

APPEAL NO. 192062  
FILED JANUARY 21, 2020

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 October 10, 2019, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (carrier) specifically contested compensability of the claimed injury pursuant to Section 409.022 and 28 TEX. ADMIN. CODE § 124.2(f) (Rule 124.2(f)); (2) respondent/cross-appellant (claimant) sustained a compensable injury on (date of injury); (3) the claimant was not in a state of intoxication, as defined in Section 401.013, therefore, the carrier remains liable for compensation; (4) the claimant had disability resulting from the compensable injury of (date of injury), from May 15 through June 7, 2019; and (5) the claimant did not have disability resulting from the compensable injury of (date of injury), from June 8, 2019, to the date of the CCH.

The carrier appealed the ALJ's determinations that the claimant was not in a state of intoxication; that the claimant sustained a compensable injury; and that the claimant had disability resulting from the compensable injury from May 15 through June 7, 2019. The appeal file does not contain a response from the claimant to the carrier's appeal. The claimant cross-appealed, disputing that portion of the ALJ's disability determination that the claimant did not have disability from June 8, 2019, to the date of the CCH. The carrier responded to the claimant's cross-appeal, urging affirmance that the claimant did not have disability from June 8, 2019, to the date of the CCH.

The ALJ's determination that the carrier specifically contested compensability of the claimed injury pursuant to Section 409.022 and Rule 124.2(f) was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The claimant testified that he was injured when he fell from scaffolding on (date of injury). The claimant first sought medical treatment on May 17, 2019. The evidence indicates that a hair specimen was collected from the claimant on May 17, 2019, and a report dated May 23, 2019, reflects that the specimen tested positive for cocaine. We note that in the decision and order the ALJ inadvertently listed the carrier exhibits admitted as A and F rather than A through F.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the

evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

## **INTOXICATION**

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) provides that “[o]n 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.”

As previously mentioned, the claimant underwent a post-injury hair specimen test that tested positive for cocaine. The ALJ states the following in the Discussion section of the decision and order:

An injured employee is presumed to be sober at the time of injury. However, [the] [c]laimant underwent a hair sample drug test on May 17, 2019, and tested positive for cocaine. Under [Section] 401.013(c), this positive drug test creates a rebuttable presumption that [the] [c]laimant was intoxicated and did not have the normal use of his mental or physical faculties at the time of his alleged injury.

Section 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 his or her mental or physical faculties. We hold that testing of a hair sample, 3 days after the accident, may be sufficient to raise the question of intoxication under Section 401.013(a)(2), but does not create a rebuttable presumption of intoxication under Section 401.013(c). The ALJ, by stating the positive hair sample drug test created a rebuttable presumption that the claimant was intoxicated, 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 ALJ's determination that the claimed injury occurred while the claimant was not in a state of intoxication as defined in Section 401.013. We remand the intoxication issue to

the ALJ 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). See Appeals Panel Decision (APD) 121062, decided August 6, 2012.

### **COMPENSABLE INJURY AND DISABILITY**

Since the intoxication issue has been reversed and remanded for the ALJ to apply the correct legal standard, the ALJ's determinations that the claimant sustained a compensable injury on (date of injury), the claimant had disability resulting from the compensable injury from May 15 through June 7, 2019, but not from June 8, 2019, to the date of the CCH, are also reversed and remanded for a decision consistent with the ALJ's determination on the intoxication issue on remand.

On remand, the ALJ shall consider all the evidence, make findings of fact and conclusions of law regarding the intoxication, compensable injury, and disability issues consistent with this decision and the statute discussed herein.

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 ALJ, 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 060721, decided June 12, 2006.

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

**RICHARD J. GERGASKO  
2200 ALDRICH STREET  
AUSTIN, TEXAS 78723.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge