APPEAL NO. 990751

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 9, 1999, and March 17, 1999, hearings were held with (hearing officer 1) presiding at the former and (hearing officer 2) presiding at the latter; he provided the decision in this case. He determined that respondent (claimant) had the normal use of her physical and mental faculties at the time of the injury at work on _____, and that she had disability from August 19, 1998, to the date of hearing. He also found that appellant's (carrier) dispute, concerning whether claimant was injured compensably, was sufficient. Carrier asserts that its medical evidence showed that claimant was intoxicated from marijuana use at the time of the injury and that lay testimony as to normal use of one's faculties is of limited value, *citing* Texas Workers' Compensation Commission Appeal No. 981662, decided September 3, 1998, and that claimant did not have disability past October 26, 1998. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer), but was assigned to work at the (site employer) as a packer. She described her job as packing items in boxes which had been ordered by customers of site employer; site employer primarily made water pumps. On _____, she was struck in the ankle (she did not say of which leg) by a pallet that extended from a moving pallet jack. The medical record of _____, of Dr. H indicates that claimant's right ankle had a contusion and was sprained and her right leg had a contusion. There was no dispute that the accident happened at approximately 12:30 p.m. on a Tuesday, _____, after claimant had begun work at 6:00 a.m. that day.

Upon receiving medical treatment, claimant provided a urine sample which was tested for marijuana. The test was positive. Eight hundred nanograms per milliliter (ng/ml) was reported. Dr. K provided an opinion for carrier in which he said that histories taken from patients "under conditions of addiction" are not reliable. (There was no evidence, other than the urine test, that claimant was a marijuana addict.) He added that "impressions of others . . . are subsidiary to the laboratory testing . . . " but offered no citation of any study for this statement. Dr. K also stated that the 800 ng/ml reported herein is four times greater than that in a district court case in which the claimant was determined to be intoxicated, adding that "these levels" have shown impairment "in the established scientific literature," and then saying that "such impairment . . . can persist for several days after cessation of use"; it is not clear whether the reference to "established scientific literature" applies also to the phrase about persistence that was made after the reference. No particular study or literature was referenced within his report. He adds that testing of urine is the "standard for federal workers," but does not add what level of marijuana, if any, found in such testing is considered to be sufficient to show intoxication at the time of an accident. He then concluded by saying that claimant was intoxicated and impaired at the

time of the accident. Dr. K did list four references at the end of his report, two were his own reports, one was a reference to the court case referred to above, and the last was a JAMA article dated February 21, 1996; the article concluded that heavy users of marijuana were shown to still be affected "even after a day of supervised abstinence." However, this article then said that questions that need further "pursuit" include "how long marijuana associated neuropsychological impairment lasts."

This opinion was sufficient to raise the issue for which claimant then had the burden to show that she had the normal use of her mental and physical faculties. *See* Section 401.013(a)(2). Although the statement of Dr. K could be considered conclusory since he gave no explanation concerning claimant, her condition, her history of marijuana use or absence of such history, or what period of time could have elapsed for her to have 800 ng/ml in her urine, and since he did not cite any particular study or standard set forth which concluded that intoxication at a certain time was shown by a certain level of marijuana in the urine, the hearing officer could still have decided to give Dr. K's opinion significant weight--but he did not have to. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

Claimant provided the opinion of Dr. C, dated December 17, 1998. Dr. C's statement was shorter and also provided no citations to specific literature while citing "peer reviewed literature" in general. He said that such "peer reviewed literature" does not correlate "intoxication with the level of marijuana in the urine." He added that claimant may have used the marijuana "days, and even weeks, prior to the accident" or could have used it immediately before the accident.

The hearing officer could conclude from the two opinions that the longest period of impairment indicated by Dr. K was "several days," whether supported or not, while the longest period of time since possible use prior to the injury stated by Dr. C, also whether supported or not, was "weeks." The hearing officer found that use occurred "about 10 days prior to the injury." This finding was not specifically attacked and is sufficiently supported by the evidence.

Mr. M and Mr. T both testified that they saw claimant on the day of the accident. Mr. M is a supervisor who did not testify as to having observed claimant working prior to the accident so as to be able to opine as to whether claimant had the normal use of her mental and physical faculties while working before the accident. Mr. M said he talked with claimant right after the accident about medical care. When asked if there was anything "about her that would have led you to believe she was . . . intoxicated at the time," Mr. M replied, "Not that I can get into in any detail, no."

Mr. T, on the other hand, said he drove the pallet jack that ran into claimant. (Whether he was tested for drug use is unknown.) He also said that he brought products on the pallet jack to claimant's area for sorting and shipping. He said the day in question was a normally busy day. He made deliveries to the area, where claimant and one other packer worked, about five times each hour. He spent little time with each load in claimant's area, but communicated regularly with claimant, asking, "Where do you want this pallet,"

etc. He added that claimant might move something out of the way to allow him to place his load in a particular place. Mr. T described his observation of claimant before the injury as, "She was working fine, doing her packing like always."

Carrier cited Appeal No. 981662, *supra*, which appears to say that testimony is insufficient to show whether a claimant was sober when only directed to claimant's work on the day of injury as compared to "any other day," without addressing whether claimant had the normal use of his or her mental or physical faculties. (That opinion did not address whether a fact finder could or could not make reasonable inferences from such limited testimony; however, we note that there was no determination that claimant was chronically intoxicated so that one day's intoxication appeared similar to any other day's intoxication.) In the case under review, Mr. T did not opine about "normal use of claimant's mental or physical faculties," but he did say claimant's work was "fine"; his other testimony, "like always," was somewhat similar to that described in Appeal No. 981662. (We note also that Appeal No. 981662 cited Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, in regard to the limited effect of "any other day" testimony, but Appeal No. 92591 affirmed no intoxication on the basis of testimony of other workers that the claimant in that case at the time of injury was "doing his work okay and was not impaired, that he was talking normally, and that he functioned well.") Mr. M, while not providing as much detail, said that there was nothing about claimant that would have led him to believe she was intoxicated. The evidence provided by Mr. M and Mr. T, along with reasonable inferences that may be made by a fact finder in any case, depending on the evidence presented and what may be reasonably inferred therefrom, was sufficient to support the determination that claimant had the normal use of her mental and physical faculties at the time of the injury on _____.

Carrier states that disability was not shown past October 26, 1998. While claimant did testify that she could not stand or climb, she never testified that she could not work after October 1998. She did say that she has not worked anywhere since _____, and has not tried to work anywhere. The hearing officer could believe claimant rather than a report by Dr. M dated October 22, 1998, which said that claimant was "back at her regular duty," although it also alluded to discomfort she was having. The record also contains a release to very restricted work from Dr. Ha, D.C., dated October 26, 1998; claimant was to do no lifting, no climbing, and no pushing or pulling. Dr. Ha indicated on this restriction form that it was to remain in effect "until further notice." On the same date, October 26, 1998, Dr. Ha provided an initial medical report in which he said that claimant could return full time to restricted work. He indicated that "6 to 8 weeks for recovery" should be allowed. There is no further report by Dr. Ha, but claimant testified that she is still receiving therapy under his direction and provided a list of appointments that extended through December 16, 1998. While the hearing officer could have considered Dr. Ha's initial medical report as only imposing restrictions on claimant for up to eight weeks (the end of December 1998), based on his prognosis and absence of any other statement from Dr. H changing that prognosis, the hearing officer could give weight to the restrictions form which indicated that it remained in effect "until further notice." In this instance, since disability was only found to March 17, 1999, less than three months after the eight-week duration referred to at the end of October, since claimant testified she still was receiving therapy, and since she testified that

she could not climb or stand, the hearing officer was sufficiently supported in finding disability to the date of the hearing. (We note that a doctor's report restricting work "until further notice" does not mean that disability will be found for an extended period of time without further evidence of inability to work.)

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge