APPEAL NO. 121062
FILED AUGUST 6, 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 May 3, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues the hearing officer determined that: (1) the appellant/cross-respondent (claimant) did not sustain a compensable injury on [date of injury]; (2) the claimed injury occurred while the claimant was in a state of intoxication, as defined in Section 401.013 from the introduction of a controlled substance or substance analogue, as defined by Section 481.002 of the Health and Safety Code, thereby relieving the respondent/cross-appellant (carrier) of liability for compensation; and (3) because the claimant did not sustain a compensable injury, he did not have disability.

The claimant appealed, contending among other matters, that hair analysis testing positive for cocaine and cocaine derivatives was insufficient to raise the rebuttable presumption of intoxication in Section 401.013(c) which only referenced "a blood test or urinalysis." The claimant also appealed the hearing officer's determinations regarding compensability and disability. The carrier responded to the claimant's appeal urging affirmance and cross-appealed the hearing officer's finding that due to the claimed injury of [date of injury], the claimant was unable to obtain and retain employment at wages equivalent to his wages prior to [date of injury], from December 15, 2011, through May 3, 2012, the date of the CCH. The appeal file does not contain a response to the carrier's cross-appeal.

DECISION

Reversed and remanded.

The claimant testified that he was a courier for a medical laboratory and that he was involved in a work-related motor vehicle accident on [date of injury]. The claimant alleged injuries to his right ankle, right knee, right leg and right wrist. The claimant said he was taken by ambulance to a hospital emergency room (ER) where he was treated and released. The claimant testified he was prescribed hydrocodone for pain. A hair sample was collected from the claimant on December 16, 2011, and drug testing on the hair sample was positive for cocaine and cocaine derivatives.

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 the voluntary introduction into the body of any substance listed under Subsection (a)(2)(B), based on a blood test or urinalysis, raises a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties.

In evidence is a report from [Clinic], which indicates a hair sample was collected on December 16, 2011, for drug testing. The report shows positive for cocaine "317 ng/10 mg." A report dated January 13, 2012, from [Dr. M] discussed the test, noted that it was less invasive than a urine screen, noted that the claimant was "prescribed hydrocodone (Lortab) to use for pain as needed every [six] hours . . . and was noted to be positive for cocaine, testing positive with Mass Spectrometry for cocaine (317 ng/10 mg) . . . ." Dr. M in his report further stated:

> The level of 317/10 mg of cocaine in the hair correlates to 317,000 picograms/mg of cocaine . . . . A level of <10,000 picograms/mg of cocaine correlates to very high cocaine usage, or almost constant usage of cocaine. The level tested was greatly higher than this (317,000 picograms/mg), so it can safely be stated that this drug test shows the level of drugs in the claimant's system would have caused significant impairment of mental and physical faculties on the date of injury.

The hearing officer, in her Background Information, after commenting on the evidence, commented that the claimant's "evidence was not sufficient to overcome the presumption of intoxication." Section 401.013 was amended in 2005 to add Subsection (c) which specifically states that "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." Subsection 401.013(c) does not say that any drug test creates the rebuttable presumption of intoxication. Rather that section specifically only refers to a blood test or urinalysis to create the rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties. We hold that testing of a hair sample, two days after the accident, may be sufficient to raise the question of intoxication under Section 401.013(a)(2)(B), but it does not create a rebuttable presumption of intoxication under Section 401.013(c). The hearing officer, by stating the evidence was not sufficient to overcome the presumption of intoxication applied the wrong standard to determine whether the claimant was in a state of intoxication at the time of the claimed injury. This constituted legal error. Therefore, we reverse the hearing officer's determination that the claimed injury occurred while the claimant was in a state of intoxication as defined in Section 401.013. We remand the

intoxication issue back to the hearing officer for her to apply the correct standard as set out in Section 401.013 without applying the presumption of intoxication under 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 determinations that the claimant did not sustain a compensable injury on [date of injury], and that because the claimant did not sustain a compensable injury, he did not have disability are also 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 conclusions of law regarding the intoxication, injury and disability issues consistent with this decision and the statute discussed therein. The hearing officer is not to consider additional evidence on remand but is to provide the parties an opportunity to comment.

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* Appeals Panel Decision 060721, decided June 12, 2006.

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

KIRK HOOD
1021 MAIN STREET, SUITE 1150
HOUSTON, TEXAS 77002.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge