

APPEAL NO. 011429  
FILED AUGUST 7, 2001

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 June 7, 2001. In response to the only issue before him, the hearing officer determined that respondent 1 (claimant) was not intoxicated on \_\_\_\_\_, when he sustained certain injuries.

The appellant (carrier) appealed, on a sufficiency of the evidence basis, arguing that the hearing officer improperly kept the burden on the carrier to prove intoxication, and that lay witnesses are not required to know the symptoms of cocaine intoxication. The file does not contain a response from either the claimant or respondent 2 (subclaimant).

DECISION

Affirmed.

The claimant was employed by a employer. At about 10:00 a.m. on Friday August 11, 2000, the claimant walked through some floor stripping, slipped, and fell, injuring his head and left wrist. Mr. D, the employer's owner, was present and witnessed the fall. Mr. D's wife took the claimant to the subclaimant's medical facility, where the claimant was treated and gave a urine sample that tested positive for cocaine metabolite. The sample was collected at 2:35 p.m. Further drug screening showed a level of 564 nanograms per milliliter (ng/ml). The claimant admitted using a "dime" (which claimant said was a "very little amount") of cocaine two days prior to \_\_\_\_\_. A medical report by Dr. K, which indicates he is an internal medicine specialist, in response to the question of whether the claimant "was impaired at the time of injury," stated that he "presumes that the specimen was collected at the time of the injury" and that the "mechanism of injury was not provided, but cocaine is well known to effect concentration, cognition, and performance." The claimant testified that he was not intoxicated, that he had the normal use of his faculties, and that he had been working with Mr. D for a period of time before his fall. Mr. D, in a transcribed statement, stated that the claimant looked "kind of funny" but he did not "pay too much attention."

The hearing officer in his Statement of the Evidence considered all the evidence and, while not citing specific sections of the 1989 Act, clearly considered the appropriate provisions of Sections 406.032(1)(A) and 401.013(a)(2)(B) in giving his rationale why he found that the claimant was not intoxicated, as defined in Section 401.013(a)(2), at the time of the alleged injury. The carrier challenges the hearing officer's decision by stating that the hearing officer improperly kept the burden on the carrier to prove intoxication. We disagree. The hearing officer was merely commenting on the carrier's exhibit (Dr. K's report) in stating that it "offered only text-book generalities" and that Dr. K, according to his signature block, was only board certified in internal medicine. We do agree with the carrier that there is "no requirement . . . that . . . lay witnesses know the symptoms of intoxications," but we view the hearing officer's comments on the evidence as just that, comments on the evidence. In that

regard, the hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), 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)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them 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).

The decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Robert W. Potts  
Appeals Judge