APPEAL NO. 982483

A contested case hearing was originally held on July 21, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 981848, decided September 21, 1998, the Appeals Panel held that the hearing officer did not err in refusing to permit the taking of the deposition of Dr. P and affirmed determinations that the evidence concerning intoxication placed the burden on the appellant (claimant) to prove that he was not intoxicated when he was injured and that he was intoxicated when he was injured. The Appeals Panel reversed the determination that at the time the claimant was injured (Employer 1) and (Employer 2) were co-employers of the claimant pursuant to TEX. LAB. CODE ANN. § 91.001 *et seq*., the Staff Leasing Act, and remanded for the hearing officer to resolve the disputed issue of whether Employer 1 or Employer 2 was the claimant's employer for workers' compensation purposes at the time of the injury. The hearing officer did not hold another hearing. The hearing officer rendered another decision on October 12, 1998, in which she again determined that the claimant was intoxicated at the time of his on-the-job injury on _____, and that since he did not sustain a compensable injury, he did not have disability. She also determined that Employer 1 was the claimant's employer when he was injured. That determination has not been appealed and has become final under the provisions of Section 410.169. The claimant appealed the determinations concerning intoxication. He contended that the hearing officer abused her discretion in not ordering that the deposition of Dr. P be taken, that she erred in placing the burden on the claimant to prove that he was not intoxicated, and that the evidence is not sufficient to establish that he was intoxicated at the time he was injured. One carrier responded and repeated its argument on those issues in its earlier response. The other carrier replied, stating that the appealed questions were properly decided in Appeal No. 981848, *supra*.

DECISION

We affirm.

The evidence is summarized in Appeal No. 981848 and a lengthy summary will not be repeated in this decision. We have again reviewed the evidence and the law related to the evidence. We have found no reversible error by the hearing officer and have found the evidence to be sufficient to support her factual determinations.

A claimant has the burden of establishing that a compensable injury was sustained. An insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 406.032. Section 401.013 defines intoxication and subsection (a) provides:

In this subtitle, "intoxication" means the state of:

(1) having an alcohol concentration as defined by Section 49.01, Penal Code, of 0.10 or more; or

(2) not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of:

(1) an alcoholic beverage, as defined by Section 1.04, Alcoholic Beverage Code;

(2) a controlled substance or controlled substance analogue, as defined by Section 481.002, Health and Safety code;

(3) a dangerous drug, as defined by Section 483.001, Health and Safety Code;

(4) an abusable glue or aerosol paint, as defined by Section 485.001, Health and Safety Code; or

(5) any similar substance, the use of which is regulated under law.

The claimant requested that the Appeals Panel clarify, and correct if necessary, the import of Texas Workers' Compensation Commission Appeal No. 92424, decided October 1, 1992, when there is no evidence establishing what quantitative level of a substance would reasonably cause intoxication. In Appeal No. 92424, the carrier introduced a laboratory report stating that the claimant tested positive for the marijuana metabolite and expert opinion that the test results were consistent with recent use of marijuana and that within all reasonable scientific probability the claimant had lost the use of his normal mental and physical faculties during the last 24 hours prior to the collection of the urine sample. The Appeals Panel held that the evidence was sufficient to shift the burden to the claimant to prove that he was not intoxicated at the time of the injury.

There is a presumption that an injured worker was sober. Establishing that a claimant had a blood alcohol concentration of 0.10 or more at the time of an injury is sufficient to establish that a claimant was intoxicated and relieve the carrier of liability. If that blood alcohol level is not established, the "normal use of mental or physical faculties" provisions of Section 401.013 apply. Presumption of sobriety and the shifting of the burden to the claimant to prove that he was not intoxicated at the time of the injury were discussed in Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992. The Appeals Panel wrote:

In Texas Workers' Compensation Commission Appeal No. 91012, decided September 11, 1991, an alcohol intoxication case, we noted that "[c]ases

from Texas Employers' Insurance Ass'n v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1948, ref'd n.r.e.) to March v. Victoria Lloyds Ins. Co., S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied), which dealt with the intoxication exception, varied greatly in their outcome but were basically consistent in their criteria. The employee had the burden to prove injury arose in the course of employment; the carrier had the burden to present evidence of intoxication; and if carrier presented such evidence, employee then had the burden to show he was not intoxicated at the time of injury as part of the proof that the injury occurred in course of employment." In Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, a marijuana intoxication case, the carrier adduced a lab report showing the employee had a THC level of 86 ng/ml [nanograms per milliliter] in his urine as well as the testimony of an expert witness who testified that in his opinion the employee was "intoxicated" at the time of his injury in that he could not have the normal use of his mental and physical faculties. We determined in the face of such evidence, and given the nature of the employee's evidence, that under the circumstances of that case the employee failed to meet his burden of establishing he was not intoxicated and reversed the hearing officer's decision. With respect to the raising of the intoxication exception by the carrier, however, we observed that "a claimant need not prove he was not intoxicated as the courts will presume sobriety," and that "when the carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove that he was not intoxicated at the time of injury." While we went on to state that we found no "indication that the legislature in any way disturbed the holding in March, *supra,* in shifting the burden of establishing lack of intoxication by the respondent when the issue is raised by probative evidence on the part of the appellant," we neither held nor implied in that decision, or in subsequent decisions, that a carrier must present scientific evidence and/or expert testimony to raise the intoxication exception and shift the burden back to the employee to establish the absence of intoxication at the time of the injury.

With regard to presumptions the Texas Supreme Court has quoted with approval the following excerpt from McCormick & Ray's Texas Law of Evidence, pp. 62-63, Sec. 53:

> "* * * the presumption places upon the party against whom it operates the burden of producing evidence sufficient to justify a finding of the nonexistence of the presumed fact * * *. Under this rule where the opponent produces sufficient evidence to justify a finding against the presumed fact the presumption vanishes and the situation is the same as it would have been had no presumption been created." (Emphasis supplied.) First

> National Bank of Mission v. Thomas, 402 S.W.2d 890, 893 (Tex. 1965).
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> *See also* 35 Tex. Jur. 3d *Evidence* § 112 (1984) which states that "[w]hen substantial or positive contrary evidence is introduced, sufficient to support a finding of the nonexistence of the presumed fact, a disputable presumption is rebutted, and the presumption then disappears, insofar as its effect as a rule of law is concerned. . . ." We observed in Texas Workers' Compensation Commission Appeal No. 91107, decided January 21, 1992, that "[t]he quantum of evidence necessary to dispel the presumption is not found with any precision in cases we have examined," citing Texas cases using such terms as "positive" evidence and "sufficient" evidence, as well as Appeal No. 91018, *supra*, where we stated that the burden to prove lack of intoxication is on the claimant when the issue is raised by "probative evidence." In Texas Workers' Compensation Commission Appeal No. 92148, decided May 29, 1992, a case involving the intoxication exception and alcohol, we stated that "[w]hen evidence is presented that raises an issue that an employee was intoxicated at the time of his injury, the claimant then has the burden of proving that he was not intoxicated. (Citations omitted.)" *See also* Texas Workers' Compensation Commission Appeal No. 91048, decided December 2, 1991, a cocaine intoxication case, in which we referred to "the burden to present evidence sufficient to raise an issue as to the intoxication exception to be on [the insurer]."
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> We believe it clear from the above referenced Texas cases and Appeals Panel decisions that evidence sufficient to raise the issue is what is required of the insurer to overcome the presumption of the employee's sobriety. We have referred to such evidence as probative evidence, that is, evidence that has some value in establishing a factual matter as opposed to evidence that amounts to no more than speculation or which is a mere scintilla. Contrary to appellant's assertions, our decisions have not required the carrier to present scientific or expert evidence in order to raise a fact question concerning the intoxication exception under Article 8308-3.02(1) [now Section 406.032]. It would seem reasonable, however, that the more persuasive the carrier's evidence relied on to raise the intoxication exception, the more difficult will be the burden of the employee to prove the absence of intoxication to the satisfaction of the factfinder.

The 1989 act does not establish levels to rebut the presumption of sobriety. Interestingly, a blood alcohol level of less than 0.10 and other evidence may be sufficient to shift the burden to the claimant to prove that he was not intoxicated at the time of the injury. The Appeals Panel does not have the authority to establish the level of the cocaine metabolite required to rebut the presumption of sobriety. In the case before us, a laboratory report sets forth "cutoff" levels for 10 substances and states that the test was

positive for the cocaine metabolite. In a report dated March 13, 1998, Dr. P stated that the urinalysis screen was "presumptive positive" for cocaine. In a report dated April 7, 1998, Dr. C said that the drug test was positive for the cocaine metabolite. The hearing officer did not err in determining that the evidence was sufficient to rebut the presumption of sobriety and shift the burden to the claimant to prove that he was not intoxicated. The evidence concerning the claimant's activities prior to the injury and his condition the morning he was injured are summarized in Appeal No. 981848, *supra.* The determinations of the hearing officer that at the time the claimant was injured his voluntary use of cocaine prevented him from having the normal use of his mental or physical faculties and that he was intoxicated are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge