APPEAL NO. 080732
JUNE 13, 2008

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 March 24, 2008, with the record closing on April 8, 2008. The hearing officer decided that: (1) the respondent 1 (claimant) did not have good cause for his failure to appear for the proceedings of March 24, 2008; and (2) the claimed injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, and the (appellant) carrier is not relieved of liability for compensation. The carrier appealed the hearing officer's adverse determination on the intoxication issue. The appeal file does not contain a response from either the claimant or respondent 2 (subclaimant). The determination that the claimant did not have good cause for his failure to attend the proceedings on March 24, 2008, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

It is undisputed that on _____, while working a construction job, the claimant sustained lacerations to his right hand due to a fall from a pump truck. On (3 days after date of injury), a urine sample was collected from the claimant. The evidence establishes that the claimant's urinalysis was positive for marijuana metabolities and opiates. The claimant failed to appear at the CCH after being notified of the CCH and failed to respond to the hearing officer's 10-day letter giving the claimant the opportunity to request that the CCH be reconvened for him to present evidence on the disputed issue and to show good cause for his failure to appear at the CCH.

Section 406.032(1)(A) provides that the carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. Section 401.013(a)(2)(B) defines intoxication as not having the 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. Section 401.013(c), amended effective September 1, 2005, provides that on the voluntary introduction into the body of any substance listed under Subsection (a)(2)(B), based on a blood test or urinalysis, it is a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties.

In Appeals Panel Decision 062507-s, decided January 31, 2007, the Appeals Panel held that a hearing officer erred in failing to make a finding regarding a positive drug screen for amphetamines which resulted in a rebuttable presumption of intoxication for amphetamines, referencing Section 401.013(c). The Appeals Panel also noted that it disagreed with the carrier's argument that under the 2005 amendment to Section 401.013(c), establishing a rebuttable presumption of intoxication based on a

blood test or urinalysis, an injured worker's lay testimony could not be considered sufficient to overcome the legal presumption of intoxication. However, under the facts of that case, the injured worker's one line statement that he was not intoxicated did not overcome the rebuttable presumption of intoxication established by the positive drug screen.

In the Background Information, the hearing officer stated that the positive urinalysis was three days after the date of injury and that there was no evidence that the claimant was continually confined in some manner that would preclude him from ingesting marijuana after he was injured and before the drug screen was performed. Under the facts of this case, the post-injury urinalysis, which was positive for marijuana metabolites and opiates, established a rebuttable presumption that the claimant was intoxicated and that he did not have the normal use of his mental or physical faculties at the time of the claimed injury. In the carrier's admitted exhibits is a peer review doctor's report indicating that the positive drug screen for opiates could be explained by medication ingested by the claimant after the accident, but there was no explanation for the finding of marijuana metabolites. Most importantly, there was no testimony by the claimant at the CCH, at which he failed to appear, that he was not intoxicated and had the normal use of his mental and physical faculties at the time of the claimed injury, nor was there any other evidence to rebut the presumption of intoxication with regard to marijuana.

Therefore, the hearing officer applied the wrong standard to determine whether the claimant was in a state of intoxication at the time of the claimed injury. This was legal error. Accordingly, we reverse the hearing officer's determination that the claimed injury did not occur while the claimant was in a state of intoxication as defined in Section 401.013, and the carrier is not relieved of liability for compensation. We render a new decision that the claimed injury occurred while the claimant was in a state of intoxication as defined in Section 401.013; thereby relieving the carrier of liability for compensation.

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

MAC SHIPMAN
5525 LBJ FREEWAY
DALLAS, TEXAS 75240.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge