

APPEAL NO. 033057
FILED JANUARY 8, 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 October 28, 2003. The hearing officer determined that the respondent (claimant) was not in a state of intoxication at the time of the claimed injury; that the claimant sustained a compensable injury on _____; and that he did not have disability resulting from the compensable injury. The carrier appeals the determination that the claimant was not intoxicated at the time of the injury and its resulting effect on the compensability determination. The appeal file contains no response from the claimant. The disability determination has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed.

Section 406.032 provides, in pertinent part, that an insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication, which is defined in Section 401.013. The Appeals Panel has noted that courts have held that a claimant need not prove he was not intoxicated as there is a presumption of sobriety, but that when a carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove he was not intoxicated at the time of injury. Texas Workers' Compensation Commission Appeal No. 951373, decided September 28, 1995. The carrier asserts on appeal that the claimant's refusal to submit to a drug test following a work-related injury "should be equated to a positive drug test, thus shifting the burden to [c]laimant to prove that he was not intoxicated at the time of the accident." The Appeals Panel has previously considered and rejected this argument in Texas Workers' Compensation Commission Appeal No. 980443, decided April 16, 1998, wherein we stated that a claimant's refusal to submit to a drug test does not shift the burden on intoxication as a matter of law. That is not to say that a hearing officer is precluded from finding that under the facts of a particular case a claimant's refusal to submit to a drug test could be sufficient to overcome the presumption of sobriety. However, as a refusal does not, as a matter of law, rebut the presumption of sobriety, we cannot agree that the hearing officer erred in failing to shift the burden to the claimant to establish that he was not intoxicated at the time of the injury or in determining that the claimant was not intoxicated and sustained a compensable injury on _____. Accordingly, no sound basis exists for us to reverse the hearing officer on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision. With respect to the well-reasoned dissenting opinion, I want to point out that the claimant's testimony was that he had smoked marijuana several weeks before the date of injury.

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. In his testimony, the respondent (claimant) acknowledged that he refused to take the requested drug test because he thought that the test would be positive and he knew that a positive drug screen would adversely affect his probation. Under these circumstances, it seems axiomatic that the refusal to take a drug test should be sufficient evidence of intoxication to rebut the presumption of sobriety and shift the burden of proof to the claimant to demonstrate that he was not intoxicated at the time of the injury. If such a refusal does not shift the burden, the appellant (carrier) can never produce sufficient evidence to rebut the presumption of sobriety because the claimant's conduct deprived the carrier of the opportunity to obtain that evidence. I believe that to affirm the hearing officer's determination that the burden did not shift in this case improperly rewards the claimant for his refusal to submit to the drug test. In my opinion, the claimant's refusal to take the drug test, where the stated reason for the refusal is concern that the test will be positive, should have the same effect as a positive drug test; thus, shifting the burden to the claimant to prove that he

was not intoxicated. Accordingly, I would reverse the determination that the carrier did not rebut the presumption of sobriety in this case and would remand for the hearing officer to determine whether the claimant sustained his burden of proving that he had the normal use of his mental and physical faculties at the time of his injury.

Elaine M. Chaney
Appeals Judge