APPEAL NO. 92173

On March 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer, to consider three disputed issues left unresolved after a Benefit Review Conference (BRC), namely, whether respondent sustained a compensable injury while in the course and scope of his employment, whether respondent was intoxicated at the time of his claimed injury, and whether respondent had disability as a result of his claimed injury. The hearing officer decided these issues adversely to appellant who requests our review pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308.1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

DECISION

Finding the evidence factually sufficient to support the challenged findings and conclusions of the hearing officer, we affirm.

Respondent (claimant below) was employed as a carpenter by (Employer) to assist with certain demolition work at the (city) Convention Center. He began this employment on Friday, December 13, 1991, worked 10 hours that day and 10 hours again on Saturday and on Sunday. On Monday afternoon, December 16th, after approximately eight hours of work, respondent and coworker (coworker), another carpenter who had been hired at the same time, were terminated by the foreman, (Mr. F). According to respondent, the demolition work didn't require much skill and they were told by the foreman upon termination that the work could be done cheaper using unskilled laborers.

Prior to his employment respondent submitted to a required preemployment urinalysis on December 12th, the day before he commenced his employment. The test results revealed the presence of the marijuana metabolite at a level of 290 nanograms per milliliter (ng/ml). The test was completed on December 16th, the date respondent's employment was terminated. On December 18th, the date respondent reported his injury to Employer, he submitted to another urinalysis, completed on December 23rd, which revealed the presence of the marijuana metabolite at a level of 705 ng/ml. Respondent testified that before commencing this employment he had been off work for two to three months and smoked marijuana during that interval including Saturday, December 7th. He said he resumed smoking it on Tuesday, December 17th, after being laid off, and began to smoke it two to three times a week. However, he insisted he did not use marijuana during the period of his employment and denied being under the influence of marijuana on the job.

Employer was demolishing the west wall of the center and the various duties performed by respondent included the construction of a wooden rack to hold the oxygen tanks, the erection of a cable handrail, the erection of scaffolding, the directing of the crane operator with flags, and the removal of sprinkler system piping and tiles from the ceiling. In the performance of such tasks respondent had occasion to drive a pickup truck, operate and work from a "scissor lift," described as a forklift-type vehicle which extended up to four and

one-half stories in height, as well as use equipment such as a hammer, drill and saw.

On Saturday morning the foreman, (Mr. F), directed respondent and (coworker) to retrieve two 20-ton chain hoists from a trailer and carry them to a location on the job site. (Mr. F) advised that the wheelbarrows and pickup truck were in use so "they would have to hump them up there." Respondent and (Mr. T) then went to the trailer where the hoists were located, picked them up and carried them approximately 150 yards to the required location. In the process of lifting the hoist onto his right shoulder, respondent said he hurt his shoulder. He said he lifted the hoist to a height somewhat above his elbow and then had to hesitate and strain several seconds to lift it up to his shoulder. When respondent lifted it further up it fell two or three inches onto his shoulder. Respondent's hoist had much more chain wrapped around it than did (Mr. T's) and weighed about 100 pounds. He had to get a laborer to help him carry the hoist up three flights of stairs and they had difficulty doing such. (Mr. F) testified he was present and didn't see respondent hesitate in lifting the hoist. Respondent testified (Mr. F) wasn't in the trailer when the hoists were lifted. He continued to work the rest of Saturday and on Sunday and Monday. While his shoulder hurt, respondent didn't mention it to anyone at work and it didn't hurt him enough to cause him to complain to Employer. Respondent said he had never before had a workers' compensation claim or been seriously hurt on the job in 18 years of construction work and he didn't want to appear as a "crybaby" and risk the loss of his job. However, on Monday night, after he was terminated, respondent told (Ms. H), a rehabilitation nurse and friend of his mother, that his shoulder hurt.

At some time on Tuesday, (Ms. H) looked at his shoulder, told him it was lower than his left shoulder, and advised him to report it to Employer. Respondent could see by looking in the mirror that his right shoulder was lower than the left. (Ms. H) observed that respondent's shoulder was about two inches lower than the other, was much warmer, and had a protruding scapula. She saw that respondent had range of motion trouble. In her experience, it is commonly a matter of days before maximum pain is experienced with muscle, ligament, tendon or nerve damage, as distinguished from broken bones. At around noon on Tuesday respondent realized he "had a complication with [his] shoulder socket."

On Wednesday, December 18th, respondent could hardly move his arm so he went to Employer and filled out a report with (Mr. F) and (Mr. D), Employer's safety man. They sent him to Employer's doctor. Appellant introduced an "Initial Medical Report" (TWCC-61) which bore the date of March 20, 1992, just four days before the hearing. This TWCC-61 form, signed by (Dr. M), M.D., reflected respondent's date of injury as "12-13-92" (sic); a diagnosis of "impingement syndrome rt shoulder" and "strain r mid back;" a treatment plan consisting of "physio" and nonsteroidal antiinflammatory drugs; and, a prognosis of "released 12-30-92" (sic). This form also contained the comment: "12-30-92 patient reports that WC is denying claim - DC due to WC insurance complications." Thus, the information on this form would seem to indicate that (Dr. M) not only "released" respondent but also discontinued his treatment because of workers' compensation insurance "complications."

Respondent said the physical therapist told him it wasn't surprising that his injury took a few days to manifest itself. According to respondent, his shoulder didn't improve in the area of intense pain so he went to another doctor. However, respondent didn't obtain treatment from that doctor because (LL), appellant's representative, had been called for verification of respondent's workers' compensation coverage and she advised that his claim was being denied because he had turned up with "dirty urine." This was respondent's first indication that there was an intoxication issue involved in his workers' compensation claim. Thereafter respondent sought and obtained treatment at Parkland Hospital. He said he had received workers' compensation benefits up to December 30th. Appellant believes he has a torn rotator cuff and stated that lifting the chain hoist caused the injury. The hospital records indicate respondent had a "probable [right] rotator cuff tear." He was scheduled for an orthopedic consultation on April 3, 1992. Respondent testified that although Employer's doctor had "released" him to return to work, he hadn't sought work because there was "no way" he could work and he was under a doctor's care. He said he had no strength in his right arm and shoulder and much pain. Strength in his arm and shoulder are essential to his ability to do his work.

In his sworn, written statement, (coworker) essentially corroborated the chain hoist lifting incident, stated that to the best of his knowledge respondent was not intoxicated in any way, and that he "was a witness to everything that happened because [he] worked with [respondent] most of the time."

(Mr. F), who almost constantly observed respondent on the job, said respondent did a good job building the oxygen boxes and he never observed respondent having any problem doing his work including working 40 feet up in the air to remove old ceiling tiles and cut ductile iron fire lines out of the ceiling. He never saw any indication respondent was under the influence of marijuana and observed nothing unusual about respondent's gait, eyes, odor, or speech. He said that "if I had felt he was intoxicated, I would have asked him to leave right then." Similarly, (Mr. D), Employer's safety supervisor, said he "walked the job" twice a day looking for safety infractions and never saw any indication that respondent was injured or under the influence of a controlled substance or alcohol.

Appellant challenges the sufficiency of the evidence to support the following factual findings and legal conclusions of the hearing officer:

FINDINGS OF FACT

6.The claimant injured his back and shoulder while in the process of carrying out the duty assigned to him by his immediate supervisor.

7.Prior to the injury the Claimant performed other job assignments to the satisfaction of the Employer.

11.As a result of his injury, the Claimant has been unable to work in his vocation since December 18, 1991.

CONCLUSIONS

2.The greater weight and preponderance of the evidence established that on (date of injury), the Claimant was injured in the course and scope of his employment with the named employer.

3.The greater weight and preponderance of the evidence established that the Claimant did have the normal use of his mental and physical faculties at the time of the injury and, therefore, was not intoxicated.

4.The Claimant has been unable to obtain or retain employment at preinjury wage levels as the result of this injury. Therefore, Claimant had a "disability" within the meaning of Art. 8308-1.03(16), effective December 18, 1991.

Notwithstanding that appellant challenges the sufficiency of the evidence to support the above findings and conclusions, most of the discussion in its Request for Review concerns our application of the law regarding the exception to liability based on intoxication. Thus, we will first address the evidence relating to the sustaining of an injury and to disability before turning our attention to appellant's concerns with the intoxication exception.

Article 8308-6.34(e) (1989 Act) designates the hearing officer as the sole judge of the relevance and materiality of the evidence and the weight and credibility it is accorded. The hearing officer was free to believe and obviously did believe respondent's testimony to the effect that he sustained an injury to his right shoulder when he lifted the chain hoist on the job. The medical records introduced by respondent corroborated his testimony that he sustained an injury to his shoulder. No evidence contradicted respondent's testimony that, according to the physical therapist who treated him, a later manifestation of disabling pain was not uncommon in the type of injury he sustained. That notion was testified to directly by a nurse with experience in physical rehabilitation. That respondent did not complain of his injury to Employer and was not observed to be injured while at work for approximately two and one-half days following his injury is explained by respondent's evidence. As for his having "disability" (defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury" by Article 3808-1.03(16)), appellant testified he had lost strength in his right shoulder and arm and could not pursue his trade (construction carpentry) in that condition. While Employer's doctor "released" respondent on "12-30-92" (sic), respondent's testimony that he cannot do his work is somewhat corroborated by his medical records of March 16, 1992, showing he has a "probable [right] rotator cuff tear," was receiving pain medicine, and was scheduled for an orthopedic consultation on April 3, 1992. We find the evidence sufficient to support the hearing officer's findings and conclusions to the effect that respondent sustained an injury

on the job and did have disability.

Article 8308-3.02(1) provides that an insurance carrier is not liable for compensation if "the injury occurred while the employee was in a state of intoxication." The 1989 Act defines "intoxication," as it relates to substances other than alcohol, to mean "the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of [a controlled substance or analogue, dangerous drug, abusable glue or aerosol paint, or similar substance]. Under the Workers' Compensation Act, injuries received while in a state of intoxication are not considered "injuries sustained in the course of employment." Texas Indemnity Ins. Co. v. Dill, 42 S.W.2d 1059 (Tex. Civ. App.-Eastland 1931, aff'd, 63 S.W.2d 1016 (Tex. Comm'n App. 1933, opinion adopted)). Not only did respondent deny both using marijuana during the period of his employment and being under its influence when injured, but his coworker, who worked alongside respondent throughout the four days, as well as Employer's foreman and safety director, all provided evidence that respondent did not manifest intoxication on the job. Appellant has not specifically challenged the hearing officer's Finding of Fact No. 9, to wit: "Neither the Claimant's co-worker nor his immediate supervisor or safety director, perceived the Claimant to be conducting himself in a manner indicative of lacking the normal use of his mental or physical faculties." Appellant's theory seemed to be that with lab test readings for the marijuana metabolite of 290 ng/ml and 705 ng/ml from respondent's urine specimens, collected on December 12th and 18th, respectively, that respondent must have been intoxicated at the time of his injury on Saturday morning, (date of injury). Both appellant and respondent introduced a study sponsored by the U.S. Department of Transportation, published in *Clinical Chemistry* in 1987, and entitled "The Effects of Drugs on Human Performance and Behavior: Drugs and Driving/Drugs in the Workplace." As might be expected, appellant and respondent underlined or highlighted different comments in the study. A conclusion of the study was that "[q]uestions remain as to how long cannabis-induced impairment of brain function lasts. The evidence after 20 years of reasonably decent research is that easily measurable effects [of cannabis] do not last more than a few hours. . . . Whether subtle effects include significant impairment of behavior important in the workplace has not been clearly established." According to this study, cannabinoids can be detected in urine for days, weeks or even months after the last use of marijuana; cannabis metabolites are measurable for a longer time than any other commonly used illegal drug; and, peak concentrations of cannabis in the brain are not the same as peak concentrations in the blood and certainly not the same as peak concentrations in urine.

We cannot agree that the posture of the evidence of intoxication compelled the hearing officer to find that respondent was intoxicated at the time he sustained his injury. While we agree with appellant that the lab tests results raised the exception thus requiring respondent to go forward with evidence to prove by a preponderance of the evidence that he was not in a "state of intoxication" when injured and was thus in the course of his employment, we believe the evidence sufficient to support the hearing officer's finding and conclusion in this regard. In Texas Workers' Compensation Commission Appeal No. 91006 (Docket No. AU-A0006-91-CC-1) decided August 21, 1991, we first considered drug

(marijuana) intoxication under the 1989 Act and observed that "[t]he 1989 Act does not provide either a presumptive or conclusive level of a drug found in the blood or urine as establishing intoxication (as opposed to an alcoholic concentration of 0.10 or more which is deemed to be intoxication)." In that case, the employee testified he had taken three or four puffs from a marijuana cigarette the night before the injury and a lab report showed a level of 55 ng/ml of tetrahydrocannabinol (THC) in the employee's urine obtained after the injury. (THC is the active and proscribed ingredient in marijuana.) That evidence was in juxtaposition with the testimony of four witnesses who worked with the employee on the day he was injured and who observed no indication of impairment of his physical and mental faculties at the time of his injury. The hearing officer determined that the employee's intoxication at the time of his injury was not established by the evidence and we did not disturb that decision. We do not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. Texas Employers Insurance Company v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). *Instanter*, respondent met his burden of proving he sustained a compensable injury (was not intoxicated) thus rendering appellant liable for the provision of whatever benefits respondent is entitled to under the 1989 Act.

In its Request for Review appellant asserts that the Appeals Panel decisions appear to "increase the standard of proof required by carriers to raise the issue of intoxication . . ." by requiring carriers not only to raise the intoxication exception with "probative evidence" but also to prove intoxication with scientific and expert evidence. In Texas Workers' Compensation Commission Appeal No. 91012 (Docket No. HO-00010-91-CC-1) decided September 11, 1991, an alcohol intoxication case, we noted that "[c]ases from Texas Employers' Insurance Ass'n v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1948, ref'd n.r.e.) to March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied), which dealt with the intoxication exception, varied greatly in their outcome but were basically consistent in their criteria. The employee had the burden to prove injury arose in the course of employment; the carrier had the burden to present evidence of intoxication; and if carrier presented such evidence, employee then had the burden to show he was not intoxicated at the time of injury as part of the proof that the injury occurred in course of employment." In Texas Workers' Compensation Commission Appeal No. 91018 (Docket No. CC-00002-91-CC-1) decided September 19, 1991, a marijuana intoxication case, the carrier adduced a lab report showing the employee had a THC level of 86 ng/ml in his urine as well as the testimony of an expert witness who testified that in his opinion the employee was "intoxicated" at the time of his injury in that he could not have the normal use of his mental and physical faculties. We determined in the face of such evidence, and given the nature of the employee's evidence, that under the circumstances of that case the employee failed to meet his burden of establishing he was not intoxicated and reversed the hearing officer's decision. With respect to the raising of the intoxication exception by the carrier, however, we observed that " a claimant need not prove he was not intoxicated as the courts will presume sobriety," and that "when the 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 injury." While we went on to state that we found no "indication that the legislature in any way disturbed the holding in March, *supra*, in shifting the burden of establishing lack of intoxication by the respondent when the issue is raised by probative evidence on the part of the appellant," we neither held nor implied in that decision, or in subsequent decisions, that a carrier must present scientific evidence and/or expert testimony in order to raise the intoxication exception and shift the burden back to the employee to establish the absence of intoxication at the time of the injury.

With regard to presumptions the Texas Supreme Court has quoted with approval the following excerpt from McCormick & Ray's Texas Law of Evidence, pp. 62-63, Sec. 53:

> "* * * the presumption places upon the party against whom it operates the burden of producing evidence sufficient to justify a finding of the nonexistence of the presumed fact * * * . Under this rule where the opponent produces sufficient evidence to justify a finding against the presumed fact the presumption vanishes and the situation is the same as it would have been had no presumption been created." (Emphasis supplied.) First National Bank of Mission v. Thomas, 402 S.W.2d 890, 893 (Tex. 1965).

See also 35 Tex. Jur. 3d *Evidence* §112 (1984) which states that "[w]hen substantial or positive contrary evidence is introduced, sufficient to support a finding of the nonexistence of the presumed fact, a disputable presumption is rebutted, and the presumption then disappears, insofar as its effect as a rule of law is concerned. . . . " We observed in Texas Workers' Compensation Commission Appeal No. 91107 (Docket No. AM-00036-91-CC-1) decided January 21, 1992, that "[t]he quantum of evidence necessary to dispel the presumption is not found with any precision in cases we have examined," citing Texas cases using such terms as "positive" evidence and "sufficient" evidence, as well as Appeal No. 91018, *supra*, where we stated that the burden to prove lack of intoxication is on the claimant when the issue is raised by "probative evidence." In Texas Workers' Compensation Commission Appeal No. 92148 (Docket No. DA-91-150445-01-CC-DA41) decided May 29, 1992, a case involving the intoxication exception and alcohol, we stated that "[w]hen evidence is presented that raises an issue that an employee was intoxicated at the time of his injury, the claimant then has the burden of proving that he was not intoxicated. (Citations omitted.)" *See also* Texas Workers' Compensation Commission Appeal No. 91048 (Docket No. WF-00007-91-CC-1) decided December 2, 1991, a cocaine intoxication case, in which we referred to "the burden to present evidence sufficient to raise an issue as to the intoxication exception to be on [the insurer]."

We believe it clear from the above referenced Texas cases and Appeals Panel decisions that evidence sufficient to raise the issue is what is required of the insurer to overcome the presumption of the employee's sobriety. We have referred to such evidence as probative evidence, that is, evidence that has some value in establishing a factual matter as opposed to evidence that amounts to no more than speculation or which is a mere scintilla. Contrary to appellant's assertions, our decisions have not required the carrier to

present scientific or expert evidence in order to raise a fact question concerning the intoxication exception under Article 8308-3.02(1). It would seem reasonable, however, that the more persuasive the carrier's evidence relied on to raise the intoxication exception, the more difficult will be the burden of the employee to prove the absence of intoxication to the satisfaction of the factfinder.

The hearing officer's findings are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge