APPEAL NO. 012269
FILED NOVEMBER 14, 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 (CCH) was held on August 13, 2001, with the record closing on August 14, 2001. The hearing officer determined that the respondent (claimant) was not in a state of intoxication when the claimed injury occurred; that the appellant (self-insured) waived its right to dispute compensability of the claimed injury by not contesting it in accordance with Section 409.021(c); that as a result of the injury sustained on _____, the claimant had disability from May 19, 1998, through the date of the CCH; and that the self-insured is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation within one year of the date of injury. The self-insured contends on appeal that these determinations are not supported by the evidence and are against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

INTOXICATION

The evidence reflects that the claimant was injured at work on the evening of _____. He was transported to the hospital where a urine sample was taken to detect the presence of drugs and/or alcohol. There was conflicting evidence presented regarding the chain of custody of the urine sample after it was provided by the claimant. The sample was subsequently analyzed and was positive for the presence of cocaine at a level of 21,126 ng/ml. The laboratory report gives a cutoff level for cocaine of 300 ng/ml, while Dr. K, opines in his report that the cutoff is 150 ng/ml. In either event, the results of the sample exceed an acceptable cutoff level.

A claimant has the burden of establishing that a compensable injury was sustained. An insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 406.032(1)(A). Section 401.013 defines intoxication and subsection (a) provides:

In this subtitle, "intoxication" means the state of:

(1) having an alcohol concentration as defined by Section 49.01, Penal Code, of 0.10 or more; or

(2) not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of:

(A) an alcoholic beverage, as defined by Section 1.04, Alcoholic Beverage Code;

(B) a controlled substance or controlled substance analogue, as defined by Section 481.002, Health and Safety code;

(C) a dangerous drug, as defined by Section 483.001, Health and Safety Code;

(D) an abusable glue or aerosol paint, as defined by Section 485.001, Health and Safety Code; or

(E) any similar substance, the use of which is regulated under law.

Section 401.013 does not define intoxication resulting from the ingestion of cocaine, a controlled substance, in terms of a specific amount found in a drug test, contrary to the definition of alcohol intoxication, which does set a specific amount. The standard used to define intoxication resulting from the use of a controlled substance is whether a claimant had the normal use of his mental or physical faculties. The Appeals Panel has noted that courts have held that a claimant need not prove he was not intoxicated as there is a presumption of sobriety but that when a carrier presents probative evidence of intoxication, raising a question of fact, the claimant then has the burden to prove he was not intoxicated at the time of injury. Texas Workers' Compensation Commission Appeal No. 951373, decided September 28, 1995. We have observed that while a positive drug test, such as in this case, can shift the burden of proof to the claimant, it does not, in and of itself, compel a finding of intoxication at the time of injury. Texas Workers' Compensation Commission Appeal No. 941099, decided September 30, 1994.

Here, when the carrier came forward with evidence of the positive drug test for cocaine, the claimant presented evidence on his behalf to show that he was not intoxicated. This evidence consisted of his own testimony that he has never used cocaine and witness statements, including coworkers and EMT's, that the claimant was not known to use drugs, did not act out of the ordinary or unusual at work in the hours before the injury, and acted appropriately under the circumstances following the injury. The hearing officer notes in his decision that due to the conflicting evidence relating to the chain of custody of the urine sample, he was skeptical of the validity of the laboratory drug report and Dr. K's report, which was based on the laboratory report, and was not persuaded that it established that the claimant was intoxicated at the time of the injury.

Whether the claimant had the normal use of his mental or physical faculties at the time of the injury was a fact question for the hearing officer. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084,

decided February 28, 1995. As an appeals tribunal, the Appeals Panel is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and 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). We conclude that the hearing officer's decision in favor of the claimant on the intoxication issue is supported by sufficient evidence.

DISABILITY

Disability is likewise a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. "Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant bears the burden of establishing that a compensable injury was a producing cause of his disability. Under the facts of this case, we do not perceive error in the hearing officer's resolution of the disability issue.

WAIVER OF RIGHT TO DISPUTE COMPENSABILITY OF INJURY

A carrier or self-insured is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). The self-insured does not dispute that it received notice of the claimant's injury on May 13, 1998. The self-insured contends that it filed the Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation (Commission), via facsimile on June 2, 1998. In support of this contention, the self-insured points out that Commission records reflect that an electronic transmission was received by the Commission on the same date. Although the records indicate that a transmission was received by the Commission on June 2, 1998, it was the Notice of Injury (TWCC-1) which was received, not the TWCC-21 as alleged by the self-insured. The evidence reflects that the TWCC-21, which is dated June 1, 1998, was filed with the Commission on September 1, 2000. We are satisfied that the evidence sufficiently supports the hearing officer's determination that the self-insured waived its right to dispute compensability of the injury by not doing so within 60 days after receiving notice of the injury.

TIMELY FILING OF CLAIM FOR COMPENSATION

Section 409.004 provides that the failure to file a claim for compensation with the Commission as required by Section 409.003 (not later than one year after the date of injury) relieves the employer and the carrier of liability unless good cause exists for failure to timely file a claim or the employer or the carrier does not contest the claim. The self-insured urges on appeal that the hearing officer erred in considering whether it timely raised the issue of the claimant's failure to file a claim for compensation within one year.

In the Statement of Evidence, the hearing officer explains that the Appeals Panel has previously stated that the issue of a late-filed claim must be raised by a self-insured within a reasonable time after receiving notice of the claim. Texas Workers' Compensation Commission Appeal No. 950613, decided June 8, 1995, Texas Workers' Compensation Commission Appeal No.962230, decided December 20, 1996. We perceive no error in the hearing officer's consideration of this issue as it is germane to the overriding issue of whether the self-insured was relieved from liability because of the claimant's failure to timely file a claim for compensation within one year. Nothing in our review of the evidence indicates that the hearing officer's determination in favor of the claimant on this issue is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The decision and order of the hearing officer are affirmed.

The true corporate name of the self-insured is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

C. T. CORPORATION
811 DALLAS AVENUE
HOUSTON, TEXAS 77002.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge