APPEAL NO. 980443

Following a contested case hearing held on January 28, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that appellant (employer) had standing to contest compensability; that respondent (claimant) sustained a compensable injury on _____; that claimant had disability beginning on July 13, 1997, and continuing through the date of the hearing; that claimant was not intoxicated at the time the claimed injury occurred; and that the fact that claimant refused a drug test is insufficient to overcome the presumption of sobriety and does not establish that claimant was intoxicated at the time the claimed injury occurred. The employer has appealed the latter determination, asserting a clause in an agreement between the employer and the union to which claimant belonged providing that a refusal to provide either blood or urine specimens upon "probable suspicion" of being under the influence of a controlled substance will constitute a presumption of intoxication, asserting a written policy of the employer to which claimant agreed, as a condition of employment, that an employee will be tested for intoxication any time there is an on-the-job injury (not in evidence), and asserting that an injured worker should not be permitted to flout Texas public policy and the "mandates" of the Texas legislature and Texas Workers' Compensation Commission (Commission) and benefit from obstructing an employer's attempt to test such employee for objective evidence of intoxication. The employer further asserts that it was error for the hearing officer to find no intoxication based upon the subjective evidence provided by claimant's testimony and the subjective observations of his supervisor. The employer asks that we reverse and render a decision that because of claimant's failure to submit to drug/alcohol screen testing, he is precluded from rebutting the presumption of intoxication with mere subjective testimony since his own conduct deprived the employer of objective evidence. The file does not contain responses from the claimant and the carrier.

DECISION

Affirmed as reformed.

The parties stipulated that on _____ (all dates are in 1997 unless otherwise stated), claimant was injured in the furtherance of the employer's business affairs at his place of employment when he was hit by a crate, and that due to the claimed injury, claimant has been unable to obtain and retain employment at wages equivalent to the preinjury wages beginning July 13th and continuing through the date of the hearing.

Claimant testified that on _____, a Saturday, he was struck by a crate being loaded into a trailer parked at a hotel, that he was knocked down and lost consciousness for a while, and that he was carried off the trailer and told by his supervisor (Mr. T), to sit down and cool off. He said he had previously undergone triple bypass heart surgery following a heart attack, that after the accident on the trailer he began to experience chest

pain, which scared him, that he was concerned about his heart, and that he called his wife to come take him to the hospital so he could be checked. Claimant said that Mr. T told him to go get his heart checked and that they would take care of the drug screen testing later, and that on the following Wednesday Mr. T said he would send someone to the hospital to get claimant's blood tested. He said he had worked for the employer for 14 years and was aware of the requirement for drug testing following an on-the-job accident. The employer's safety director, (Mr. L), testified that new employees sign a paper acknowledging advisement of the employer's drug policy. No document concerning the employer's drug policy signed by claimant was in evidence. Claimant indicated that hospital x-rays revealed fractured bones in his foot, that he underwent surgery on the foot, and that he also underwent the drug screen testing at the hospital. The hospital's July 17th drug screen test was negative.

Claimant further testified that he did not drink alcohol or use non-prescribed drugs, and that he had not smoked marijuana for 10 to 15 years and had never used cocaine. He said that on the day of the accident he had no alcohol or drugs in his body, that Mr. T did not ask him then to submit to a blood test, that he did not see Mr. T with a drug screen kit at the accident site, and that he did not refuse to submit to drug testing but assumed from what Mr. T had said that it would be done the following Monday.

In his written statement of July 18th and transcribed interview of July 23rd, Mr. T stated that he did not witness the accident, that after the accident claimant complained of his heart racing and was concerned since he had previously undergone heart bypass surgery, that claimant took off his shoe and had no obvious injury to his foot, and that claimant indicated he was not concerned about his foot but wanted to get his heart checked. Mr. T further stated that he went to his vehicle and retrieved a drug test kit, that he told claimant he needed to take the kit with him to the hospital, and that claimant talked fast, appeared nervous, and gave the impression he wanted to avoid being tested for drugs. Mr. T said he did not send the drug screen kit with claimant when his wife took him to the hospital because he "had to assume that he pretty much refused the test, wasn't going to take the test, and wasn't going to even have his foot looked at." He further stated that claimant's wife called him that night and told him that two fractured bones were found and that they were going to file under her health insurance and indicate the accident happened at home. Mr. T indicated that this reinforced his impression that claimant was evading being tested for drugs. Mr. T further stated in his interview that he was very familiar with drug and alcohol screens, that he has observed persons under the influence of drugs and alcohol and knows the signs and symptoms, and that claimant did not appear to be under the influence and was not acting "high."

Mr. L testified that he had no evidence of claimant's having been intoxicated when he was injured.

In evidence is an agreement between the employer and a union which in Article 16 (Alcohol and Drug Use) provides that in cases in which an employee is acting "in an

abnormal manner" and a supervisor has "probable suspicion to believe that the employee is under the influence of controlled substances," the employer may require the employee to go to a medical clinic to provide both urine and blood specimens for laboratory testing." Article 16 further provides that "a refusal to provide either specimen will constitute a presumption of intoxication and the employee will be subject to discharge without the receipt of a prior warning letter."

The hearing officer found that "[o]n July 18 [sic], 1997, claimant was asked by his supervisor to take a drug test kit to provide specimens for testing and claimant did not," and that at the time of the injury, claimant had full use of his mental and physical faculties. The hearing officer concluded that claimant was not intoxicated at the time the claimed injury occurred, and that the fact that he refused a drug test is insufficient to overcome the presumption of sobriety and does not establish that he was intoxicated at the time the claimed injury occurred. The July 18th date in the above finding appears to be a typographical error since the evidence indicated that claimant was asked by Mr. T to take a drug test kit on the date of the injury. Accordingly, we reform that date in Finding of Fact No. 6 to read _____.

In a public policy argument, the employer asserts on appeal that various provisions of the 1989 Act and the Commission's rules address requirements for employers to have drug abuse policies and safety programs and that the overall purpose of these legislative and Commission mandates are not served if a claimant can defeat an intoxication defense by refusing reasonable drug and alcohol testing previously agreed to as a condition of employment. We have stated that the formulation of public policy is best left to the legislature and rule makers. *See* Texas Workers' Compensation Commission Appeal No. 950910, decided July 19, 1995.

The employer next cites the decision in Texas Employment Commission v. Hughes Drilling Fluids, 746 S.W.2d 796 (Tex. App.-Tyler 1988) as "similar." In that case, the employee was discharged by his employer for refusal to submit a urine specimen for drug screening as required by company policy. The employee filed a claim for unemployment compensation benefits which was approved by the Texas Employment Commission (TEC). The employer then obtained a summary judgment against TEC, which the appellate court affirmed, stating that it found the summary judgment evidence to establish, as a matter of law, that the employee is disqualified for unemployment compensation because of misconduct connected with his employment, namely, his refusal to obey company policy and submit a urine specimen. We cannot read that case, which found the employee's refusal to submit a urine specimen for drug testing to constitute "misconduct" under the applicable statute, as supporting the carrier's argument in this case that claimant should be denied workers' compensation benefits because he did not take a drug test kit to provide specimens for testing, as was found by the hearing officer. The issue in the former case was whether claimant was disqualified from receiving unemployment compensation benefits under the applicable statute because of misconduct whereas, in the case we consider, the issue is whether claimant was intoxicated at the time of the injury. *See*

Sections 406.032(1)(a) and 401.013 concerning intoxication. Refusing to submit to drug testing may amount to "misconduct" and may be grounds for termination of the employment, but it cannot be said to shift the burden on intoxication as a matter of law.

The employer also cites Texas appellate court decisions which have recognized that it is Texas public policy to encourage parties to produce evidence that may resolve a dispute rather than destroy that evidence. We do not find these cases controlling.

The carrier further asserts that the hearing officer's decision violates the common law maxim, "*omnia praesemuntur* [sic] *contra spoliatorem* [all things should be presumed against a wrongdoer]," that the hearing officer's decision presumed in favor of a wrongdoer by relying on purely subjective testimony when claimant refused testing which could have provided certainty as to the issue of intoxication, and that this not only encourages intoxication and drug abuse in the work place, but also deprives the employer and the carrier of any statutory defense of intoxication under the 1989 Act.

Since no evidence of claimant's intoxication at the time of the injury was presented, we find no basis in the evidence to reverse the finding that at the time of the injury claimant had the full use of his mental and physical faculties and the conclusion that he was not intoxicated at the time of the injury. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Further, we find no legal basis to reverse the conclusion that claimant's refusing a drug test is insufficient to overcome the presumption of sobriety and establish that he was intoxicated at the time of the injury.

The decision and order of the hearing officer are affirmed as reformed.

Phillip F. O'Neill
Appeals Judge

CONCUR:

Susan M Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge