APPEAL NO. 002090

Following a contested case hearing held on August 15, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by concluding that on _____, when his ankle injury occurred at work, the respondent (claimant) was not intoxicated, as defined in Section 401.013, and that he has disability which began on _____, and has continued through the date of the hearing. The appellant (carrier) appeals the conclusion that the claimant was not intoxicated, asserting that the hearing officer erred as a matter of law because once the carrier rebutted the presumption of sobriety with a positive drug screen test (marijuana), the only evidence presented to establish his sobriety was the claimant's uncorroborated testimony. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a work-related injury to his left ankle on _____ (all dates are in 2000 unless otherwise stated). Not disputed are the hearing officer's factual findings that the claimant began to work full-time for the employer on April 13, 2000, after having worked for the employer as a temporary employee for approximately ____ months; that on _____, the claimant was assigned to work the Columbia machine at the employer's warehouse during the morning shift which began at 5:00 a.m.; that after working approximately two hours, the claimant caught his foot in the conveyor belt as he was attempting to turn off the Columbia machine which had malfunctioned; that the claimant was taken by ambulance for emergency medical treatment on May 2 and was diagnosed with an ankle fracture; that at the emergency room the claimant was given a drug screen test which was positive for marijuana; and that the drug screen test is sufficient evidence to shift the burden to the claimant to establish that he was not intoxicated on _____.

The claimant, then age 21, testified that he began working on the Columbia machine when he commenced full-time employment with the employer; that he was still in training on the machine, which apparently removes cases of ice cream moving along a roller conveyor, stacks them on pallets, and wraps them; and that the machine frequently malfunctions, sometimes necessitating his having to walk across the conveyor rollers to reach the machine's stop button. He said that on _____, a Tuesday, his mother drove him to work at 5:00 a.m.; that once at the job site he ate breakfast, conversed with coworkers, asked his supervisor if the rubber boots he was supposed to have been provided with were in yet, and commenced working alone on the Columbia machine for about one hour. The claimant further stated that he next operated a forklift for about 25 minutes, moving pallets of ice cream; that he then went on a 15-minute break; and that when the break was concluded he resumed operating the Columbia machine until the wrapper malfunctioned and ice cream cases began falling off. He said it became necessary to shut the machine

off and that as he walked across the conveyor to hit the stop button, his left tennis shoe caught in a conveyor slot and he fell, fracturing his ankle. The claimant further testified that he was taken to an emergency room for treatment; that a sample of his urine was obtained and tested; and that the sample was positive for marijuana. He said he had used marijuana at a party on the Friday before his injury and he denied being impaired at the time of his injury.

The carrier introduced a barely legible copy of a _____ laboratory report which reflects that the claimant's urine sample tested positive for marijuana metabolites with the "Initial Test Level" being 50 nanograms per milliliter (ng/ml) and the "GC/MS Confirm Test Level" being 15 ng/ml.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury "occurred while the employee was in a state of intoxication." Section 401.013(a)(2)(B) provides that intoxication means "not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance . . . ." In a case such as this, sobriety is presumed. Bender v. Federal Underwriters Exchange, 133 S.W.2d 214 (Tex. Civ. App.-Eastland 1939, writ dism'd judgm't correct). However, when the carrier presents probative evidence of intoxication, thus raising a question of fact, the claimant then has the burden to prove that he or she was not intoxicated at the time of the injury. March v. Victoria Lloyds Insurance Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ dism'd); Texas Employers' Insurance Association v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1949, writ ref'd n.r.e.).

As noted, the hearing officer found the drug screen test to be sufficient evidence to shift the burden to the claimant to establish that he was not intoxicated on _____. Although no evidence was adduced to indicate the significance of the amounts stated in terms of inferring the claimant's intoxication from marijuana on _____, this finding is not appealed.

The carrier contends on appeal that the hearing officer erred as a matter of law in failing to find the claimant intoxicated at the time of his injury because the Appeals Panel, citing Texas Workers' Compensation Commission Appeal No. 981662, decided September 3, 1998, has said that "the claimant's testimony alone is insufficient to prove that he was not intoxicated when the carrier has sufficiently rebutted the presumption of sobriety." We do not agree that the decision in Appeal No. 981662 established as a rule of law that a claimant can never prove sobriety with his or her testimony alone and believe that the carrier overreads it. That decision, which reversed and rendered a new decision in favor of the insurance carrier, relies on the decisions in Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 970935, decided July 7, 1997; and Texas Workers' Compensation Commission Appeal No. 971971, decided November 10, 1997. In these cases, as in Appeal No. 981662, *supra*, not only were there in evidence the lab reports showing the initial and confirmatory test results for controlled substances, but there were

also in evidence expert opinions concerning the relationships between the levels of the controlled substances in the urine samples and their impairing effects on the claimants involved.

In the case we here consider, no expert evidence was introduced and the hearing officer was left to consider the amount of the marijuana metabolite found in the claimant's urine and the claimant's description of the duties he performed on _____ prior to his injury. We cannot agree with the carrier that the hearing officer's determination is erroneous as a matter of law.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge