APPEAL NO. 93179

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on January 13, 1993, with the record closing on January 20th. The issues before hearing officer (hearing officer)., were as follows:

1.Did the claimant sustain an injury in the course and scope of his employment on (date of injury)?

2.Was the claimant intoxicated at the time of any such injury?

3.Has the claimant had disability as the result of any such injury?

The hearing officer held that the claimant was injured in the course and scope of his employment on April (date) and that he was not intoxicated at the time. He also held that claimant had disability as the result of the injury, beginning on April 23rd and ending on October 23, 1992. The claimant, who is the appellant in this action, appeals the length of the disability found by the hearing officer, attaching to his appeal a doctor's statement which he contends shows disability through November 13th. A second set of doctor's records were later forwarded to the Appeals Panel by the claimant.

The carrier filed a document styled "Response to Request for Review" in which it contends the claimant has not shown any reason this panel should overturn the hearing officer's decision on the issue of disability. It also contends that the hearing officer's application of the law regarding intoxication is incorrect, and it requests that this panel reverse and render on the defense of intoxication; it does not request a remanded hearing on that issue.

DECISION

Because we find that the carrier presented sufficient evidence to raise the issue of intoxication, and because it appears the hearing officer may have misconstrued the law on intoxication, we reverse the hearing officer's decision and order and remand for findings on whether the claimant was intoxicated, as defined by the 1989 Act, at the time of his alleged injury.

The claimant worked the night shift as a loader for (employer). He testified that between 6:00 and 10:00 p.m. on (date of injury), he was loading two pieces of half-inch glass, 83" by 96", on a truck when he strained his back picking up the glass. He said he told his supervisor, (Mr. S), that he had hurt his back. Mr. S asked if he wanted to see a doctor but claimant declined because he was afraid he would have to undergo a urinalysis and would lose his job. The claimant's fear was due to the fact, as he testified, that he had smoked marijuana around noon that day before he reported to work at 5:00 p.m.

On cross-examination the claimant acknowledged he had told carrier's adjuster that in the past he had gone in to work "stoned," a term he defined as meaning "intoxicated, high, whatever." According to the transcription of that telephone conversation, which was introduced into evidence, he had been counseled by his supervisor in the past for drug use and had promised he would try to confine such use to off-duty hours.

The claimant said he went back to work and finished his shift at about 6:30 or 7:00 a.m. He continued to work until the following Thursday, when he awoke in pain and barely able to move. He contacted (Mr. D), the plant manager, went in to fill out an accident report, and was seen the following Monday by (Dr. P), who diagnosed low back strain and took claimant off work for two days with light duty work thereafter. When he reported back to work the following Sunday, taking the doctor's light duty release with him, he was told by Mr. S that there was no light duty and he was to go home. Three or four days later he telephoned Mr. D, who said he was letting claimant go because he had failed to report for light duty work.

Dr. P, following a normal x-ray, diagnosed low back strain and prescribed medication. His initial medical report of April 28th also noted a urinalysis that was negative for all drugs tested, including marijuana. Because of the claimant's continued complaints of pain in the lower back and right leg, he was seen by (Dr. N), who recommended a CT scan which was performed on August 5th. Dr. N reported that the CT scan showed a mild protrusion at the L4-5 vertebral disc, with nerve root irritation at the fifth lumbar vertebra on the right. Dr. N thereafter referred the claimant to Dr. Rapp (Dr. R), who, on September 4th, stated his impression of an acute herniated lumbar disc at L4-5 and who said he believed claimant was a candidate for surgery, although further studies were needed. He referred claimant to a neurosurgeon, (Dr. S), who ordered an EMG, a myelogram,and a post-myelogram CT scan. On October 23rd Dr. S wrote Dr. R that the claimant's neurological examination was normal and the myelogram and CT scan revealed disc bulging at L3-4 and L4-5, but no herniation. He said he believed the claimant's problem was myofascial strain of the lumbar spine which could be treated with anti-inflammatory medicine and exercise.

Mr. D, employer's plant manager, was called as a witness by the carrier and disputed claimant's version of what happened when he tried to return to work. Mr. D said he saw claimant performing his usual job on Monday through Wednesday following the accident, and that he spoke with claimant on that Tuesday about claimant's dissatisfaction with being used in a "fill-in" capacity. He said the claimant said nothing about an injury on any of those days, and that the first he knew claimant was contending he had been hurt on the job was when he received a call from Dr. P's office. Mr. D said he knew Dr. P had released the claimant to light duty work, and that the employer had a light duty work policy. It was his understanding that when claimant reported to work with Dr. P's release, Mr. S instructed him to go to the back of the truck and tie off glass, a job that required no lifting; however, claimant refused to do this job. (Claimant later stated that Mr. S had said he had work for him to do

in the back of the truck, but if he couldn't do that he might as well go home.) Mr. D said he tried to contact the claimant thereafter about light duty work, but that claimant did not have a telephone. He said he asked one of claimant's friends and coworkers to tell claimant to contact him, but by the time the claimant called him, on May 12th, he had been terminated due to the employer's policy of termination after three days of no contact.

Also testifying for carrier was DW, who did employer's personnel work. She testified that in late December 1992 she was informed that the claimant was doing roofing work. She sent her husband to the site, where she said he observed and photographed the claimant. She also went to the site herself and stated she saw claimant nailing shingles on a pitched roof. She also saw him come down a ladder, get more shingles from a truck and throw them over his shoulder, and go back up the ladder. The claimant contended he was just helping a friend by hitching the friend's trailer to his pickup truck, and that he "hung a few shingles" while he was there talking to his friend but didn't actually do any roofing work.

Because a finding of intoxication would negate any determination of injury in course and scope and obviate any need to find disability, we will first consider the carrier's contention that the hearing officer applied an incorrect standard of review in considering the defense of intoxication. Regardless of the fact that the carrier's pleading was styled as a response, it was also timely as an appeal, and it asks that this panel consider an issue in the case and take action. *See* Texas Workers' Compensation Commission Appeal No. 92141, decided May 21, 1992. 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 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]." Article 8308-1.03(30)(A). This panel has previously held that marijuana comes within this definition. Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992.

Courts have held that a claimant need not prove he was <u>not</u> intoxicated, as there is a presumption of sobriety. <u>Bender v. Federal Underwriters Exchange</u>, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct). However, when the 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 the injury. <u>March v. Victoria Lloyds Insurance Co.</u>, 773 S.W.2d 785 (Civ. App.-Fort Worth 1989, writ denied). The critical question raised in this case is what amount of evidence must be presented in order to rebut the presumption and shift the burden of proof. The carrier complains of the hearing officer's interpretation, as embodied in the discussion section of his decision and order, as follows:

> Also, the carrier has failed to present the required scintilla of evidence that the claimant was intoxicated at the time of his injury. Even though the claimant

> admitted he had come to work `stoned' before and had smoked marijuana on the morning of the (date), he denied any subsequent use that day. He declined to go to the doctor when injured for fear his urine test might be positive; however, this was obviously a supposition on his part. Even so, testing positive is not the same thing as being intoxicated.

The 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 alcohol concentration of 0.10 or more which is deemed to be intoxication. Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. In that case we also declined to hold that a carrier must present scientific evidence and/or expert testimony in order to raise the intoxication exception. However, we have said that "evidence offered to raise the issue of intoxication and erase the presumption of sobriety thereby shifting the burden back to claimant, must have some probative value and not be so weak as to be meaningless or amount to no more than a mere scintilla." Texas Workers' Compensation Commission Appeal No. 92224, decided July 16, 1992.

Under the circumstances of this case, we are unable to say that the evidence, which included claimant's own testimony of marijuana use some five hours before he reported to work, coupled with his reluctance to see a doctor the same day because of his fear that such use would be disclosed upon urinalysis, is not sufficient evidence to raise the intoxication defense and shift to the claimant the burden of proving he was not intoxicated.

In Appeal No. 92173, *supra*, we discussed the amount of evidence a carrier would have to offer to rebut the presumption of sobriety. While not articulating a firm standard, that case speaks of "substantial or positive contrary evidence . . . sufficient to support a finding of the nonexistence of the presumed fact," as well as stating that "the burden to prove lack of intoxication is on the claimant, when the issue is raised by `probative evidence' . . . evidence that has some value in establishing a factual matter." That opinion concluded that evidence sufficient to raise the issue is what is required of the insurer to rebut the presumption. In our opinion, the testimony of the claimant as noted above meets the above requirements.

The exception having been sufficiently raised, it would have been incumbent upon the claimant to establish that he nevertheless possessed the normal use of his mental or physical faculties at the time of the injury. It is not clear from the hearing officer's decision and order, however, that his analysis followed the correct sequence under the law, as he found that the carrier did not provide enough evidence to shift the burden of proof to the claimant, yet he made a finding of fact that the claimant "had the normal use of his mental and physical faculties at the time of his injury." Because of the apparent inconsistency between these two determinations, it appears that there was a misapplication of law which requires a remand. We therefore reverse the decision and order of the hearing officer and

remand this case for findings and conclusions, with development of any such further evidence as the hearing officer deems necessary, on the issue of whether the claimant was intoxicated at the time of his injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge