

APPEAL NO. 030792
FILED MAY 19, 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 March 11, 2003. The hearing officer determined that the injury the appellant (claimant) sustained on _____, is not compensable because it occurred while the claimant was in a state of intoxication and that, because there was no compensable injury, there could be no disability. In his appeal, the claimant challenges each of those determinations as being against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered in part and affirmed in part.

The primary issue in this case is whether the claimant was intoxicated as a result of marijuana use at the time of his motor vehicle accident on _____. Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 401.013(b)(2)(B), the intoxication provision applicable in this case, defines intoxication as not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002 of the Health and Safety Code. 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 Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of injury, that is that he or she had the normal use of his or her faculties at the time of the injury. In this instance, the hearing officer properly determined that the positive drug screens and the evidence from the carrier's toxicologist was sufficient to shift the burden to the claimant to prove that he had the normal use of his mental or physical faculties at the time of the claimed injury.

The record reflects that the claimant was employed by a glass company as a glazier. On _____, the claimant was working on the roof of a local high school replacing windows. The testimony from the claimant and others working with him that day indicates it was a hot day. The claimant testified that he did not smoke marijuana on the day in question, and that he was not intoxicated at the time of the injury. As the hearing officer correctly points out in his statement of the evidence, co-workers on the roof with the claimant that day testified that the claimant seemed to be normal and that he was performing his job duties as usual.

Some time after 3:00 p.m., the claimant loaded equipment onto the company truck, and departed from the job site to return the truck to the employer's yard. The claimant was injured when he lost control of the vehicle and struck a guardrail in the median. In evidence is an affidavit from a witness to the accident. The witness states that she observed the truck the claimant was driving weaving and striking the yellow bumps that designate the edge of the lane. The witness states that the claimant's driving was erratic and that "[i]t appeared that the driver of the white truck was impaired in some way." The witness concludes her affidavit by saying, "[w]hen I observed the [claimant] on the ground following the accident, he did not seem to be in a lot of pain. That fact further led me to believe that [claimant] was somehow impaired at the time of the accident." The police officer that arrived on the scene within minutes of the accident testified at the hearing. He stated that when he arrived at the scene, there was a lot of blood on the claimant's head and someone was applying cloth to the claimant's head wound and holding the claimant down on the ground. The police officer further testified that he spoke to the above-mentioned witness while at the scene of the accident and that she told him that she suspected that the claimant might be intoxicated. The police officer testified that in response to the witness' assertion, he did an investigation to determine if the claimant was intoxicated at the time of the accident. He stated that he knelt down over the claimant and was within two feet of his face; that the claimant did not appear intoxicated; that he did not detect the odor of alcohol or marijuana on the claimant; and that his brief search of the truck revealed no evidence of alcohol or marijuana. Finally, the police officer testified that someone told him the accident might have been caused by heat exhaustion because the claimant had worked all day on a hot roof. The police report in evidence indicates that no citations were issued in connection with the accident.

The claimant was transported to the hospital for treatment. A drug screen was performed approximately five hours after the accident. The drug screen came back positive for cannabinoids (THC). The results were not quantified, the screen merely reflects that the level of THC was greater than 50 nanograms per milliliter (ng/ml). A second drug screen was performed on _____, which showed that the claimant had a THC level of 700 ng/ml. The carrier submitted an opinion from a Ph.D. toxicologist which states, "it is my opinion that [claimant's] [p]ositive THC urine test results of at least 50 ng/mL [sic] in a sample obtained 5 [hours] after an accident, associated with the observation of his driving performance, are a clear indication that he was under the influence of the drug while operating the motor vehicle involved in the accident." The claimant also submitted an opinion from a Ph.D. toxicologist, which states "the positive test for marijuana metabolite in [claimant's] urine on _____ is consistent with casual use of marijuana several days prior to his accident, and does not indicate any effect of marijuana on the day of this accident." The claimant's toxicologist amended his report to reflect that even had the claimant smoked marijuana the day before the accident, the _____, drug screen does not indicate that the claimant was suffering from any effect from the usage on the date of his accident. The toxicologist further stated that, "[i]n responses to interrogatories given by [claimant], he states that he did use marijuana the evening before the accident, which occurred at 3:35 pm, and again after release from the hospital. This would be approximately 18

hours before the accident, and the second use would explain the positive test on _____.”

In the present case, the hearing officer found that there was sufficient evidence to shift the burden of proof of sobriety to the claimant, and that the claimant failed to “overcome the evidence of the drug screens and the witness’ corroborating account of his driving.” The hearing officer concluded that the claimant’s injury occurred while he was in a state of intoxication. The issue of whether the claimant was intoxicated at the time of the injury was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a hearing officer’s factual determination only if it is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Our review of the record indicates that the hearing officer’s intoxication determination is reversible under that standard. The hearing officer states that the _____, drug screen is “far more convincing” than the _____, screen at the hospital in terms of demonstrating that the claimant was intoxicated at the time of his injury. The hearing officer explains his conclusion in that regard because the “claimant never presented any evidence that he smoked marijuana at any time *after* the accident. If that is true, then there was a lot more THC in his system in the hospital on _____ than on _____.” On two separate occasions during the hearing, the hearing officer limited questions about the claimant’s marijuana use to the time period before _____, and specifically stated that he had no interest in the claimant’s marijuana use after the accident. The hearing officer cannot prohibit testimony about marijuana use after the injury and then hold the lack of any such evidence against the claimant in resolving the intoxication issue. In addition, as noted above, the claimant’s toxicologist states that the claimant acknowledged marijuana use after the _____, accident and before the _____, drug test; thus, it appears that had the claimant been permitted to testify as to his post-injury marijuana use, he would have acknowledged such use.

It is also troubling that the hearing officer makes no mention of the police officer’s testimony. By failing to address that testimony, the hearing officer gives no guidance as to why he discounted the police officer’s opinion that the claimant was not intoxicated at the time of the accident and no reason for discounting that evidence is apparent to us. To the contrary, it would seem that objective testimony from a police officer as to the claimant’s condition after the accident is far more probative of the issue of normal use of mental and physical faculties than the affidavit of a witness who was not shown to have any training or experience relative to the issue of intoxication. Finally, the hearing officer discounted the evidence from the claimant’s coworker and his supervisor that the claimant was working normally on the day of the injury and was able to complete his job duties as he normally did. The hearing officer suggested that the testimony from these witnesses was not credible on the issue of normal use because they only knew the claimant on the job. There was no dispute that both the coworker and the supervisor had had the opportunity to observe the claimant for approximately two months performing heavy, physical work. They both testified that the claimant was a good

worker and that his performance was up to its usual standards on _____. This evidence also seems compelling on the issue of normal use and overwhelms the observer's testimony about the "erratic" driving, particularly since she had no familiarity with the claimant. When the evidence is considered as a whole, we believe that it demonstrates that the claimant had the normal use of his faculties at the time of his injury. Thus, the hearing officer erred in determining that the claimant was intoxicated at the time of the injury and that, as a result, he did not sustain a compensable injury pursuant to Section 406.032(1)(A).

Regarding the issue of disability, the hearing officer determined that the claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage, due to the physical injuries from the accident, from August 2 through October 10, 2002. The claimant argues that his disability extended through the date of the hearing. We find the challenged determination to be supported by the evidence and not so against the great weight of the evidence as to compel its reversal on appeal. *Pool, supra; Cain, supra*. We note that the hearing officer did not have an extent-of-injury issue before him, and that question, as well as any corresponding issue related thereto, remains unresolved.

The hearing officer's determinations that the claimant was intoxicated at the time of his _____, injury; that he did not sustain a compensable injury; and that he did not have disability are reversed and a new decision rendered that the claimant was not intoxicated at the time of his injury; that he sustained a compensable injury; and that the claimant had disability from _____ through October 10, 2002. We affirm the hearing officer's determination of the claimant's ending date of disability.

The true corporate name of the insurance carrier is **AMCOMP ASSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 330
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Veronica Lopez
Appeals Judge