APPEAL NO. 990603

This appeal arises 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 March 8, 1999. The issues at the CCH were whether the claimed injury occurred while the appellant (claimant) was in a state of intoxication thereby relieving the respondent (carrier) of liability for compensation, and whether the claimant sustained disability. The hearing officer determined that the claimant had the normal use of his mental and physical faculties at the time of the claimed injury but that he did not have disability under the 1989 Act. The claimant appeals urging that there was no jurisdiction in the CCH because the claimant and employer in the employment application agreed that "any disputes arising out of my employment, including any claims of discrimination, harassment or wrongful termination that I believe I have against (employer) and all other employment related issues (excepting only claims arising under the National Labor Relations Act or otherwise within the jurisdiction of the National Labor Relations Board) will be resolved by arbitration as my sole remedy." Claimant also urges error in the admission of evidence that the claimant was terminated for cause (a positive drug test taken the day after the injury), and argues that if this improperly admitted evidence had not been before the hearing officer, the issue of disability may have been resolved in claimant's favor. The carrier appeals the hearing officer's determination on the intoxication issue urging that the hearing officer applied an incorrect legal standard and inappropriately placed the burden of proof of intoxication on the carrier even though evidence of a positive drug test was admitted that shifted the burden of proof to the claimant to prove sobriety. The carrier responds to the claimant's appeal urging that the carrier was not a party to any agreement between the employer and claimant at the time of employment; that as a party to this claim, it had never agreed to arbitration under the 1989 Act; and that the CCH had jurisdiction on this benefits case. Carrier also urges that the evidence of the drug test result was appropriately admitted and that the evidence sufficiently supported the hearing officer's determination of no disability.

DECISION

Reversed and remanded.

The claimant testified that he sustained a head injury (laceration) on _____, when he was hit with a steel door. He was on a location with another construction company and no report of the injury was made to the employer until the following day. In any event, on the day of the incident, the claimant was taken to a hospital where he was treated with his laceration being stapled, and he returned to his workplace. The initial medical records show that he presented to the hospital awake, alert and acting appropriately, that he was smiling and pleasant and he was oriented "x 3." There is no indication that any drug test was performed. The claimant stated that after he came back to the job site, he subsequently went home and that early in the morning his head was hurting him and at about 4:00 a.m. he went out and got some marijuana to ease the pain, although he had never had marijuana before. The next day he went to work, but since the employer had now received notice of the incident, he was told to go to their doctor for a drug test. He had

agreed at the time of employment to consent to a drug test if he suffered a work-related injury and that the testing "is to be done at the location where initial treatment for the injury/illness is provided . . . ." Claimant's position was that the drug test was not admissible because it did not comply with the employment agreement by being conducted at the location of the treatment for the initial injury. In any event, the drug test, using the confirmatory test gas chromatography/mass spectrometry showed 61 ng/ml presence of marijuana metabolite. The claimant was subsequently terminated from employment based on the test results and the employer's policy on drug abuse. The claimant states that he tried to find employment, that he also unsuccessfully applied for unemployment, and that he has not worked since then because of his injury.

Initially, we do not find merit to the assertion that the CCH lacked jurisdiction because of the aforementioned employment agreement. Even supposing that the agreement (which we do not conclude from its terms) was intended to extend to workers' compensation claims, the carrier, who is the other party in the dispute resolution process involved here, is not a party to any agreement and is not bound by the agreement between the employer and claimant. While the 1989 Act does provide for arbitration (Section 410.101 *et seq*.), the parties to the disputed claim must agree to arbitration, and the parties to the disputed claim here are the claimant and the insurance carrier since the carrier is disputing compensability. Section 409.011(b)(4); Texas Workers' Compensation Commission Appeal No. 970670, decided June 2, 1997. *See also* Texas Workers' Compensation Commission Appeal No. 960490, decided April 24, 1996 and Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992.

We also do not find merit to the assertion that the results of the drug test were improperly admitted since it was not performed at the location of the initial treatment. Aside from the fact that the employer was not aware of the incident or injury until the next day, we do not find any basis to conclude that the provision cited intended to confer any rights on the claimant regarding a particular location or time for a drug test. Although those factors may affect the credibility and weight of the evidence to be assessed by the hearing officer, we cannot conclude that the hearing officer abused his discretion in admitting the drug test results. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We also conclude there was sufficient evidence to support the hearing officer's determination that disability was not established by the evidence.

Regarding the assertion of error by the carrier that the hearing officer imposed the wrong standard in an intoxication situation, we are uncertain from the confusion contained in the hearing officer's Decision and Order that the standard held by the Appeals Panel has been correctly applied. Therefore, we remand for further consideration. An insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Section 406.032. Where the carrier raises the issue of intoxication, and a positive drug test is sufficient to raise the issue, the burden of proof switches to the claimant to prove that he was sober or not under the influence (had the normal use of mental and physical faculties) at the time of the injury. *See* Texas Workers' Compensation Commission Appeal No. 982576, decided December 16, 1998, and cases discussing the

standard and burden of proof. Here, the hearing officer states in his discussion that the evidence presented is insufficient to establish that claimant was intoxicated at the time of the injury which leads us to have serious doubts that the correct standard was applied, particularly under the facts of this case. Thus, we reverse and remand for further consideration and clarification on this issue.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge