APPEAL NO. 010191

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 January 10, 2001. With regard to the issues before him, the hearing officer determined 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 and that the appellant (carrier) is not relieved from liability for compensation. The hearing officer further found that the claimant had disability beginning July 20, 2000, and continuing through January 10, 2001.

The carrier appeals the hearing officer's determinations on both issues based on insufficiency of the evidence. The claimant filed a response urging the Appeals Panel to affirm the decision of the hearing officer.

DECISION

Affirmed.

The claimant was employed as a helper on an assembly line boxing iron for trampolines. The claimant was tasked to load filled boxes onto the fork lift, operated by his supervisor. On _____, after the claimant had been at work about an hour, the supervisor lowered the forklift onto the claimant's foot, causing an injury. After he was taken to the hospital, the claimant was asked to provide a urine sample.

The claimant's urine drug screen tested positive for cocaine metabolites. The claimant testified that the sample had been switched, citing evidence of one transposed number of his social security number on the label of the container. The carrier introduced the results of the drug screen as well as expert analysis of the results, in the form of a report from Dr. K, stating that the test showed nine times the cut-off rate of cocaine metabolites which demonstrated that the claimant was intoxicated at the time of his injury. (The claimant tested positive at 1,376 nanograms/milliliter (ng/ml)). The claimant introduced evidence that the medical personnel at the hospital had released him back to work on the same day. The claimant also introduced a signed "statement" by a coworker and the supervisor indicating that they did not believe the claimant was intoxicated at the time of his injury.

It is undisputed that the claimant incurred an injury on _____. The evidence is conflicting whether the claimant was intoxicated at the time of the incident. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

An insurance carrier is not liable for compensation if an employee's injury occurred while he was in a state of intoxication. Section 406.032(1)(A). The type of intoxication the carrier alleges here is defined in the 1989 Act in Section 401.013(a)(2)(B) as the state of "not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002, Health and Safety Code." Appeals Panel decisions have held that an employee is presumed sober at the time of any injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier may rebut the presumption of sobriety by introducing "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 000861, decided June 7, 2000. Once the carrier has rebutted the presumption, the employee has the burden of proving he was not intoxicated at the time of the injury. *Id.*

Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer commented that it was "inconceivable" that the medical personnel at the hospital would have released him back to work on the same day of his accident, if he had been intoxicated. The hearing officer evidently found that evidence more compelling than that of Dr. K, because the hearing officer determined that the toxicology report was "highly suspect" and "a positive drug test does not, in itself, compel a finding of intoxication at the time of the accident."

Upon review of the record submitted, we find no reversible error and will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

The hearing officer's decision and order is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Phillip F. O'Neill
Appeals Judge