APPEAL NO. 002818

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 commenced on October 20, 2000, continued to October 24, 2000, with the record closing on October 30, 2000. With regard to the only issue before her, the hearing officer determined that the appellant's (claimant) injury occurred while he was in a state of intoxication, thereby relieving the respondent (carrier) of liability.

The claimant appeals, asserting that the carrier failed to present sufficient evidence of intoxication to rebut the presumption of sobriety, that the blood test was not "reliable," and that Dr. A was not credible. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier's response emphasizes evidence in its favor and urges affirmance.

DECISION

Affirmed.

The claimant (and his brother) were employed as "structure feeders." Exactly what the claimant's duties were; what he was doing the morning of September 8, 1999; the mechanics of the accident; and how the claimant was injured were discussed in great detail using photographs and diagrams in evidence. As the carrier stated, it is undisputed that the claimant was injured (injuries to his hands and thumbs) "doing his job." The issue in dispute is whether the claimant was (alcohol) intoxicated at the time of his injury. The claimant and his brother testified that the evening before the injury they had purchased groceries, including at least one 12 pack of beer; that they had gone home and eaten supper of fajitas asada; that the claimant drank "six to eight" 12-ounce beers; that the claimant had gone to bed about 10:00 or 10:30 p.m.; and that the next morning both of the men had gone to work. The claimant had received his assignment from the foreman and had proceeded to work at least two hours without incident before he sustained his injury when a heavy roller crushed his thumbs at about 9:30 or 9:45 a.m. The claimant was taken to a hospital emergency room (ER).

The ER triage report notes that "pt had heavy odor of ETOH [with] red sclera" and includes a history that the claimant had "6-8 beer last night." A blood-alcohol test performed at 10:48 a.m. on September 8, 1999, showed 69 milligrams per deciliter (mg/dl), which is also a blood alcohol level (BAL) of 0.069. Dr. A, an occupational medicine/clinical toxicology specialist, testified that the normal metabolism rate for alcohol by the liver is 0.015 to 0.020 mg/dl per hour. Dr. A assumes that the hospital took the claimant's blood sample one hour after the claimant's accident and extrapolates that the claimant's BAL at the time of his accident was 0.084 to 0.089. Dr. A testified that in reasonable medical probability, the claimant was intoxicated at the time of his injury. There was also disputed testimony that euphoria can occur at concentration levels as low as 0.03 percent and impaired judgment skills can occur in levels as low as 0.025 to 0.050 percent. The

claimant testified that he was not intoxicated and presented statements from coworkers to that effect.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury "occurred while the employee was in a state of intoxication." Intoxication is defined in Section 401.013(a)(1) and (2)(A), for claims based on a compensable injury that occurs on or after September 1, 1999, as having an alcohol concentration of .08 percent 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, of the Alcoholic Beverage Code.

The statute regarding the presumptive level of alcohol intoxication was lowered from 0.10 to 0.08 percent effective September 1, 1999. Courts have held that a claimant need not prove he was not intoxicated as there is a presumption of sobriety. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't cor.). However, when a carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove that he was not intoxicated at the time of the injury. March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied). In this case, there was sufficient evidence of intoxication to shift the burden to the claimant to prove that he was not intoxicated. Whether the claimant was intoxicated at the time of his injury was a question of fact for the hearing officer to determine from the evidence presented. The claimant sought to meet that burden by his own testimony, with the statements of others that he was not intoxicated, by raising inferences that the foreman would have sent him home if he had been intoxicated, and by pointing out that he had worked on a scaffold without mishap prior to his injury. The claimant also attacks Dr. A's credibility that Dr. A could not attest to the reliability of the hospital blood test, that "any retrograde extrapolation is merely speculation," and that there were a number of variables (such as whether the claimant was a light, average, or heavy drinker) which vary from individual to individual and which Dr. A did not adequately consider.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer made detailed findings in her decision, correctly applying the law. Specifically, the hearing

officer found that the lay evidence (and inferences) offered by the claimant "did not outweigh the expert evidence presented by the carrier."

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge