

APPEAL NO. 011008
FILED JUNE 21, 2001

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 April 18, 2001. With respect to the issues before him, the hearing officer determined that the respondent (claimant) was not intoxicated at the time of his _____, compensable injury to his right ankle and that the appellant (carrier) was not, therefore, relieved of liability for compensation. The hearing officer further concluded that the claimant's compensable injury did not extend to and include injury to his neck and low back. In addition, the hearing officer resolved that the claimant had disability from March 21, 2000, to March 23, 2000, and from May 25, 2000, to the date of the CCH, April 18, 2001. The carrier appeals and seeks reversal on sufficiency grounds. There is no response in the file from the claimant or appeal of the hearing officer's finding that the injury did not extend to the claimant's neck or low back.

DECISION

Affirmed as to finding of no intoxication, reversed and rendered as to the disability finding.

The hearing officer did not err in determining that the claimant was not intoxicated at the time of his _____, compensable injury to his right ankle. Evidence adduced at the hearing supports the hearing officer's decision in this regard. A positive indication on a drug test does not, standing alone, establish intoxication for marijuana as a matter of law. More to the point were two statements from the claimant's coworkers wherein they stated that the claimant was acting in his usual manner and, one of them wrote, seemed of "good sound mind as usual." See Section 401.013. The hearing officer could choose to believe these statements.

However, we believe that the hearing officer erred in his disability finding to the extent that he found disability from the right ankle injury after May 25, 2000. There was no testimony or medical record indicating that it was the ankle injury that resulted in the inability to obtain and retain employment, as opposed to the other conditions not found to be related to the compensable injury. Although on _____, an imaging study of the right ankle found a ganglion cyst or possible acute hematoma in the region above the ankle (mistakenly called the left ankle in the report) as well as a bone infarct in the distal tibia, the treating doctor continues to treat the ankle injury as "a sprain." If either indication on the imaging study was determined to be part of the injury or something other than a sprain, it is not in the record.

A fair reading of all the medical evidence and work-status reports yields the clear indication that the treating doctor took the claimant off work due to back, radiculopathy, and neck conditions. As the carrier argues, the videotape taken a month after the injury shows

no impediment to physical activity, including assisting in washing a car at a commercial car wash.

While, pursuant to Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence, that determination will be reversed if it goes against the great weight and preponderance of the evidence. See Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Because we believe that to be the case here for the period of disability found by the hearing officer beginning May 25, 2000, we reverse and render the decision that the only period of disability was from March 21 through March 23, 2000. We otherwise affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge