APPEAL NO. 040004
FILED FEBRUARY 25, 2004

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 December 11, 2003. The hearing officer determined that the respondent (claimant) was not intoxicated at the time of the _____, injury and that he had disability, resulting from the compensable injury, beginning on June 17, 2003, and continuing through the date of the hearing. The appellant (carrier) appeals and there is no response from the claimant in the appeal file.

DECISION

Affirmed.

An insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 406.032. Section 401.013(a)(2) defines intoxication as 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 or a dangerous drug, as defined by Section 483.001, Health and Safety Code. 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 evidence of intoxication, 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.

Whether the claimant had the normal use of his mental or physical faculties at the time of the accident, thereby making the work-related injury compensable, and whether he had disability were factual questions for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995, citing prior Appeals Panel decisions, stated that lay evidence as to the claimant's faculties while at work was admissible. A disability determination can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record indicates that the hearing officer's decision is 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). We perceive no error in the hearing officer's failure to make an explicit finding that based on the positive drug screen in evidence, the burden of proof shifted to the claimant to prove that he was not intoxicated at the time of injury. It is clear from the hearing officer's decision that he analyzed the facts as though the burden had shifted and concluded that the claimant established that he was not intoxicated at the time of the injury.

The decision and order of the haring officer are affirmed.

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

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Margaret L. Turner
Appeals Judge