APPEAL NO. 992935

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 December 9, 1999. The issue involved whether the respondent, who is the claimant, was in a state of intoxication when he was injured on _____, and whether the appellant (carrier) was thus discharged from liability for the claimed injury. Although inadvertently not recited in the decision, a second issue of whether the claimant had disability, and for what period, was also before the hearing officer.

The hearing officer held that the claimant was not in a state of intoxication, and that he met the burden of proof when it shifted to him because of a positive marijuana test result. The hearing officer further found that the claimant had disability from his injury for the period from _____, and continuing through August 8, 1999, when he returned to work.

The carrier has appealed, and argues that the hearing officer's decision is against the great weight and preponderance of the evidence. The carrier complains of admission of two of claimant's exhibits over objection for the failure to make a timely exchange and argues why the claimant failed to make a showing of good cause. The carrier argues that admission was reversible error because the hearing officer's decision hinges on these documents. Finally, the carrier argues that the claimant failed to prove his disability, and that his testimony, the only evidence of this, was uncorroborated, and that the reason he was off work was due to a layoff, not his injury. There is no response from the claimant.

DECISION

We affirm the decision.

All dates are 1999 unless otherwise stated. The claimant was employed by (employer) on _____. On that day, the claimant said he was working in a "snorkel lift," in which he was raised in a basket to heights to install conduits for electrical work. He noticed that it was real "jerky." As he was riding it down near the end of the day, the device "locked up" and he was thrown into the rail back behind him inside the basket. Claimant was in pain, and was sent by his supervisor to a medical clinic. He said they took a urine sample and x-rayed him. The test taken by the medical clinic was positive for marijuana metabolites. Claimant made it clear that he thought the staff of the medical clinic did not know what they were doing because they had x-rayed the wrong side.

Claimant said he returned to work the next day and was in pain. He asked to take the rest of the day off, and then went to a local hospital emergency room. He was x-rayed again, and said that three cracks in his ribs were obvious. The prescribed treatment was four to six weeks off work, a rib support and pain medication. He took off four weeks and then returned to work because he did not have money.

Claimant denied that he was intoxicated, and said he went to the hospital to have his own drug test run. It was negative. He had no idea why the other test would have been positive. He said he had been at a family Fourth of July get together before his accident and there was no marijuana at that party. When asked if he had been to a party the next weekend, he responded that generally he did not go out due to other activities around the home. He said that his job at the employer was short term, and he knew it would be coming to an end, although he denied that July 12th was his last day.

He said he did not return to the doctor after his first round of treatment because the claim had been denied and he could not afford to pay. He said he went back to work when he was ready to go, based primarily on financial obligations. The claimant agreed that while his job for the employer would have been of limited duration, he denied that he was due to be laid off on _____.

At the beginning of the CCH, the carrier objected to exhibits tendered by the claimant for failure to timely exchange. The carrier noted that two exhibits had been exchanged, but outside the 15-day time period (although received over a month before the CCH). The claimant responded that he sent these to the carrier's attorney immediately upon receiving them. Three other exhibits were exchanged for the first time at the CCH.

In evidence was the medical clinic drug screen and a brief letter explaining what the "cut off" was. The letter accompanying the test said that claimant's level was 160 ng/ml, with the cutoff being 15 ng/ml. The test report itself showed "positive" in two areas for marijuana metabolites, one with a 50 ng/ml cutoff and the other with 15 ng/ml. An unsigned one-line opinion on a memo written October 21st was presented ostensibly from Dr. J. It stated: "It is probably that, on _____, [claimant] was intoxicated at the time of his injury since his quantitative level for marijuana was 160 ng/ml by gc/ms." The claimant's own drug test report showed that the urine sample was collected (date of collection), and was negative for marijuana metabolites.

The carrier objected to five documents, two of which were witness statements from coworkers. The ombudsman explained that the claimant had not realized, before the benefit review conference (BRC), that he would need statements and it was then that he contacted his coworkers. He accordingly contacted his coworkers, but explained he had to follow up to see if they had sent him the statements. While the claimant could not say exactly when they were received, he said he had sent them to the carrier as soon as they were received. The carrier agreed that they were received on November 5th; the BRC was held October 13th. The claimant agreed that he may have gotten one of the statements a few days before the other, but he wished to mail them altogether. The claimant said that he did not know that he had a deadline to meet, but understood he should mail the statements as soon as he got them. He thought his wife mailed them within two or three days of receipt, by certified mail. The claimant also testified that he did not realize there was a deadline for these documents. The hearing officer admitted the coworkers' statements, finding good cause in that claimant exchanged them shortly after they were received.

As to the other documents, the claimant said all were exchanged at the BRC. The attorney for the carrier said she was at the BRC and denied she had received copies. The BRC conference report mentioned only two, and the hearing officer admitted these because they had been presented at the BRC and were pivotal in the benefit review officer's (BRO) recommendation. The other was excluded.

The statements were from Ms. F and Mr. M. Mr. M said that claimant did not appear to be under the influence of any substance on _____. Ms. F's statement was more lengthy and said that she did not believe claimant was under the influence of any intoxicant, nor did he appear to be intoxicated. Ms. F was claimant's supervisor.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.13(c) (Rule 142.13(c)) provides that documentary evidence shall be exchanged not later than 15 days after a BRC, but Rule 142.13(c)(2) also provides that additional documentary evidence shall be exchanged as it becomes available. The hearing officer can believe that sending such documents to the other party within two or three days after receipt, and well before the CCH, satisfies a requirement of exchange "as it becomes available." Therefore, with respect to the coworkers' statements being exchanged by November 5th, we cannot agree that the hearing officer abused his discretion by finding a good cause for late exchange. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992.

With respect to the other exhibits, we note that the two admitted by the hearing officer were indicated in the BRC report. The hearing officer could consider the additional conflicting evidence presented as to whether the documents were made available at the BRC as opposed to reviewed afterwards by the BRO. We note that one admitted document is the Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), not essential to the decision. The last admitted exhibit consists of a medical record which essentially consists of documents showing he was treated on _____. As the carrier was not disputing that the claimant was injured on the job, and claimant further testified that he was treated, neither document constitutes reversible error or evidence without which the decision would have been different.

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. *Id.* An insurance carrier is not liable for compensation if an employee's injury occurred while he was in a state of intoxication. Section 406.032(1)(A). Intoxication is defined in the relevant portions of Section 401.013(2)(B) as:

> 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 . . . .

Although the carrier presented its drug test results without authentication or expert evidence, the hearing officer nevertheless found that the burden was shifted to the claimant. We believe that there was sufficient evidence that supports the hearing officer's decision that the claimant was not intoxicated at the time of his injury. The hearing officer obviously gave weight to the coworkers' statements. The hearing officer could also consider that the mechanism of injury is not one that obviously indicates a loss of physical faculties.

Concerning disability, we cannot agree that the hearing officer's decision was against the great weight and preponderance of the evidence. A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). We cannot agree that the decision is so against the great weight and preponderance of the evidence as to constitute reversible error.

We accordingly affirm the decision and order of the hearing officer.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge