APPEAL NO. 000582

On February 1, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). The hearing officer resolved the disputed issues by deciding that respondent=s (claimant) injury did not occur while claimant was in a state of intoxication and thus appellant (carrier) is not relieved of liability for compensation and that claimant has had disability from August 2, 1998, through the date of the CCH. Carrier requests that the hearing officer=s decision on the issues of intoxication and disability be reversed and that a decision be rendered in its favor on those issues or, in the alternative, reverse the hearing officer=s decision and remand the case to the hearing officer. Claimant requests that the hearing officer=s decision be affirmed.

DECISION

Affirmed.

Claimant testified that _____, was his day off from working at a company whose name was not given. He said that about 9:00 p.m. that evening one or more persons from (employer), told him that he would be hired that evening for a long-term job. He said that employer contacted him about 9:00 p.m. that evening and that he told the people from employer who contacted him that he had been drinking alcohol and that he did not want to go to work. He said that he was told that that was okay and he was picked up and taken to employer=s drilling rig. He said that he started to work at 11:00 p.m. on _____ and that at about 1:45 a.m. on _____ he was cleaning the floor of the drilling rig when he slipped and fell and injured his left leg. The parties stipulated that on _____, claimant sustained an injury while working for employer. Claimant said that at the time of his injury, he was working with RP and SR. Claimant said that TW, who claimant said was in charge of the job and who carrier represents is employer=s safety man, was called to pick him up at the drilling rig. Claimant said that TW got to the rig at about 5:00 a.m. on _____ and asked him to give a urine sample in a clear plastic bag, which claimant said he did. Claimant said that the plastic bag was not sealed other than the way a sandwich bag is closed and that TW put it in TW=s truck. Claimant said that TW took him to one hospital and then to a second hospital where he arrived at about 9:00 a.m. Claimant said that the plastic bag with his urine sample was still in TW=s truck when he arrived at the second hospital.

Records from the second hospital reflect that claimant arrived there at about 9:00 a.m. on _____, and that he was diagnosed as having a fractured left tibia and fibula. Claimant underwent surgery by Dr. S on August 2, 1998, and the operative report reflects that a rod was placed in claimant=s left leg. Dr. S noted on August 2, 1998, that claimant would be discharged from the hospital the next day with crutches and pain medications. Dr. S noted on August 3, 1998, that employer wanted to get claimant back to work on light duty and that he, Dr. S, thought that if claimant was doing okay the following week then he would allow claimant

to perform sedentary work and that if claimant=s wounds were healed in about two weeks, claimant could begin light-duty work. Claimant said that he last saw Dr. S in December 1998 and that no doctor had released him to return to work. Claimant said that TW came to his house and told him that because his drug test had come back positive, employer would be unable to help him. He said he has been unable to continue to see Dr. S because of his lack of money. Claimant said that for about one or two weeks in November 1998 he did a little bit of work driving a tractor on a ranch but was unable to continue working because of leg pain from his injury. Claimant said that he continues to have problems with his left leg.

RP stated in an affidavit that he had been asked to hire claimant; that he contacted claimant at about 8:45 p.m. on _____; that claimant told him that he, claimant, had drunk three or four beers; that he told claimant not to drink anymore and that he would pick him up and take him to the work site; that he picked claimant up and claimant started working at 11:00 p.m.; that from the time he first made contact with claimant until the accident, he did not see claimant drink anymore; that based on his observations, he believes that claimant had the normal use of his mental and physical faculties and was not in any way impaired in doing the work from the time claimant started until the accident; and that he believes that the injury was just an accident. SR stated in an affidavit that from the time Awe@ (apparently SR and RP) picked up claimant at claimant=s house and the time of the accident, he did not see claimant drink any alcohol; that from his observations, it is his opinion that claimant had the normal use of his mental and physical faculties; that he does not believe that claimant was in any way impaired at the time of the accident; that he saw the accident happen; and that the accident could have happened to any of them.

TW did not testify. He signed a drug testing custody and control form (the form) indicating that he received a urine sample from claimant at the rig site on _____, at 5:00 a.m. and that he put the sample in the mail on the same date. There is a signature on the donor line of the form. Claimant initially said he could not recall signing the form and then indicated that he had signed the form. The form states in English that the sample is in a sealed bottle. Claimant stated that he cannot read English. Another copy of the form indicates that Universal Toxicology Laboratories (the laboratory) received a urine sample of claimant=s from TW on August 7, 1998, apparently by mail. The laboratory noted that the specimen bottle seal was intact. The laboratory drug test report of August 7, 1998, states that the urine sample of claimant=s it received tested positive for alcohol and gave a A210 mg/dl@ confirmatory result.

At carrier=s request, Dr. W, a forensic toxicologist, reviewed a copy of the Employer=s First Report of Injury or Illness (TWCC-1) and a copy of the laboratory=s drug test report and wrote on August 17, 1998, that claimant began work at 11:00 p.m. on _____, the accident occurred at 1:45 a.m on _____, claimant=s urine sample was collected at 5:00 a.m. on _____, the urine sample was submitted to the laboratory on August 7th and was found to contain ethyl alcohol Aat 210 mg/dl (0.21 grams percent).@ Dr. W wrote that, since the water content of urine is greater than that of blood by a ratio of 1.25 to 1.35, Athe corresponding blood alcohol concentration would range from 0.155 to 0.168 grams percent earlier that

morning.@ Dr. W stated that the statute for intoxication in Texas is a blood alcohol concentration of 0.10 grams percent or greater and that, in addition, intoxication is defined as no longer having the normal use of one's mental and/or physical faculties. Dr. W concluded that, within all reasonable scientific probability, claimant was intoxicated at the time of his accident and that the presence of alcohol in his system greatly contributed to the accident.

On the date of claimant=s injury, Section 401.013 provided in relevant part that:

> (a) In this subtitle, Aintoxication@ means the state of:
>
> (1) having an alcohol concentration as defined by Section 49.01, Penal Code, of 0.10 or more; or
>
> (2) not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of:
>
> (A) an alcoholic beverage, as defined by Section 1.04, Alcoholic Beverage Code; . . . .

Section 406.032 provides in pertinent part that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication.

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, raising a question of fact, 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. However, the Appeals Panel has held that under the statutory definition of intoxication in effect at the time of claimant=s injury, intoxication is deemed to exist when an alcohol level of 0.10 is reached and that once the statutory level of intoxication is reached, statements generally describing normalcy of activity do not overcome the deemed state of intoxication provided by the 1989 Act. Texas Workers= Compensation Commission Appeal No. 970621, decided May 21, 1997. In March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785, 788, (Tex. App.-Fort Worth 1989, writ dism=d), a workers= compensation case involving alcohol intoxication, the court noted that gaps in the chain of custody should go to the weight, and not the admissibility of the evidence.

Carrier appeals the hearing officer=s findings that claimant was presumed to be sober at the time of his injury on _____, and that the report of Dr. W is not probative evidence that claimant was intoxicated at the time of his injury and as such was not sufficient to overcome the presumption of sobriety. Carrier also appeals the hearing officer=s conclusion that the injury did not occur while claimant was in a state of intoxication and that carrier is not relieved of liability for compensation. The presumption of sobriety is in accordance with

applicable law. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism=d judgm=t cor). Dr. W=s report is primarily based on the laboratory=s drug report, and the hearing officer sets out in her decision the evidence that caused her to be skeptical of the validity of the laboratory=s drug report. We note that the hearing officer could believe claimant=s testimony that he gave his urine sample in a plastic bag that was not sealed other than the way a sandwich bag is closed and then consider in evaluating the evidence that the laboratory indicated on the form that the urine sample it received for testing arrived in a sealed specimen bottle. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and determines what facts have been established. Texas Workers= Compensation Commission Appeal No. 950084, decided February 28, 1995. As an appeals tribunal, the Appeals Panel 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. Appeal No. 950084. When reviewing a hearing officer=s decision to determine the factual sufficiency of the evidence, we should set a side the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer=s decision in favor of claimant on the intoxication issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Section 401.011(16) defines Adisability@ as Athe inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.@ Carrier appeals the hearing officer=s finding that due to the compensable injury, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from _____, through the date of the CCH and the hearing officer=s conclusion that claimant had disability from August 2, 1998, through the date of the CCH. Carrier contends that claimant does not have medical evidence to support a disability finding, that claimant does not have disability because he was terminated as a result of his drug test, and that claimant testified that he did work some. The fact that the employment is terminated does not necessarily preclude a finding of disability and whether disability exists is a fact question for the hearing officer to decide and may be established by the testimony of the claimant alone if deemed credible. Texas Workers= Compensation Commission Appeal No. 992318, decided December 1, 1999. We conclude that the hearing officer=s decision in favor of claimant on the disability issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer=s decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge