APPEAL NO. 990772

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 18, 1999. The issues at the CCH were whether the claimed injury occurred while the respondent (claimant) was in a state of intoxication, thereby relieving the appellant (carrier) of liability for compensation, and whether the claimant had disability resulting from a compensable injury on _____. The hearing officer determined that the claimant was not in a state of intoxication, and the claimant had disability from December 18, 1998, through March 18, 1999. The carrier appeals, urging that the hearing officer's determinations are either insufficiently supported by the evidence, or so contrary to the evidence in the record as to be manifestly unjust, requiring reversal. The file does not contain a response from the claimant.

DECISION

We reverse and render.

The claimant testified that he sustained an injury on _____, when he was driving an electric pallet jack. According to the claimant, the pallet jack malfunctioned and began rolling towards a window; he put his foot out to stop it, and it broke his right foot. The claimant testified that he arrived at work at approximately 10:00 a.m. and the injury occurred at 10:30 a.m. The claimant testified that he was driven by a coworker, Mr. M, to obtain medical care. While receiving medical care, a urine specimen was collected at 2:15 p.m. Subsequently, specific and quantitative gas chromatography/mass spectrometry confirmed the presence of marijuana at over 200 ng/ml of urine.

The claimant testified that he smoked marijuana on a regular basis, usually a "joint" every evening. The claimant testified that on the night before the injury, he was at a party and took five to six "hits" of a marijuana cigarette, the last "hit" close to 2:00 a.m. According to the claimant, he got approximately six hours of sleep before going to work on _____.

The carrier presented the expert testimony of Dr. K, a toxicologist. Dr. K testified that 50 ng/ml is generally accepted as an indication of intoxication. Dr. K testified that the level of 200 ng/ml is a very high level, and within reasonable medical probability the claimant's mental and physical state was impaired. Dr. K stated that given the claimant's level, the claimant's reaction time to auditory stimuli and visual stimuli and hand/eye coordination would be impaired. Dr. K testified that the claimant's marijuana metabolite level would have been even higher at the time of the accident than at the time the sample was taken.

The claimant presented the report of Dr. C, who reviewed the report of Dr. K. Dr. C states:

> Though the [claimant] shows high levels and there is a possibility of intoxication, the behavioral response is variable in my professional opinion, and there is no direct numerical correlation between 200 [ng/ml], and intoxication. Thus, with reasonable medical probability, we cannot define intoxication based on a specific level in the urine. This is best addressed by coworkers or physicians directly observing the patient.

The claimant presented three witness statements from Mr. M. Mr. M's first handwritten statement, dated January 10, 1999, states:

> When i Mr. M. Took Claimant To the Doctor's Office He didn't look or seam [sic] to be inpair [sic] any drugs or achol [sic].

Mr. M's second statement, dated February 7, 1999, was made on a typed form. Those portions which are handwritten are italicized. The second statement states:

> I *Mr. M,* affiant, state that I have been an employee of Employer since on or about *11-96* I am personally acquainted with Claimant, claimant. On or about _____ I personally observed the claimant as follows; (ate lunch, took break etc . . .) *I saw Claimant Before work and gave Him a ride to (clinic)*. During the above mentioned instances Claimant, claimant, at all times possessed a normal use of his mental and physical faculties. I have read the above mentioned statement of facts and acknowledge that it is true and correct to the best of my information and belief.

Mr. M's third statement, dated March 4, 1999, states:

> I, Mr. M, request that a correction to my statement given February 7, 1999 be made. I wrote "I saw Claimant before work and gave him a ride to Clinic." The following sentence was not part of the statement I signed, "*During the above mentioned instances Claimant, claimant, at all times possessed a normal use of his mental and physical faculties."*
>
> I would like to correct my statement to read as follows:
>
> "I saw Claimant before work as he was going to clock in for the day, we said Good Morning to each other and that is all that consisted of us seeing each other. I was asked to drive Claimant to Clinic in City 1 to have his foot examined by a doctor; he had hurt it on the pallet jack. I do not feel I can say he *at all times* possessed normal use of his mental and physical faculties. As a co-worker I did not pay attention to how he was when I saw him when he arrived other than to say hello. It is not up to me to make a judgment as to his mental or physical condition for work because I am not his supervisor. When I drove Claimant to Clinic after the accident he seemed okay, but he was in a lot of pain.

An employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once the carrier has rebutted the presumption, the employee has the burden of proving he was not intoxicated at the time of the injury. Intoxication is 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 controlled substance analogue, as defined by Section 481.002, Health and Safety Code." Section 401.013(a)(2)(B). A carrier is not liable for compensation if the employee's injury "occurred while the employee was in a state of intoxication." Section 406.032(1)(A).

There is no dispute that the laboratory report revealed the presence of marijuana at over 200 ng/ml of urine, or that marijuana is a controlled substance. The laboratory report and the testimony and report of Dr. K shifted the burden of proof to the claimant. Whether the claimant met his burden to show he was not intoxicated by way of marijuana ingestion is a factual question for the hearing officer to consider. Texas Workers' Compensation Commission Appeal No. 951856, decided December 21, 1995.

The hearing officer found that the claimant had the normal use of his mental and physical faculties at the time of the injury. The claimant did not testify that he was not intoxicated at the time of the injury, did not testify as to how he carried out his tasks on the day of the injury, and did not testify as to his interaction with those in the workplace prior to the injury. The claimant did testify that he "misjudged" whether he could stop the pallet jack, which one could argue indicates that the claimant did not have the normal use of his mental and physical faculties. Mr. M's statements were evidence regarding the claimant's sobriety at the time of the injury. While we have previously affirmed hearing officer's decisions where an employee proved through coworkers' testimony that the employee was not intoxicated at the time of the injury, this case involves the contradictory statements of only one witness, Mr. M. Mr. M's second statement, while it uses the required statutory language that claimant "possessed the normal use of his mental and physical faculties," fails to indicate any factual basis for the statement such as: how the claimant performed his work that morning, whether he appeared to be acting or performing normally, or any observations of the claimant's behavior prior to the injury. In the third statement, Mr. M indicates he "did not pay attention to how [claimant] was when [he] saw him when he arrived other than to say hello." The absence of any supporting facts for Mr. M's conclusion in his second statement, and the contradiction in the three statements, compels us to conclude that the hearing officer's finding is not supported by the evidence and is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The determination that the claimant had the normal use of his mental and physical faculties at the time he was injured at work is not supported by the evidence. *See* Appeal No. 91018, *supra.* We reverse the decision and render a new decision that the claimant was intoxicated at the time of his injury and, therefore, the carrier is not liable for compensation.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant testified that has not worked since the injury. The claimant stated that he was released to work light duty on December 18, 1998, but was subsequently taken off work. The medical report of the claimant's treating doctor, Ms. McC, on December 29, 1998, indicates the claimant was released to sedentary work, but had not returned to work because it was not available. The claimant testified he was fired on January 8, 1999. In February 1999, the claimant changed treating doctors and was taken off work by Dr. E. Disability, by definition, depends upon there being a compensable injury. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Since the carrier is not liable for compensation, we also reverse the determination that the claimant had disability and render a new decision that he does not have disability.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge