APPEAL NO. 032268
FILED OCTOBER 15, 2003

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 July 24, 2003. With regard to the only issue before her the hearing officer determined that the appellant's (claimant) injury occurred while he was in a state of intoxication as defined in Section 401.013 and, thus, the respondent (carrier) was relieved of liability for compensation. In his appeal, the claimant argues that the hearing officer erred in determining that he was intoxicated at the time of his injury. In its response, the carrier urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained an injury in the course and scope of his employment on _____. The claimant was working in a ditch where cement drainage pipe was being laid. The pipe became dislodged from the chain that was being used to lower it into the ditch and struck the claimant on his low back and legs. The claimant was taken from the job site to the emergency room. A urine sample was collected at the emergency room within two or three hours after the injury. The drug screen was positive for cocaine metabolite and a quantitative gas chromatography/mass spectrometry (GC/MS) confirmation testing revealed a cocaine metabolite level of 26,720 ng/ml. Dr. K, a toxicologist who conducted a records review for the carrier and testified at the hearing, opined that, based on the "immense" concentration of cocaine metabolite in the claimant's urine sample, the claimant was intoxicated within the meaning of Section 401.013. The claimant presented testimony from Dr. R, a pathologist. Dr. R testified that he had "serious questions" about the reliability of the urinalysis report and the reported levels. Dr. R explained that when the reported 26,720 ng/ml level is considered in light of the half life of cocaine, the claimant would have to have had a cocaine level at the time of the injury that was in the range of extreme danger or death. The claimant sought to show that he had the normal use of his mental and physical faculties at the time of the injury through his testimony and statement of his supervisor.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication in Section 401.013(a) includes 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. The law presumes that a claimant was sober at the time of an injury; however, the carrier can, with probative evidence of intoxication, rebut this presumption and shift the burden to the claimant to prove that he was not intoxicated. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. In this instance, the positive drug screen taken in the hospital

after the accident, the quantitative testing establishing the 26,720 ng/ml metabolite level, and the opinion from Dr. K are sufficient to shift the burden to the claimant to prove that he was not intoxicated. Thus, the hearing officer did not err in shifting the burden to the claimant to show that he had the normal use of his mental and physical faculties at the time of his injury. The claimant attempted to do so through his own testimony, the testimony of Dr. R, and his supervisor's statement, which the hearing officer was free to accept or reject. Nothing in our review of the record reveals that the hearing officer's determination that the claimant did not have the normal use of his mental and physical faculties at the time of his injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the hearing officer's intoxication determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Although another fact finder may have drawn different inferences from the evidence, which would have supported a different result, that fact does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Chris Cowan
Appeals Judge