APPEAL NO. 950266

This appeal is brought 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 January 19, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the claimed injury occurred while the respondent (claimant herein) was in a state of intoxication from cocaine use and whether the claimant had disability. The hearing officer determined that the claimant was not intoxicated and that he had disability from May 26, 1994, through June 21, 1994. The appellant (carrier herein) appeals arguing that the determinations of the hearing officer on these issues are against the great weight and preponderance of the evidence. The claimant replies that the decision and order regarding intoxication are supported by sufficient evidence and should be affirmed. The claimant also asserts in its response that the hearing officer erred in finding that disability did not extend beyond June 21, 1994. Although the response was timely filed as a response, it was not timely as an appeal and for this reason the alleged error of the hearing officer in limiting the period of disability will not be considered. *See* Texas Workers' Compensation Commission Appeal No. 93345, decided June 17, 1993. Unless otherwise indicated, all dates are in 1994.

DECISION

We affirm in part and reverse and render in part.

The claimant worked as a derrick hand in the oil fields. It was not disputed that at about 11:00 a.m. on (date of injury), while working on a derrick approximately 90 feet above the ground, he sustained a crush-type injury to his right hand when the hand got caught between an elevator and some pipe. He arrived at an emergency room at approximately noon and x-rays disclosed a commuted chip fracture of the right ulnar styloid. A cast and splint were applied. In accordance with the employer's policy, the claimant submitted a sample of his urine for drug screening at about 3:00 p.m. the same day as the accident. The sample was reported positive on May 25th for a cocaine metabolite at the level of 685 nanograms per milliliter (ng/ml).

The claimant denied any voluntary or knowing ingestion of cocaine. Apparently the day before the injury was his day off. He said that he went to a party with a friend that night. He did not know who hosted the party or who many of the attendees were. He said he only drank beer at the party even though he noticed others were using cocaine. He further speculated that someone may have put cocaine in his beer when he left it to go to the bathroom and urges that if he had knowingly used the drug he would not have voluntarily taken the urine test. The claimant said he left the party at about 1:00 a.m. and was picked up at 3:00 a.m. to be driven with the rest of the crew to the work site. He said he slept much of the way and arrived at the work site about 6:45 a.m. He began work about 8:00 a.m. and had been latching elevators to pipe for about three hours before the injury occurred. He admitted this was a difficult job which required constant attention and said he had never been hurt before doing this kind of job. After the injury the claimant was given light duty

work with the employer, but was terminated on May 26th upon the employer's receipt of the positive drug test.

The claimant was initially treated by (Dr. R) in (city), who, according to the claimant, told him on a day off that he was not to return to work because of his injury. There was no written record in evidence of Dr. R excusing the claimant from work or otherwise establishing when Dr. R made this statement. The claimant changed treating doctors to (Dr. D) after he was terminated because the carrier stopped medical payments and the claimant could no longer afford to see Dr. R in (city). On July 12th, Dr. D diagnosed a crush injury of the right hand and reflex sympathetic dystrophy of the right upper extremity. His plan of treatment stated the claimant was to be off work.

(Mr. H), the employer's safety director, testified that the claimant's last day of work was May 23rd. He said it was the employer's policy to give all injured employees light duty consistent with their medical condition. These duties included general clean up and paperwork. He said the claimant was terminated solely because he tested positive for drugs and that he would still be working for the employer had he not been terminated for this reason. He considered the claimant a reliable employee and admitted he was not able to tell if someone was on drugs simply by looking at them. He offered no opinion on whether or not the claimant was intoxicated at the time of the accident.

Other evidence on the issue of intoxication came in recorded statements of two coworkers who said the claimant did not appear intoxicated though neither could tell from observation the effects of cocaine use.

The carrier also introduced the statement of (Dr. W), Ph.D., who in a letter of August 3rd, said he reviewed information from the carrier that included the results of the urinalysis. Cautioning that "the information is somewhat limited," Dr. W concluded that the nanogram reading in this case meant "within all reasonable scientific probability" that the claimant "took/used approximately 10 mg of cocaine within 24 hours of the time the specimen was collected (3:00 p.m.)." He described the effects of cocaine shortly after use as "euphoric" which can persist for up to several hours. This "high" is then replaced by a "phase of restless irritability." He concluded that the ability of the claimant to function normally "during the restless/anxiety phases would have, within all reasonable scientific probability, been impaired during his working hours." Although Dr. W did not appear to be affiliated with the laboratory that did the drug testing, there was no evidence about his training or experience or position with Laboratory Specialists, Inc., on whose letterhead he prepared his report. *Compare* Texas Workers' Compensation Commission Appeal No. 94520, decided June 9, 1994, as case cited by the claimant, wherein the carrier's expert was identified as a forensic toxicologist.

Section 401.013(a)(2)(B) provides that intoxication means the state of "not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of . . . a controlled substance." A carrier is not liable for compensation for an injury if

the injury occurred while the employee was in a state of intoxication. Section 406.032(1)(A). The hearing officer stated in his discussion of the evidence that the "[c]laimant's own conduct in performing his job the entire morning without incident also argues against the cocaine being a factor." Though not appealed, we disapprove of this language to the extent that it suggests that the intoxication has to be the cause of the injury. As we said in Texas Workers' Compensation Commission Appeal No. 91006, decided August 21, 1991: "[t]he fact of intoxication alone precludes compensability regardless of whether there is any causal connection to the injury. [Citations omitted.]" Whether a claimant is intoxicated, as defined above, at the relevant time is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1992. Neither party disputed that cocaine is a controlled substance. Nor has either party appealed the finding of the hearing officer that the claimant "ingested approximately ten milligrams of cocaine during the evening hours of (date), or morning hours of (date of injury)." This finding has become final and is binding on the parties. *See* Texas Workers' Compensation Commission Appeal No. 94588, decided June 20, 1994. While there was some discussion at the CCH as to whether the claimant's ingestion of cocaine was knowing or voluntary, the hearing officer did not premise his decision on a finding of involuntary ingestion and this possible issue was not pursued on appeal. Finally, as to these preliminary matters, neither party made an issue of burden of proof at the CCH, nor did the claimant assert that the drug test and Dr. W's statement were in any way insufficient to rebut the presumption of sobriety and shift to him the burden of proving he was not intoxicated. *See* Texas Workers' Compensation Commission Appeal No. 94673, decided July 12, 1994. The CCH was conducted as if the claimant had this burden of proof.

In Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992, the Appeals Panel observed that a positive drug test in itself does not compel a finding of intoxication at the time of the injury, because unlike the case of alcohol intoxication, the 1989 Act does not establish a level of drug concentration in a specimen as conclusive or presumptive of drug intoxication. In the case now appealed, the evidence of drug use was the test report itself and Dr. W's opinion quoted above in pertinent part. Mr. H could offer no evidence about whether the claimant was intoxicated as defined by the 1989 Act. The two coworkers did not believe the claimant was intoxicated but admitted they had no expertise in this type of analysis. The carrier cites Texas Workers' Compensation Commission Appeal No. 941400, decided December 2, 1994, for the proposition that a claimant cannot meet his burden of proving that he had normal use of his faculties through the nonexpert testimony of coworkers.

We disagree. In that case, we affirmed a decision of a hearing officer that the claimant was intoxicated based on extensive expert testimony about the effects of cocaine usage on an employee's mental and physical faculties. There, the hearing officer simply considered expert testimony on this complicated issue more persuasive than nonexpert testimony. We need only point out, first, that the expert evidence in that case was forceful and detailed, and secondly, that regardless of the carrier's evaluation of the credibility of the

claimant's evidence, the hearing officer was the sole judge of the relevance and materiality and weight and credibility to be given the evidence. Section 410.165(a). The hearing officer could choose to believe all, part, or none of the testimony of any witness, including the claimant's and the coworkers'. Mr. H testified that he had no previous problems with the claimant's job performance and could identify no abnormality in his behavior on the day of the injury. While one should not be surprised to find a hearing officer treat with some skepticism the testimony of coworkers, their evidence was not inherently unworthy of belief as the carrier suggests or nonprobative as a matter of law. No credentials of Dr. W were presented, nor did his statement reflect any particular knowledge of the claimant's duties when the injury occurred that he could relate to intoxication based on a likely amount of cocaine ingested. An appeals level body 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. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Even though the evidence could support a different result, when reviewing a hearing officer's decision we will reverse such 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); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Having reviewed the record in this case, we concluded that the determination of the hearing officer that the claimant was not intoxicated at the time of his injury is supported by sufficient evidence and we decline to overturn it on appeal.

The carrier also contends on appeal that the hearing officer erred in finding any disability after the claimant was terminated because the overwhelming weight and preponderance of the evidence established that the only reason the employee stopped working was because of the positive drug test. We agree. 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 has the burden of establishing disability. Texas Workers' Compensation Commission Appeal No. 93959, decided November 30, 1993. Whether disability exists as claimed is a question of fact for the hearing officer to decided. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. We have also held that a termination for cause does not in and of itself foreclose a finding of disability if a cause of the inability to earn pre-injury wages is the compensable injury. Texas Workers' Compensation Commission Appeal No. 94697, decided July 13, 1994. The hearing officer found disability from the date of termination to the date his cast was removed on June 21st because after that date the hearing officer concluded that claimant offered no proof that his inability to find employment was due to his compensable injury. As we stated above, the correctness of this finding of no disability after June 21st has not been timely appealed and we need concern ourselves only with the carrier's appeal of the finding of disability before June 21st.

It was uncontroverted and conceded by the claimant, that he, in fact, performed light duty at full pay up to the termination. He said he was told by Dr. R not to go back to work before the employer received notice of the positive drug test and for this reason, not the

termination, he did not return to work. No evidence of Dr. R on this point was introduced and the claimant did not specify when he was told this other than that it was on one of his days off. The claimant could point to no change in his condition or assigned light duties that rendered him unable to continue working because of his injuries. Given the vagueness of the testimony on Dr. R's release and the uncontradicted evidence that claimant actually worked up to the time he was terminated, we find that the determination of the hearing officer that the claimant had disability from May 26th through June 21st is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

That part of the decision and order of the hearing officer which finds that the claimant was not intoxicated at the time of his injury is affirmed. That part of the decision and order which finds disability is reversed and a new decision is rendered that the claimant did not establish disability.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge