APPEAL NO. 000231

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 18, 2000, a hearing was held. The hearing officer determined that respondent (claimant) was compensably injured on _____; that an exception to liability for intoxication was not shown; and that claimant had disability from March 31, 1999, through October 13, 1999, but that claimant's injury does not extend to his left hand and wrist. Appellant (carrier) asserts that medical evidence shows that claimant was intoxicated on cocaine at the time of the accident; carrier also states that the statement of the supervisor shows that claimant did not turn off a machine before attempting to correct a malfunction, which is said to show that claimant did not have the normal use of "his faculties"; carrier states that claimant's evidence only addressed whether claimant was acting as "he always did," not whether he acted as a "normal, non-intoxicated person." As to disability, carrier said there should be none because claimant did not have a compensable injury. The appeals file contains no reply from claimant and no appeal as to the extent-of-injury determination or to the date that disability ended.

DECISION

We affirm.

Claimant testified that at about 4:45 a.m., after having begun that shift at 10:00 p.m., over six hours before, a small part of his index finger (at or near the first joint) was severed in a machine at work. Claimant also testified that after a break, a supervisor, Mr. M, asked him to use a particular machine that had malfunctioned. Another worker, Mr. H confirmed at the hearing that he had been using that machine that night and that it had broken down several times--that it had "jammed up," and that Mr. M asked claimant to use the machine. (There was no testimony from Mr. M, and no statement from Mr. M, indicating that he did not ask claimant to use the particular machine that shift after another worker had been unable to use it.)

The evidence does indicate that Mr. M prepared an accident investigation report in which he said that claimant did not turn off the machine before trying to clear it, but he also indicated in that report that there were no suspicious circumstances in regard to the accident.

Mr. H, when he testified, did testify that claimant acted the "same as every day" on the day of the accident, but he also said that claimant did not act peculiarly, was not speaking strangely, and that there was nothing abnormal about his behavior. Mr. H also said that he is familiar with cocaine intoxication and then said that claimant was "acting normal" that day. In addition, Mr. H and Mr. V jointly signed a statement indicating not only that claimant was acting as he always did, or that he was acting normally, but that claimant "was most definitely not under the influence of any substance . . . ."

Claimant testified that when a worker leaves the chair in front of the machine, it turns off; he also said that he used a key to turn off the machine. Claimant described leaving his chair to use an eight-inch tool at the rear of the machine to try to clear it, but this did not work. He then reached in and cleared a part, but the machine then "completed its cycle" and crushed the tip of his finger. Claimant's testimony indicated cocaine usage in high school, but on rebuttal claimant said he was not intoxicated at work that night, although he also said that he performed his normal duties that night. He characterized Mr. H as a friend. Claimant was taken to a hospital where a drug test was conducted.

The carrier introduced evidence that claimant's drug test showed 1,194 nanograms per milliliter of the cocaine metabolite benzoylecgonine. Dr. N said that there is "no medical justification" for the drug screen results. Dr. H provided a statement which said it is "highly improbable" that the cocaine did not adversely affect claimant's ability to work. He also said that due to the amputation and the "reasonable probability that this patient was within the spectrum of intoxication of cocaine," it is likely that the cocaine used is "causally related" to the work incident. He also said that it was likely that the cocaine usage "significantly influenced" the claimant's abiltiy to work. While the comments by Dr. H involving the amputation and "spectrum" may appear to indicate circuitous reasoning, they could be interpreted as indicative of impairment, and the latter comments could also be considered to say (in the use of the term, "significantly influenced") that claimant was "impaired," that medical opinion was only part of the evidence available for the hearing officer to weigh in determining whether claimant was intoxicated at the time of the accident--not whether claimant tested positive for having introduced an illegal drug into his body.

The hearing officer chose not to weigh the medical opinion indicative of impairment as greater than the lay opinion that claimant was not intoxicated. This lay opinion included the fact that Mr. M, three-fourths of the way through the workday, summoned claimant to work with a troublesome machine, which allowed a reasonable inference by the hearing officer that claimant's own supervisor did not consider claimant's physical or mental faculties to be impaired. As stated, Mr. M did not provide any evidence disputing his choice of claimant to work with the machine late in the day. In addition, the statement of Mr. H and Mr. V provided their opinion that claimant was not under the influence of any substance. This lay evidence could be assigned weight by the hearing officer just as she could assign weight to claimant's statement that he was not intoxicated. That Mr. H was a friend of claimant was another factor for the hearing officer to consider in determining the weight to give his opinion. There was no assertion that Mr. V was a friend of claimant. Whether or not claimant was intoxicated was a factual determination for the hearing officer; the evidence presented provided a sufficient basis for her to determine that claimant showed that he was not intoxicated.

While the issue of disability was addressed by carrier as tied to whether there is a compensable injury and to claimant's termination for having failed the drug test, we also note that Dr. C gave one opinion that claimant was unable to work from June 30, 1999, through October 15, 1999. Dr. C also said in a medical report dated October 15, 1999, that he would keep claimant off work for "two weeks," confirmed by an off-work slip dated

October 15, 1999, which says claimant may not resume work. The hearing officer commented in her Statement of Evidence that Dr. C had certified that claimant reached maximum medical improvement (MMI) on October 13, 1999, and added, "disability ends when the claimant reaches [MMI]." That is incorrect. Temporary income benefits end when MMI is reached. The ending date of disability was not appealed. Termination may affect disability but does not necessarily negate disability when a claimant is unable to earn comparable wages because of a compensable injury.

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:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge