APPEAL NO. 040241
FILED MARCH 10, 2004

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 January 12, 2004. The hearing officer determined that the appellant/cross-respondent (claimant) sustained a compensable injury on _____; that the claimant did not have disability; and that the claimed injury did not occur while the claimant was in a state of intoxication as defined in Section 401.013.

The claimant appealed the disability determination contending that her testimony and medical evidence supports a disability finding and that the hearing officer impermissibly addressed an issue not before him. The respondent/cross-appellant (carrier) appeals, contending that the claimant was not in the course and scope of her employment at the time of the claimed injury and that the claimant had failed to prove she was not intoxicated at the time of the injury. Both parties responded to the other's appeal urging affirmance on the issues on which they prevailed.

DECISION

Affirmed.

The basic background facts are not much in dispute. The claimant was employed as an "assembler" (assembly line worker) and her shift was from 7:00 a.m. until 3:30 p.m. Apparently it was the claimant's usual practice to arrive at work early, clock in (although not beginning to be paid until 7:00 a.m.) and then "hang out" with coworkers on a dock. There was no evidence that the employer disapproved of this practice and the claimant testified that sometimes she helped set up the assembly lines before 7:00 a.m. On _____, the claimant arrived at work at 6:23 a.m., according to her time card, clocked in, got a soda, and socialized with some of her coworkers on the dock. At about 6:45 or 6:50 a.m. (depending on what evidence is believed) the claimant got up, apparently stepped on a discarded soda can and fell. The claimant was taken to a clinic (the employer's doctor) where complaints were of bilateral ankle pain noted, x-rays were taken, and the claimant was released to return to work. A drug screen was positive for marijuana at 68 ng/ml (the cut off level is 50 ng/ml). The claimant testified that this was due to second hand smoke but the carrier's toxicology report indicates that the claimant "actively used marijuana." The claimant saw her own choice of doctor, a chiropractor on August 29, 2003. The treating doctor took the claimant off work, noted complaints of right ankle pain, left shoulder pain, low back pain, mid back pain, and neck pain, ordered various tests, and began therapy on October 1, 2003.

COURSE AND SCOPE

The carrier appeals the course and scope determination, citing the course and scope of employment definition (Section 401.011(12)) of the 1989 Act. The carrier cites Texas Workers' Compensation Commission Appeal No. 991158, decided July 15, 1999, as being analogous. In Appeal No. 991158, a salesperson arrived at work 45 minutes early, found her shift had been changed to begin seven hours later, and was injured while leaving the premises. In this case, the claimant had already clocked in (although was not getting paid) and was ready to start her shift. The hearing officer commented that the employer had not disapproved of the practice of arriving early, that the claimant was available to help set up assembly lines and by arriving early and being available she "was in furtherance of the business of the Employer." We believe that situation is clearly distinguishable from Appeal No. 991158 and Roberts v. Texas Employers' Insurance Association, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1971, writ ref'd), a situation where the injured employee went to the parking lot on a personal errand of loading a box in her car for her own personal use. The hearing officer did not err and his determination on this issue is supported by the evidence.

INTOXICATION

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) 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 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 hearing officer did not make a finding whether or not the burden had shifted but did comment "if carrier shifted the burden regarding intoxication, Claimant met the burden." The carrier argues that the claimant only presented her testimony that she was not intoxicated. While that may be sufficient, if believed by the hearing officer, we also note that the claimant was examined at the employer's clinic shortly after the injury and the doctor did not note any evidence that the claimant was impaired or intoxicated at that time. The doctor released the claimant to return to work without restrictions and the hearing officer could believe that the doctor would not have done so if there was any indication that the claimant's faculties were impaired or that she was intoxicated.

DISABILITY

The hearing officer commented that the clinic records only noted ankle complaints (contrary to the claimant's appeal that the hearing officer was addressing an extent-of-injury issue) and there was no mention of the left shoulder, neck, or back. The hearing officer was only commenting on what the medical record indicated. Whether

disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if found credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). In this case, the hearing officer noted that the clinic had released the claimant to return to work, commented that the claimant's testimony was not credible, and that while the evidence of disability is mixed, the greater weight of credible evidence was that the claimant did not have disability as defined in Section 401.011(16).

We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or 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 **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

_____
Edward Vilano
Appeals Judge