APPEAL NO. 000382

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 January 25, 2000. The issues at the CCH were whether the respondent (claimant) sustained an injury in the course and scope of employment on _____; whether the appellant (carrier) was relieved of liability because of the claimant's intoxication; and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury; was not intoxicated; and had disability from September 10, 1999, to the date of the CCH. The appellant (carrier) appeals, urging error in the determinations that the evidence of intoxication was insufficient to shift the burden of proof to the claimant to prove sobriety and that the injury did not occur while the claimant was in a state of intoxication. The carrier also appeals the findings of a compensable injury and disability, urging the findings are not supported by the evidence. The claimant responds that there is sufficient evidence to support the findings and conclusions of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth the evidence in the case adequately and fairly and it will only be summarized here. The claimant was involved in a relatively minor motor vehicle accident (MVA) when the truck he was driving was hit on the passenger side by another slowly-moving truck. In any event, he claims he felt pain in his back shortly thereafter as he was leaving work in his automobile at the end of his shift. The next day, the claimant states, he told the employer his back was hurting and that he wanted to go to an emergency room (ER) rather than to the company doctor. Arrangements were made to also have a drug test administered. The claimant was diagnosed with a back sprain and released to light duty, with a prognosis of returning to full duty within two to three weeks. A drug test administered showed positive for the cocaine metabolite at 2,741 nannograms per milliliter along with other drugs that could be traced to prescriptions. The claimant, who denied ingesting any cocaine, was terminated based on the drug test results and has not returned to work. The claimant started treating with a chiropractor, Dr. H, on September 22, 1999, who diagnosed a lunbosacral sprain/strain and thoracic and lunbosacral myofascitis and took the claimant off work completely until October 25, 1999, when he placed the claimant on light duty only to be taken off duty again on January 10, 2000, indicating that no light duty was available.

The claimant testified and called two coworkers as witnesses who attested to the claimant's not being intoxicated and functioning normally on the day of the MVA. He also produced statements from two other coworkers who indicated he was not intoxicated and functioned normally. A statement from a toxicologist, Dr. C, indicated that the concentration of the specimen collected some 24 hours after the accident was "insufficient to support a reasonable medical probability statement that the patient was impaired at time [sic] of the accident." While indicating that the specimen supports the use of cocaine

sometime within two to three days, "impairment at the time of the accident is a possibility but is not established by the available data."

In her findings of fact, the hearing officer finds that "[t]here was insufficient evidence to shift the burden of proof to Claimant" and that "[t]here was sufficient evidence that Claimant was not under the influence of drugs at the time of the accident on _____." Section 406.032(1)(A) provides that a carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. In a very early case, we stated that there is a presumption of sobriety, but that when the issue of intoxication is raised by the carrier by probative evidence, the burden to prove sobriety or lack of intoxication switches to the claimant. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. In that case, a positive drug test, together with an expert's opinion stating intoxication, was held to switch the burden of proof to the claimant. We have not held that expert opinion is essential to raise the issue and, thus, to switch the burden; however, where there is a drug test and an expert's opinion is conflicting or inconsistent in the effects or meaning of the drug test results, we have reversed a determination that the burden has switched. Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992. In that case, we rejected the position that raising "a possibility" or a "suggestion" of intoxication will erase the presumption of sobriety. To do so, we observed, would engage in little more than gossamer speculation. In discussing probative evidence in Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992, we stated that it is evidence that has some value in establishing a factual matter as opposed to evidence that amounts to no more than speculation or which is a mere scintilla. *See also* Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992. In this case, while there is evidence of a positive drug test, the expert medical opinion in evidence regarding the test tends to impeach the effects or meaning of the test results in showing intoxication. In this regard, Dr. C states that intoxication is a mere possibility but is not established by the available data. Under this state of the evidence and facts, we cannot conclude the hearing officer erred or is unsupported by the evidence in determining the burden of proof had not shifted. In Texas Workers' Compensation Commission Appeal No. 991357, decided August 11, 1999, cited by the carrier, where we reversed a finding that the burden had not shifted, the evidence of intoxication consisted of a test result and a medical opinion indicating the result was presumptive of intoxication. In the case under review, the medical opinion tends to discount the test results on the issue.

In any event, the hearing officer also found the evidence to be sufficient to prove the claimant was not under the influence of drugs at the time of the accident on _____. Clearly, with the equivocal opinion expressed by the only expert medical evidence before her together with the testimony and statements of the claimant and four witnesses, there was a sufficient evidentiary basis for the hearing officer's finding of a compensable injury. Testimony and statements of witnesses can be sufficient to show the normal use of mental and physical faculties and overcome the results of a drug test indicating ingestion of an illegal drug. Texas Workers' Compensation Commission Appeal No. 951856, decided December 21, 1995.

The carrier asserts that the MVA in question was too minor to cause an injury and, thus, the evidence does not establish a compensable injury. Whether or not an injury was sustained as a result of a work-related activity is a factual question for the hearing officer to determine from the evidence of record, as well as the determination of disability. While the claimant did not evidence an injury at the time of the incident but claims to have experienced back pain shortly thereafter when he started to drive home, he did shortly thereafter advise the employer that he had hurt his back. He was diagnosed with a lumbar sprain the next day at the ER, and later by a chiropractor, with lumbosacral sprain/strain and thoracic and lumbosacral myofascitis. He was placed both on light duty and, for a period of time, off duty. This is evidence from which the hearing officer could find and conclude that a compensable injury was sustained and that the claimant had disability. Conversely, we cannot conclude from our review of the evidence that the findings and conclusions regarding a compensable injury and disability were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Accordingly, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Dorian E. Ramirez
Appeals Judge

CONCURRING OPINION:

I concur in the result, but write separately to point out that I believe the urinalysis shifted the burden of proof to the claimant to prove sobriety. Dr. C's report expressed an opinion only that during the preceding three days, the claimant used cocaine. It did not impeach the validity of the laboratory results. And, of course, the hearing officer was free to accept or reject Dr. C's opinion. Thus, the hearing officer clearly erred in Finding of Fact No. 7, that the evidence was insufficient to shift the burden. Contrary to this finding, I believe she, in fact, did shift the burden to the claimant and then found in Finding of Fact No. 8 that he proved his sobriety. This dispositive finding has sufficient evidentiary support in the record to require an affirmance on appeal.

_____
Alan C. Ernst
Appeals Judge