APPEAL NO. 022866
FILED JANUARY 6, 2003

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 October 21, 2002. The hearing officer determined that the respondent's (claimant) injury on _____, did not occur while the claimant was in a state of intoxication and that he had disability from March 6, though the date of the hearing. The appellant (carrier) appeals this decision. The appeal file contains no response from the claimant.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was not intoxicated at the time of the injury. Section 406.032 provides, in pertinent part, that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. When drug use is alleged, "intoxication" is defined as not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance, controlled substance analogue, or dangerous drug. Section 401.013. While there is a presumption of sobriety, when a carrier presents evidence of intoxication raising a question of fact, the claimant then has the burden to prove he was not intoxicated at the time of injury. Texas Workers' Compensation Commission Appeal No. 951373, decided September 28, 1995 (Unpublished).

The carrier contends that the hearing officer erred by finding that evidence produced by the carrier, the drug test administered on the day of the injury and the report of the carrier's expert, who interpreted the drug test results, was not sufficient to shift the burden to the claimant to prove that he was not intoxicated. In the Statement of the Evidence, the hearing officer explains that he was not persuaded that the claimant's drug test result (38 ng/ml of marijuana metabolite) reached the minimum threshold for a positive drug screen. It appears that the hearing officer believed that the claimant's initial screen resulted in a result of 38 ng/ml. However, it is clear from the evidence that the laboratory providing the test results used a minimum cutoff of 50 ng/mg for the initial screening, and if the initial screen produced a result greater than 50 ng/ml, a confirmation test was subsequently obtained. As explained by the carrier's expert in his letter, the 38 ng/ml represents the result obtained from the confirmation report.

We have held that a positive urinalysis or drug screen test is sufficient probative evidence of intoxication to shift the burden of proving that the employee had the normal use of his mental or physical faculties. Texas Workers' Compensation Commission Appeal No. 980576, decided April 30, 1998. However, we have recognized that in limited circumstances a positive urinalysis may not shift the burden to the claimant. Texas Workers' Compensation Commission Appeal No. 950656, decided June 9, 1995.

In that case, we affirmed the determination of the hearing officer that a positive urinalysis, taken some 28 to 30 hours after the injury, and a toxicologist's opinion that this was consistent with either pre or postinjury usage of marijuana did not shift the burden to the claimant. The facts in the present case are readily distinguishable from those in Appeal No. 950656 in that the claimant's urine sample was collected on the day of the injury. Consequently, the hearing officer should have made a finding to the effect that the carrier produce sufficient evidence to shift the burden to the claimant to prove that he was not intoxicated.

Nevertheless, we affirm the hearing officer's decision because he additionally analyzed the facts as though the burden had shifted to the claimant and determined that the claimant established that he was not intoxicated at the time of the injury. While a positive drug test can shift the burden of proof to the claimant, it does not, in and of itself, compel a finding of intoxication at the time of injury. Texas Workers' Compensation Commission Appeal No. 941099, decided September 30, 1994. Whether the claimant had the normal use of his mental or physical faculties at the time of the injury was a fact question for the hearing officer to resolve. The hearing officer considered evidence, including the testimony of the claimant and that of his supervisor who, contrary to the carrier's assertion on appeal, indeed testified that the claimant did not seem any different prior to the occurrence of the injury than on any other day. The hearing officer determined that the claimant was not intoxicated at the time of the injury and nothing in our review of the record indicates that this determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Disability is likewise a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. "Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant bears the burden of establishing that a compensable injury was a producing cause of his disability. Under the facts of this case, we perceive no error in the hearing officer's resolution of the disability issue.

The hearing officer's decision and order is affirmed.

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

RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

OR
P.O. BOX 12029
AUSTIN, TEXAS 78711

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge