear from his testimony whether Dr. H was saying that 15 ng/ml is the confirmatory test cut-off level or the actual level of the metabolite in the claimant's specimen.

The sobriety of a claimant at the time of injury in the workplace is presumed but once a carrier adduces probative evidence of intoxication, the burden shifts to the claimant to prove sobriety. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. However, the Appeals Panel, while recognizing that scientific reports and expert testimony may be sufficiently probative to raise the issue of intoxication, has noted that more is required of such evidence than raising a "possibility" of, or "suggesting," intoxication. Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992. While the hearing officer's findings of fact are not a model of clarity in terms of the burden shifting, we believe a fair reading of the entirety of the hearing officer's decision reflects that he found the carrier's evidence insufficient to shift the burden to the claimant to prove his sobriety. 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 his factual determinations are 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).

Finally, we find no reversible error in the hearing officer's admission of Dr. S's report. The carrier contended that Dr. S, as a chiropractor, was utterly lacking in qualifications to render an opinion on the issue of the claimant's intoxication. Dr. S's relative qualifications as an expert go to the weight and credibility of his opinion, not to the admissibility thereof. Conformity to legal rules of evidence is not necessary in a contested case hearing. Section 410.165(a).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge