

APPEAL NO. 021751
FILED AUGUST 26, 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 (CCH) was held on June 19, 2002. The hearing officer determined that the claimant sustained a compensable left shoulder injury on _____; that the carrier is not relieved of liability because the claimed injury did not occur while the claimant was intoxicated from the introduction of a controlled substance; and the claimant had disability from February 25 through May 12, 2002.

The carrier appeals a number of the hearing officer's determinations on the disputed issues, principally arguing that a toxicology report had been timely exchanged and was erroneously excluded. The carrier also asserts that the hearing officer's determination that a drug screen failed to shift the burden of proof was against the great weight and preponderance of the evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant was a maintenance supervisor and sustained a left shoulder injury when he attempted catch an extension piece from a forklift on _____. It is unclear whether the claimant saw Dr. R on _____ (as recited by the hearing officer), or _____, as indicated on the Work Status Report (TWCC-73) and the employer's report. Dr. R diagnosed a left shoulder strain and returned the claimant to light duty. A urine drug screen, performed on _____, tested positive for amphetamine and methamphetamine. The results were confirmed by a gas chromatography/mass spectrometry (2286 ng/ml for amphetamine and 75,000 ng/ml for methamphetamine) analysis. The claimant was subsequently terminated on February 25, 2002, for "Gross Misconduct." A toxicology report dated May 13, 2002, from Dr. W, was excluded upon objection by the claimant as not being timely exchanged. There was conflicting evidence presented regarding the exchange and our understanding is that the certified mail receipts attached to the carrier's appeal were not available at the CCH.

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. March v. Victoria Lloyds Insurance Co, 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ dismissed). 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 testified that after his injury on _____, he had taken some of his wife's prescription medication, which caused the positive drug screen performed two days later. The hearing officer in the statement of the evidence commented:

The claimant's explanation for testing positive was absolutely not credible, however, the burden to prove that he had not lost the normal use of his mental and physical faculties on _____ at the time of injury did not shift to the claimant. The carrier failed to provide some evidence of intoxication on _____. The proffered drug screen was taken two days after the event and there was no testimony or documentary evidence admitted to provide some evidence of intoxication.

Even if the report of Dr. W had been admitted it would not necessarily show a level of intoxication on _____, but only that the high levels of amphetamine and methamphetamine might indicate intoxication on _____. The hearing officer could certainly consider the length of time between the claimed injury and the drug screen and that those results were insufficient to rebut the presumption of sobriety and shift the burden to the claimant to prove that he was not intoxicated at the time of the injury.

The hearing officer's determinations regarding the injury and period of disability are supported by the evidence.

After review of the record before us and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Robert W. Potts
Appeals Judge