APPEAL NO. 041674
FILED SEPTEMBER 2, 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 (CCH) was held on June 9, 2004. The hearing officer determined that the respondent/cross-appellant (claimant) was not in a state of intoxication due to a controlled substance on _____; that the claimant sustained a compensable injury to his right shoulder that extended to include headaches and an injury to the cervical spine but did not extend to or include a lumbar spine injury; and that the claimant had disability from December 17, 2003, through the date of the CCH.

The appellant/cross-respondent (carrier) principally appealed the determination that the claimant was not intoxicated contending that it should be relieved of liability for the claimed injury. The claimant appealed the determination that the compensable injury did not include the lumbar spine. Both parties responded to the other's appeal urging affirmance on the issues on which they prevailed.

DECISION

Affirmed.

The primary issue in this case is whether the claimant was intoxicated as a result of marijuana use at the time of his injury. The claimant testified, and the hearing officer found, that the claimant, a supervisor of a housekeeping cleaning crew, was struck by a box that had fallen from an elevated conveyor belt in a warehouse where he was working. The box struck the claimant on the right shoulder and right side of his head. After reporting the incident the claimant was directed to go to a clinic for treatment and where a drug screen test was performed which showed a positive 134 nanograms per milliliter (ng/ml) of marijuana metabolite (THC). In evidence are reports from two doctors which indicates that the claimant "would not have had normal use of his mental or physical faculties at the time of his injury." The claimant adamantly denied the use of marijuana and believes the THC level occurred as a result of passive inhalation at a party three days earlier. The medical reports indicate that that could not be the case. The claimant relies on his testimony and the statements of a coworker that he was not intoxicated at the time of the accident.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 401.013(b)(2)(B), the intoxication provision applicable in this case, defines intoxication as not having 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 of the Texas Health and Safety Code. An employee is presumed sober. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier rebuts the presumption by presenting

probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of injury, that is that he or she had the normal use of his or her faculties at the time of the injury.

Although the hearing officer did not make a specific determination whether he believed the burden had shifted, a fair reading of the Background Information (that "the Carrier had sufficient evidence to raise the issue of intoxication") would lead to the inference that he did so. The hearing officer then "concluded that the Claimant presented sufficient evidence, especially with his car pool co-worker, that he was not intoxicated when he was injured." Both parties cited Appeals Panel decisions supporting their respective views. The hearing officer correctly commented that the "common factor in all of those decisions was that the Appeals Panel upheld the findings of the triers of the fact" (on factual determinations that are not against the great weight and preponderance of the evidence). Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the appealed extent-of-injury issue the claimant had made contemporaneous neck, right shoulder, and headache complaints at the time of the accident while the first documented low back complaint was not until January 21, 2004, over a month after the date of injury. There is sufficient evidence to support the hearing officer's decision on this issue.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including the claimant (Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ)). The hearing officer was acting within his province as the fact finder in resolving the conflicts and inconsistencies in the evidence as he did. Nothing in our review of the record reveals that the challenged determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Accordingly, no sound basis exists for us to disturb those determinations on appeal.

The hearing officer's decision and order are affirmed.

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

RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge