

APPEAL NO. 040152
FILED MARCH 1, 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 2, 2003. The hearing officer determined that the appellant (claimant) was intoxicated at the time of his on-the-job injury of _____; that the respondent (carrier) waived its right to dispute the compensability of the claimant's on-the-job injury of _____; and that the claimant did not have disability. The claimant appealed the hearing officer's intoxication and disability determinations based on sufficiency of the evidence grounds. The carrier responded, urging affirmance. The hearing officer's carrier waiver determination was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed.

The claimant testified that on _____, while performing his duties as a truck driver he stopped the truck on the side of the road and got out of the truck to evaluate the traffic conditions. As the traffic began to move, the claimant attempted to climb back into his truck and he slipped and fell to the ground. The claimant testified that he injured his left testicle, right knee, both ankles, and chin. The claimant contends that he does not remember events after his injury, specifically taking two drug tests at a police station and hospital. The claimant stated that he has not worked since the date of accident because of his injury. The carrier contends that the claimant was intoxicated at the time of the injury as evidenced by a police report and a drug test performed on _____, that reflects benzodiazepines and opiates were detected. The claimant contends that he was taking prescribed medication and that he was not intoxicated at the time of injury.

Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury. For purposes of this case, intoxication is defined as not having the normal use of mental or physical faculties from the voluntary introduction of a controlled substance into the body. See Section 401.013(a)(2)(B). Section 401.013(b)(1) provides for an exception for drugs "taken under and in accordance with a prescription written for the employee by the employee's doctor." The hearing officer commented that Section 401.013(b)(1) did not apply to this case, because at the time of the accident the claimant was in possession of his wife's prescribed medication for Xanax, rather than the medication prescribed for the claimant. An employee is presumed to be sober at the time of an injury, but if the carrier introduces probative evidence of intoxication raising a question of fact, the burden then shifts to the employee to prove nonintoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. In the instant case, the hearing officer was persuaded by the police officer's reports that the claimant was

intoxicated at the time of his on-the-job injury on _____. The hearing officer discounted the claimant's testimony that the use of prescribed medication did not deprive him of the normal use of his mental and physical faculties, or that his disorientation at the time of the accident was due to his injuries. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, the hearing officer's decision that the claimant was intoxicated at time of the on-the-job injury of _____, is supported by the evidence. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We note that even though we are affirming the hearing officer's intoxication determination, the claimant sustained a compensable injury by operation of law because the carrier waived the right to contest compensability of the injury thereby losing its right to assert an intoxication defense under Section 406.032(1)(A). See Texas Workers' Compensation Commission Appeal No. 030663-s, decided May 1, 2003.

The claimant had the burden to prove that he had disability as defined by Section 401.011(16). There was conflicting evidence presented on the issue of disability. The medical records of the treating doctor (for another injury) consistently document that the claimant was working full time in his lawn service business. Although the claimant denied that he was working in the lawn service business during the period in question, the hearing officer could 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). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer commented that the claimant did not meet his burden of proof on the issue of disability, as evidenced by the medical reports stating that the claimant was working in the lawn service business. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

The claimant asserts that the hearing officer did not consider all the evidence in determining intoxication. Our review of the record does not indicate that was the case. The hearing officer detailed in her discussion the evidence with regard to intoxication and explained the rationale for her decision. We perceive no error.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge