APPEAL NO. 071008
FILED JULY 11, 2007

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 April 23, 2007. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) the claimed injury did not occur while the claimant was in a state of intoxication; and (3) the claimant sustained disability from June 6 through August 4, 2006.

The appellant (carrier) appealed the hearing officer's injury, intoxication, and disability determinations. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the clamant was hired by the employer on _____, and on that same date the claimant sustained an injury in the form of a fracture to his right index finger when a pipe fell on his right hand. At issue was whether the claimant was intoxicated at the time of the claimed injury. The evidence reflects that on _____, at about 1:00 P.M. a pre-employment drug screen was performed which tested negative. Thereafter on that same date, the claimant was hired by the employer and told to report to work at a jobsite by 6:00 P.M. The claimant testified that a friend drove him to his jobsite. At the jobsite, after a few hours of work, the claimant sustained an injury to his right index finger at 9:00 P.M. and was taken to a clinic for medical treatment. The evidence reflects that on _____, at 11:33 P.M. a urine sample was collected for a post-injury drug screen at the clinic and the test result was positive for marijuana, 109 nanograms per milliliter (ng/ml).

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 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. The claimant testified that he was sober at the time of his claimed injury and that he last used marijuana a few weeks prior to _____. In the Background Information

section of the decision, the hearing officer stated that the "[c]laimant refuted the allegation of intoxication and testified that it had been weeks since he had used marijuana, and he was not a regular user. Claimant's testimony was credible and consistent in his description of his activities and the mechanism of injury." The carrier alleged that the claimant was intoxicated at the time of the claimed injury based on the post-injury drug screen which tested positive for marijuana. In evidence is a medical report dated September 20, 2006, from the carrier's peer review doctor, Dr. R, which states "[i]t is not possible to correlate level of impairment to a positive urine drug screen for marijuana. It is possible to say, however that the claimant did use marijuana at some time as the result is confirmed by gas chromatography and mass spectrophotometry which would eliminate the possibility of a false positive." In the Background Information section, the hearing officer states that the "[c]arrier has not shown sufficient evidence of probative value to rebut the presumption of sobriety. Therefore, Carrier is not relieved of liability for compensation."

As a general rule, an employee is presumed to be sober at the time of an injury. *See* Appeals Panel Decision (APD) 94247, decided April 12, 1994. However, under Section 401.013(c) a rebuttable presumption of intoxication exists where there is a positive blood test or urinalysis for a controlled substance. The hearing officer erred in applying a "presumption of sobriety" standard, rather than a rebuttable presumption of intoxication standard, once a positive drug screen for marijuana was admitted into evidence. *See* Section 401.013(c). *See also* APD 062507-s, decided January 31, 2007, (a rebuttable presumption of intoxication was established based on a positive drug screen for controlled substances). 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. Therefore, we reverse the hearing officer's determination that the claimed injury did not occur while the claimant was in a state of intoxication, and we remand the intoxication issue back to the hearing officer for her to apply the correct standard as set out in Section 401.013(c).

Since the intoxication issue has been reversed and remanded for the hearing officer to apply the correct standard, the hearing officer's injury determination that the claimant sustained a compensable injury on _____, and the disability determination that the claimant sustained disability from June 6 through August 4, 2006, are reversed and remanded for a decision consistent with the hearing officer's determination on the intoxication issue on remand.

On remand, the hearing officer shall consider all the evidence, make findings of fact and render conclusions of law regarding the intoxication, injury, and disability issues, consistent with the statute discussed herein. 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 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750
AUSTIN, TEXAS 78701.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas L. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge