

APPEAL NO. 021667
FILED AUGUST 6, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 11, 2002. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that he was not in a state of intoxication when he was injured on _____; and that he had disability from _____, to May 3, 2002. The appellant (carrier) appealed, arguing that the hearing officer's injury, disability, and intoxication determinations are against the great weight and preponderance of the evidence. The claimant filed a response urging affirmance.

DECISION

Affirmed.

The success of the carrier's argument that the claimant did not sustain a compensable injury is dependent upon the success of its argument that the claimant was intoxicated at the time of his compensable injury. On _____, the claimant slipped on a wet and muddy rung of a ladder and fell about 15 feet to the ground, landing on his left side. Following his injury, the claimant tested positive for the presence of marijuana metabolites. Confirmatory testing was positive for marijuana at 172 ng/ml. Dr. C, who reviewed records on behalf of the claimant, stated, "It is my medical opinion that with reasonable medical probability, one cannot state that based on a level of 172 ng/ml of marijuana metabolites in the urine that [claimant] was in fact intoxicated . . ." The carrier offered the report of Dr. W, a toxicologist, who concluded that "it is reasonable to assume, at least by the preponderance of the evidence, that [claimant] had lost the normal use of his mental and physical faculties at the time of his accident due to recent use of marijuana, altering his judgment and contributing significantly to the accident/injury." The claimant called two witnesses, his supervisor and a coworker, who testified that the claimant had the normal use of his mental and physical faculties at the time of his injury.

Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury. For purposes of this case, intoxication is defined as not having the normal use of mental or physical faculties from the voluntary introduction of a controlled substance, marijuana, into the body. See Section 401.013(a)(2). An employee is presumed sober. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier rebuts the presumption by presenting probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he was not intoxicated at the time of injury. In this instance, the hearing officer properly determined that the positive urinalysis with quantitative measurements, along

with Dr. W's report, was sufficient to shift the burden to the claimant to prove that he was not intoxicated. Whether a claimant is intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995. The hearing officer was acting within her province as the fact finder in crediting the evidence from Dr. C, the claimant, and the claimant's supervisor and coworker in determining that the claimant was not intoxicated at the time of his injury. Our review of the record does not demonstrate that the hearing officer's determination that the claimant was not intoxicated at the time of his injury is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Finally, we decline the carrier's invitation to reconsider our prior determination that lay testimony, including the testimony of the claimant, is probative evidence on the issue of whether the claimant had the normal use of his mental and physical faculties at the time of his injury. See Texas Workers' Compensation Commission Appeal No. 002824, decided January 23, 2001; Texas Workers' Compensation Commission Appeal No. 000562, decided May 3, 2000; Texas Workers' Compensation Commission Appeal No. 000167, decided March 10, 2000; and Texas Workers' Compensation Commission Appeal No. 990751, decided May 19, 1999 (Unpublished).

The carrier also asserts error in the hearing officer's determination that the claimant had disability from _____, to May 3, 2002. This issue presented a question of fact for the hearing officer. The claimant testified that he was unable to work during the period of disability found because of his compensable injury and he introduced off-work slips from his treating doctor covering that period. While we agree with the carrier that the hearing officer found that she could not determine whether the claimant had disability after May 3, 2002, because the claimant began a light-duty job and did not present evidence regarding the difference in his wages in that job as compared to his preinjury wage, we cannot agree that the hearing officer's determination in that regard precludes a finding of disability for the period found. To the contrary, the hearing officer determined that during the period of disability found, the claimant was unable to return to work because of his compensable injury. Thus, she did not err in determining that the claimant had disability in that period. Our review of the record does not reveal that the disability determination is so against the great weight of the evidence as to compel its reversal on appeal. Cain, supra.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ARGONAUT SOUTHWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH A. YURKOVICH
1431 GREENWAY DRIVE, SUITE 450
IRVING, TEXAS 75038.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge