APPEAL NO. 011313
FILED JULY 30, 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 May 17, 2001. With regard to the issues before her, the hearing officer determined that the appellant (claimant herein) was intoxicated at the time of his on-the-job injury of _____, and that the claimant has sustained no disability. The claimant appeals, contending that the evidence is contrary to the decision of the hearing officer. The respondent (carrier herein) responds that the decision of the hearing officer is sufficiently supported by the evidence.

DECISION

Finding insufficient evidence to support the decision of the hearing officer, we reverse and render a new decision.

The claimant testified that on _____, he sustained crush injuries to his lower torso when a coworker accidentally activated the incorrect tongs and pinned the claimant between a pipe and the tongs. The claimant was taken by ambulance to the hospital for treatment of his injuries. While at the hospital a sample was taken for a drug screen, which tested positive for “MAR” and “BEN.” The claimant testified that he had smoked marijuana several days before, but denied that he was intoxicated on the date of the accident. The claimant also testified that he had a prescription for Xanax, which he had taken in the past. The claimant also testified that he was at work at 5:30 a.m., that he spoke with his relief man for about 10 minutes that morning, and that his accident took place around noon. He also testified that he worked in close proximity to his fellow workers, about 6 feet or less. There was no evidence offered from any of his coworkers indicating that they thought he was intoxicated.

An employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once the carrier has rebutted the presumption, the employee has the burden of proving he was not intoxicated at the time of the injury. *Id.*

The claimant contends that the drug screen report offered by the carrier is of no probative value and does not amount to sufficient evidence to shift the burden of proof on intoxication to the claimant. In the case under review, the claimant's drug screen test result was "positive," without a corresponding amount per unit of urine or an indication of what level caused a "positive" result at the hospital's laboratory. The significance of a "positive" test is not explained in the evidence in the record before us. In the "Discussion“ portion of the decision, the hearing officer reasons that "the drug test report, does constitute the necessary probative evidence to rebut the presumption indicated . . . .” The question

before us is whether the hearing officer erred in determining that the claimant's positive drug screen test is sufficient to shift the burden of proving the lack of intoxication to the claimant.

In a similar case, Texas Workers' Compensation Commission Appeal No. 002199, decided October 31, 2000, we noted that the drug test report submitted by the carrier was striking in the lack of any measured level on the copy of the report in evidence. In that case, it merely states "positive" next to "cannabinoid." Neither was any expert evidence presented by the carrier which would give a context to these bare test results in terms of whether the claimant had the normal use of his faculties at the time of the injury. We agreed with the hearing officer's analysis in that case that the burden of proof did not shift to the claimant. In the present, the evidence is even weaker because the report does not even clearly state the substances for which the claimant was tested. Even were we to assume in this case that the positive test for MAR was for marijuana, there is no presumed level of intoxication for marijuana exposure in Section 401.013. We conclude that the drug screen under the facts of this case was insufficient to shift the burden of proof to the claimant. Therefore, the hearing officer was faced with analyzing whether the claimant had the normal use of his mental or physical faculties resulting from the introduction of marijuana into his body. *See* Appeal No. 002199*, supra.* There was no testimonial evidence that the claimant had anything but the normal use of his faculties. *Id.*

The foregoing analysis applies equally to the positive test for BEN. In addition, the 1989 Act expressly provides that the term "intoxication" does not include the loss of the normal use of mental or physical faculties resulting from the introduction into the body of a substance "taken under and in accordance with a prescription written for the employee by the employee's doctor[.]" Section 401.013(b)(1). All evidence in the record indicated that the claimant's use of Xanax was taken by prescription and in accordance with that prescription.

The hearing officer erred in finding that the burden shifted on intoxication. We believe the carrier did not present probative evidence that would have the effect of shifting the burden and that the hearing officer should have refused to shift the burden. Thus, the presumption of sobriety should have prevailed in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We reverse the hearing officer's decision and order and render a new decision that the claimant was not intoxicated at the time of his injury. Based upon findings by the hearing officer that the claimant sustained damage or harm to the physical structure of his body while engaged in the exercise of his job duties, we render a decision that the claimant sustained a compensable injury on _____. The hearing officer found that the claimant's injury has prevented the claimant from obtaining and retaining employment since July 11, 2000. We therefore render a decision that the claimant has had disability from July 11, 2000, continuing through the date of the CCH. We order the carrier to pay

medical and income benefits in accordance with the 1989 Act and rules of the Texas Workers' Compensation Commission, including interest on unpaid accrued benefits.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge