APPEAL NO. 120522
FILED MAY 31, 2012

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 February 29, 2012, with the record closing on March 6, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the claimed injury occurred while the appellant (claimant) was in a state of intoxication, thereby relieving respondent 1 (self-insured) from liability for compensation and that the claimant did not sustain a compensable injury on [date of injury]. The claimant appealed, disputing the hearing officer's determinations on compensability and intoxication. The claimant contends that: (1) the hearing officer materially misstated the evidence that was admitted at the CCH; (2) it was an abuse of discretion for the hearing officer to admit, over objection, as Hearing Officer's Exhibit No. 3, the documentation regarding the chain of custody of the claimant's drug screen because it was not timely exchanged with the claimant; and (3) it was legal error to shift the burden of proof to the claimant because the drug screen was not performed on the date of injury. The self-insured responded, urging affirmance. The appeal file does not contain a response by respondent 2 (subclaimant) to the claimant's request for review.

DECISION

Reversed and remanded.

The claimant's mother testified that on the date of injury, [date of injury], she observed the claimant at their home from 8:00 a.m. until he left for work. She further testified that he was acting normally and following his usual routine. The claimant testified that his shift at work began about noon on [date of injury], and the claimed incident occurred a little before 8:00 p.m., with him taking only one 30 minute lunch break that day in the employer's break room. While at work that day, the claimant testified that he worked unloading trucks and cutting meat using sharp knives. At the time of the claimed incident, the claimant testified that he was cleaning the ovens of materials that had accumulated inside, with a sharp knife, as he had been instructed to do, when the knife slipped and severely lacerated his left thumb.

The claimant further testified that on [date of injury], he had the normal use of his mental and physical faculties while performing his work duties. He denied using marijuana on [date of injury]. The claimant testified that he had used marijuana on July 23, 2011, but not thereafter through the date of his drug screen. The claimant also testified that the drug screen was not performed on August 1, 2011. Regardless of the date, it was undisputed that the claimant's drug screen was not on the date of injury, [date of injury], but occurred some days later in the first week of August 2011.

In evidence is the drug screen and the chain of custody documentation reflecting that the sample was collected on August 1, 2011, and the testing revealed that the claimant was positive for marijuana metabolites. There was no expert testimony at the CCH or in the documentation admitted in Hearing Officer's Exhibit No. 3 as to the time period that marijuana metabolites can be detected after drug use or the metabolism rate of marijuana.

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. *See* Appeals Panel Decision (APD) 062507-s, decided January 31, 2007.

In this case, the post-injury drug screen which tested positive for marijuana 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. *See* APD 071008, decided July 11, 2007.

In order to rebut the presumption that the claimant was intoxicated, the claimant's mother testified that on [date of injury], the claimant was acting normally and performing routine tasks prior to going to work. The claimant testified that he did have the normal use of his mental and physical faculties at the time of the claimed injury after working approximately 7 1/2 hours doing heavy lifting and using sharp knives to cut meat. The evidence reflects that after being severely cut, the claimant drove himself to the hospital emergency room for treatment.

At the CCH, the claimant further testified, and acknowledges in his appeal, that prior to the claimed incident, he had last used marijuana on July 23, 2011, and had not used marijuana on the date of injury. A review of the audiotape recording of the CCH establishes that the claimant did in fact testify that the last use of marijuana was on July 23, 2011, and that he denied using marijuana on [date of injury].

In the Background Information section of his decision, the hearing officer states:

> Even if the drug screen had not been collected until August 3, 2011 [the] [c]laimant testified that he had used marijuana on [date of injury], and had not used marijuana any other time before the drug screen. Therefore, the

> burden of proof passed to the [c]laimant to prove he had the normal use of his mental and physical faculties at the time of injury. [The] [c]laimant failed to do so; therefore [the self-insured] is relieved of liability for workers' compensation benefits.

The hearing officer erred regarding a material fact, the claimant's testimony about the date that he last used marijuana. Because of this misstatement of a material fact of evidence, we reverse the hearing officer's decision that the claimed injury occurred while the claimant was in a state of intoxication, thereby relieving the self-insured from liability for compensation and that on [date of injury], the claimant did not sustain a compensable injury. We remand the case to the hearing officer for further action consistent with this decision.

The claimant contends that it was abuse of discretion for the hearing officer to admit documentation concerning the chain of custody of the drug screen. Each party had admitted the drug screen results in their exhibits. There was conflicting testimony at the CCH regarding the date of the collection of the sample for the drug screen. Each exhibit reflected the collection date of August 1, 2011. Error, if any, in the admittance of Hearing Officer's Exhibit No. 3 was not reasonably calculated to cause or did cause the rendition of an improper judgment. *See* APD 091513, decided December 2, 2009.

REMAND INSTRUCTIONS

On remand, the hearing officer is to apply the correct legal standard on the issue of intoxication after correcting his misstatement of the material fact in evidence regarding the claimant's testimony about the date that he last used marijuana. The hearing officer shall consider all the evidence, make findings of fact and render conclusions of law regarding intoxication and compensability consistent with this decision. The hearing officer is not to consider additional evidence on remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a certified self-insured)** 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.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge