

APPEAL NO. 031994
FILED SEPTEMBER 8, 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 (CCH) was held on June 25, 2003. The hearing officer determined that the appellant (claimant) had not sustained a compensable injury on _____; that the respondent employer (self-insured) is relieved of liability because the claimant was in a state of intoxication due to cocaine ingestion; and that the claimant did not have disability.

The claimant's appeal focuses on the intoxication determinations but generally also appeals the injury and disability findings. The self-insured responds, urging affirmance.

DECISION

Affirmed.

It is undisputed that the claimant, an exterminator, was involved in a motor vehicle accident (MVA) at about 11:45 a.m. on _____. In dispute is whether the claimant was on his way back to the self-insured's shop (as the claimant alleges) or was deviating from his duties (to go to lunch or some other errand) as the self-insured alleges. In evidence were maps showing the location of the claimant's last job, the shop, and the site of the MVA. The hearing officer's determination that the claimant was not in the course and scope of his employment is supported by the evidence.

After the MVA, the claimant's supervisor was notified and the claimant was taken to a clinic where a drug screen was performed. The drug screen was positive for cocaine metabolite at the level of 800 ng/ml and the report stated that the drug screen was confirmed by gas chromatography/mass spectrometry (GC/MS). A toxicologist testified at the CCH regarding the test results and that in his opinion the claimant was intoxicated at the time of the MVA. The claimant relies on his testimony and statements from the police officer and two supervisors to show that he was not intoxicated. The claimant explains the positive drug screen by stating he possibly inhaled second hand crack cocaine fumes while exterminating in the public housing apartments.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication in Section 401.013(a)(2) includes the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. The law presumes that a claimant was sober at the time of an injury; however, the carrier can, with probative evidence of intoxication, rebut this presumption and shift the burden to the claimant to prove that he or she was not intoxicated. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No.

94247, decided April 12, 1994. In this case the drug screen, taken four hours after the MVA, confirmed by GC/MS and the toxicologist's testimony, is sufficient to shift the burden of proof to the claimant to prove that he was not intoxicated. The hearing officer, as the sole judge of the weight and credibility of the evidence, may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer obviously discounted the claimant's testimony and the various statements and credited the doctor's testimony in finding that the claimant was intoxicated. Contrary to the claimant's contention on appeal, we hold that the hearing officer properly applied the law and exercised her discretion in whom to believe.

Because the claimant had not sustained a compensable injury, the claimant by definition in Section 401.011(16), cannot have disability.

We have reviewed the complained-of determinations and conclude that the hearing officer properly applied the law and that her determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong of manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DD
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Edward Vilano
Appeals Judge