APPEAL NO. 991357

On June 8, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN.§ 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the respondent (claimant) sustained a compensable injury on _____; (2) whether the claimed injury occurred while claimant was in a state of intoxication, as defined by Section 401.013, from the introduction of a controlled substance, thereby relieving appellant (carrier) of liability for compensation; and (3) whether claimant had disability. Carrier requests reversal of the hearing officer's decision that claimant sustained a compensable injury on _____, and that the claimed injury did not occur while claimant was in a state of intoxication as defined by Section 401.013, from the introduction of a controlled substance. Carrier requests that a decision be rendered that claimant did not sustain a compensable injury and that the claimed injury occurred while claimant was intoxicated. The hearing officer determined that claimant has not had disability resulting from the injury sustained on _____. Carrier requests that the hearing officer's decision on the disability issue be reformed to reflect that claimant has not had disability because he did not sustain a compensable injury. No response was received from claimant.

DECISION

We affirm the hearing officer's finding that on _____, claimant sustained a back injury while he was performing his job duties for a client of (employer). We reverse the hearing officer's decision that claimant sustained a compensable injury on _____, and that the claimed injury did not occur while claimant was in a state of intoxication as defined by Section 401.013 from the introduction of a controlled substance and we remand the case to the hearing officer on the intoxication issue. Claimant did not appeal the hearing officer's decision that he has not had disability.

On _____, claimant, who was 42 years of age at the time of the CCH, was an employee of employer, a temporary service company, and was assigned to work for a client company delivering groceries to stores and schools. Claimant said that he arrived at work at about 4:00 or 4:30 a.m. on _____; that on that day he was taking Tylenol two "or something like that" for a cold and a headache; that another man whose name he could not recall drove the delivery truck; that his injury occurred at about 7:00 or 8:00 a.m at the second school they went to that day; that he and the driver unloaded the groceries; that he loaded a two-wheeled dolly full of boxes and cans; that as he tried to "jump" or pull the loaded dolly over a curb he heard something pop in his back and fell down and could not move; that the driver told him to stay still; that he was hurting bad, could not move, and lay down for about 45 minutes while the driver finished the unloading; that the driver called the employer; and that the driver helped him into the truck and went to a third school where he sat in the truck and waited for his boss, TL, to come.

Claimant further testified that TL came to the school and took him to (C clinic), to see a doctor; that a drug screen was done; that as a result of his accident with the dolly on

_____, he injured his lower back, left leg, and left arm, and has pain all of the time; that he did not have a back problem before his injury of _____; that he was released for light-duty work and worked light duty in the employer's office on October 20th and 21st; and that he was terminated from employment on October 23rd because the drug screen was positive for cocaine.

Claimant also testified that at the time of his injury he was not under the influence of a controlled substance; that he does not take drugs; that he has never taken cocaine; that he would not have been at work and employer would not have let him work if he had been on drugs; that every morning before working he takes a breathalyzer test for alcohol; that he is not tested for drugs every morning; that before his injury no one questioned him about whether he was intoxicated; that he had heard talk at some unspecified time that he was going to be fired and he guesses that is why "they fired me and made up some kind of deal that I had drugs in my system"; that before his injury he was able to perform his job and went to work every day; that his doctor told him that he needs surgery for herniated discs; that he has not worked since being terminated from employment on October 23rd; that he probably could have continued to do the light-duty work the employer gave him if he had not been terminated from employment; and that he has been unable to work because of his injury.

No testimony or written statement from the driver was presented. RW, a branch manager for employer, testified that claimant was employed in January 1998; that all employees take a breathalyzer test for alcohol before working; that employer does random drug testing and requires a drug screen when a work injury is claimed; that he would not request that a drug screen be fabricated; that he considered claimant to be a very good worker; that when claimant was released to light duty he had claimant work in the office for two days; that when he got the results of the drug screen he terminated claimant from employment; that he discussed the drug screen with claimant and claimant told him that he does not do drugs; that if claimant had not had a positive drug screen, claimant could have continued working light duty for employer; that TL, the employer's district manager, took claimant to C clinic on _____; that the day claimant claimed he was injured, there was another accident and he, RW, had to take that person, whom he did not name, to C clinic and that person passed a drug test; that he never had any suspicion that claimant was taking drugs; that claimant was punctual; and that he had trusted claimant enough to help with the opening of another office, apparently some time prior to the claimed injury.

TL gave a written statement that RW called him on _____ and told him that claimant had called and indicated that he was injured and needed to be taken to the clinic for treatment; that he went to the school where claimant was making a delivery and found claimant in the cab of the truck; that claimant indicated he had strained his back while unloading supplies; that he helped claimant into TL's car and asked claimant if he had a clinic he wished to use; that claimant did not know of a clinic to use; and that he told claimant employer had access to C clinic and took him there.

Claimant went to Dr. D, D.C., sometime after being seen at C clinic and Dr. D noted on October 28, 1998, that he recommended that claimant remain off work, but did not say for how long. Claimant was referred to Dr. G, who examined claimant on October 29, 1998, and wrote that claimant presented for evaluation of complaints and injuries following a fall while trying to move a fully loaded dolly over a curb and that claimant complained of headaches, mid back pain, low back pain, and pain radiating into his left arm and left leg. Dr. G diagnosed claimant as having thoracic sprain/strain, lumbar sprain/strain, lumbar muscle spasm, and nerve root irritation with radicular pain to the left leg and left arm. Claimant underwent a lumbar MRI in November 1998 and the radiologist's impression was that claimant has disc herniations at L4-5 and L5-S1. Dr. B wrote in November 1998 that claimant had a relatively unremarkable nerve conduction study of his lower extremities.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also had the burden to prove that he had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer found that on _____, as claimant was attempting to jump a curb with a loaded dolly as he was performing his job duties for a client of the employer's, he sustained a back injury. Carrier states that it disputes that an injury occurred as alleged and that claimant's description of his activities following the injury is incredible and does not support his allegation of an injury.

Generally, in workers' compensation cases, the issues of injury and disability may be established by the claimant's testimony alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's finding that claimant sustained a back injury on _____, while performing his job duties for a client of the employer's is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Claimant did not appeal the hearing officer's decision that he has not had disability resulting from the injury sustained on _____. The hearing officer's decision on the disability issue is based on his findings that employer would have provided claimant light-duty work if he had not tested positive for cocaine and that claimant's inability, if any, to obtain and retain employment at his preinjury wage is due to his testing positive for cocaine and not due to his _____, injury. Carrier states that while it agrees with the hearing officer's decision that claimant has not had disability, it requests that the decision on

disability be reformed to state that claimant does not have disability because he did not sustain a compensable injury. We decline to reform the hearing officer's decision on the disability issue pending our remand of the case to the hearing officer on the intoxication issue.

Section 406.032 provides, in part, that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication that applies to this case 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. Section 401.013(a).

Courts have held that a claimant need not prove he was not intoxicated as there is a presumption of sobriety. Bedner v. Federal Underwriters Exchange, 133 S.W. 2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't cor). However, when a 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. March v. Victoria Lloyds Insurance Company, 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied). In Texas Workers' Compensation Commission Appeal No. 92591, decided December 17, 1992, a case involving the issue of marijuana intoxication where we affirmed a hearing officer's decision that a claimant was not intoxicated at the time of injury, we observed that "the Texas Legislature has not established a presumptive or conclusive standard for determining drug intoxication, as opposed to the provisions regarding alcohol intoxication." We further stated in that decision that "the ultimate matter is whether the claimant was intoxicated at the time of the accident, that is, whether he was in the state of not having the normal use of his mental or physical faculties resulting from the ingestion of marijuana."

On January 27, 1998, claimant signed a form which states that he understands that employer will require a drug screen whenever an on-the-job accident or injury is reported and that he authorizes and consents to this drug screen. On the date of injury, _____, claimant signed a C clinic Consent for Substance Abuse Screening form. It is undisputed that on _____, claimant provided a urine specimen at C clinic for a drug screen. Claimant signed a certification form in which he acknowledged that the specimen accompanying the certification form was his own and that he observed it being sealed in a container which he initialed. A "Non D.O.T. Chain of Custody Form" (custody form), which contains C clinic's name and employer's name notes that the reason for testing is "post accident," that the collection site is C clinic, and that the test panels are "10 panel Non-DOT." By signing the custody form on _____, DP, who apparently works at C clinic, certified that the specimen identified on the custody form is the specimen presented to him or her by the donor, that it bears the same specimen identification number as that set forth on the custody form, and that it had been collected, labeled, and sealed as in accordance with applicable forensic requirements.

At the bottom of the custody form in spaces for the donor's name, social security number, telephone number, and signature appear claimant's printed name, social security number, telephone number, and signature. The custody form contains a section for people

to sign and date when they release the specimen to another and for people to sign when they receive the specimen. DP signed the custody form as having received the specimen from the donor (identified as claimant at the bottom of the custody form) _____, and DP signed the custody form as having released the specimen on _____. DP's signature indicating release of the specimen appears in the subsection for release of the specimen to a "courier" for shipment to a "lab." However, no signature appears in the space provided for "courier" to sign as having received the specimen from DP, in the space provided for "courier" to sign as having released the specimen to a "laboratory," nor in the space provided for a "laboratory" to sign as having received the specimen from the "courier."

A report from (AD lab), with a (City), (Country) address, contains C clinic's name and address; employer's name; a notation of "post accident"; claimant's name; claimant's social security number (the same number as appears on the custody form for the donor's social security number); the same nine-digit specimen identification number as appears on the custody form; a collection date of _____; a date received of _____, at 23:55; a date reported of October 20, 1998, at 23:55; and an analyses order for a drug screen 10 panel. The AD lab report notes that 10 drugs were screened for and that the drug screen for cocaine metabolite resulted in a positive result with a quantity of 5060 ng/ml. The AD report states that the results had been reviewed by a certifying scientist and that drug confirmations are "GC/MS."

Dr. P rote on March 15, 1999, that he had reviewed the claimant's available medical records, apparently at carrier's request; that the records reflect that claimant was injured at work on _____, was treated at C clinic, and a urine drug screen was performed on _____, and analyzed at Ad lab; that the urine drug screen was positive for cocaine metabolites; that that was confirmed by gas chromatography/mass spectrophotometry; that in his opinion "this represents presumptive evidence of intoxication of patient [claimant's name] at the time of the _____ incident"; that this would reflect claimant's not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a dangerous drug; and that the medical records reflect evidence of intoxication at the time of injury.

Unappealed findings of the hearing officer are that on _____, shortly after the incident with the curb and dolly, claimant provided a urine sample for a drug screen; that the drug screen was positive for cocaine metabolite; and that Dr. P opined that, based on the drug screen results, claimant did not have the normal use of his mental and physical faculties and was intoxicated at the time of the incident with the curb and the dolly on _____. Carrier appeals, as being against the great weight and preponderance of the evidence, the hearing officer's findings that "[c]arrier has not established that claimant's urine sample was properly processed from the time it was collected by [DP] to the time a urine sample was tested by the lab" and "[c]arrier has not overcome the initial presumption in favor of claimant's sobriety on _____." Carrier also appeals the hearing officer's conclusion that "[t]he claimed injury did not occur while the claimant was in a state of intoxication, as defined by Tex. Labor Code Ann. § 401.013, from the introduction of a controlled substance, thereby relieving the carrier of liability for compensation."

In the March case, *supra*, which was a workers' compensation case involving alcohol intoxication, the court stated that any gaps in the chain of custody should go to the weight, and not to the admissibility, of the evidence. In the instant case, the drug screen report showing a positive result for cocaine metabolite was admitted without objection. The hearing officer states in his decision that carrier did not present evidence to show custody of claimant's urine sample from the time it was collected by DP to the time "a" urine sample was tested by the lab and he found that carrier had not established that claimant's urine sample was "properly processed" from the time it was collected to the time "a" urine sample was tested. The hearing officer's statement and finding appear to imply that carrier had not shown that the urine sample tested was claimant's. However, the hearing officer's statement and finding do not consider that the drug screen report from AD lab of October 20th itself provides evidence through notations of the specimen identification number (which is the same specimen identification number on the custody form), claimant's name and social security number, C clinic's name, employer's name, and the date the sample was collected, that the urine sample tested was the sample provided by claimant. In addition, DP certified on the custody form that the specimen provided by claimant bore the same specimen identification number as appeared on the custody form, which is the same specimen identification number that appears on the AD lab report. DP also certified that the specimen provided by claimant was sealed and there is no indication in the AD lab report that the specimen was received unsealed or in a condition that would indicate tampering had occurred. We hold that the hearing officer erred in finding that carrier has not overcome the presumption in favor of claimant's sobriety on _____. We further hold that the hearing officer erred in failing to shift the burden of proof to claimant to prove that he was not intoxicated at the time of the injury based on the AD lab drug screen report and the opinion of Dr. P. *See* Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992. The AD lab report and Dr. P's opinion provided sufficient evidence to shift the burden of proof to the claimant to prove that he was not intoxicated at the time of injury.

We note that the Appeals Panel decision cited by carrier in its response, Texas Workers' Compensation Commission Appeal No. 970935, decided July 7, 1995, was recently considered, along with Texas Workers' Compensation Commission Appeal No. 981662, decided September 3, 1998, in Texas Workers' Compensation Commission Appeal No. 991181, decided July 14, 1999. In Appeal No. 991181, a case involving an issue of marijuana intoxication, the Appeals Panel declined to hold that, as a matter of law, a claimant's testimony alone is insufficient to prove a lack of intoxication.

We reverse the hearing officer's decision that claimant sustained a compensable injury on _____, and his decision that the claimed injury did not occur while the claimant was in a state of intoxication as defined by Section 401.013 from the introduction of a controlled substance and we remand the case to the hearing officer on the intoxication issue for further consideration of the evidence on that issue; for further development of the evidence on that issue, as deemed necessary and appropriate by the hearing officer; and for further findings of fact and conclusions of law on that issue. If claimant was intoxicated

at the time of injury, carrier would not be liable for compensation under Section 406.032 and no compensable injury would result from claimant's claim.

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 that 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge