

APPEAL NO. 001235

On May 2, 2000, 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.* With regard to the intoxication issue, the hearing officer decided that appellant's (claimant) injury of _____, occurred while the claimant was in a state of intoxication and that respondent (carrier) is not liable for workers' compensation benefits. The claimant requests that the hearing officer's decision on the intoxication issue be reversed and that a decision be rendered in his favor on that issue and, in the alternative, requests that the case be remanded to the hearing officer. The carrier requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

On the morning of _____, the claimant was performing his job duties for (employer), at (W Company) job site repairing a large tire on a paving machine when the tire exploded as he was replacing it on the machine, causing him injury. The claimant was taken by ambulance to a hospital where he was diagnosed as having a left tibial fracture for which he had surgery the same day. Two doctors at the hospital noted in their reports that the claimant was alert and oriented when they examined him on _____. Two employees of W Company stated in recorded statements that they observed and talked to the claimant on _____ prior to the accident and that the claimant had the normal use of his mental and physical faculties and was not intoxicated.

After the claimant was administered morphine at the hospital on _____, he gave a urine specimen, which, according to a laboratory report, initially tested positive for cocaine metabolites and for opiates (morphine) and which on confirmatory testing tested positive for cocaine metabolites above the cutoff level of 150 ng/ml (nanograms per milliliter) and for opiates (morphine) above the cutoff level of 2000 ng/ml. The claimant testified that he has never taken cocaine, that he had the normal use of his mental and physical faculties on _____, and that on September 20th he had taken Tylenol with codeine for flu symptoms. Dr. K, a medical toxicologist, reviewed the claimant's medical records and the drug test report at the carrier's request and opined that the positive drug test for morphine was explained by the morphine that the claimant was given at the hospital but that no substance the claimant was given at the hospital would have been metabolized to cocaine metabolite in the claimant's urine. Dr. K also opined that the Tylenol with codeine that the claimant took would not result in a positive cocaine metabolite drug test result. Dr. K further opined that at the time of the accident on _____, the claimant did not have the normal use of his mental or physical faculties from the ingestion of cocaine.

Section 406.032 provides, in pertinent 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 in 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. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dismissed judgment corrected). 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). There is sufficient evidence of intoxication in this case to shift the burden to the claimant to prove that he was not intoxicated. Whether the claimant was intoxicated at the time of his injury was a question of fact for the hearing officer to determine from the evidence presented. The hearing officer is 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). The hearing officer found that the claimant did not have the normal use of his mental and physical faculties due to the claimant's voluntary introduction of cocaine into his body when he sustained his injury while working for employer on _____, and he concluded that the carrier is relieved of liability because the claimant's injury on _____, occurred while the claimant was in a state of intoxication. We conclude that the hearing officer's findings and decision are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge