

APPEAL NO. 210714
FILED JUNE 30, 2021

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 8, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) respondent 1 (claimant) sustained a compensable injury on (date of injury); and (2) the claimed injury did not occur while the claimant was in a state of intoxication as defined in Section 401.013, and the appellant (self-insured) is not relieved of liability for compensation. The self-insured appealed the ALJ's determinations. The claimant responded, urging affirmance of the ALJ's determinations. The appeal file does not contain a response from respondent 2 (subclaimant) to the self-insured's appeal.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained damage or harm to the physical structure of his body while in the course and scope of his employment on (date of injury). The claimant testified that he was injured on (date of injury), when the water truck he was driving rolled over. In evidence are medical records from the hospital dated (date of injury), which establish a urinalysis was performed on the date of injury and that the claimant tested positive for cannabinoids. Also in evidence is a peer review report dated February 26, 2021, from (Dr. R), a medical toxicologist, that discusses her review of the hospital records dated (date of injury), through September 2, 2020. In her report Dr. R stated "[a] urine drug screen collected at 11:28 on [(date of injury)] showed a positive for cannabis." Dr. R goes on to state the claimant "had a positive urine for marijuana," and a "[f]alse positive is not likely here and likely represents the patient's history of use every other day."

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 "[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."

In Appeals Panel Decision (APD) 062507-s, decided January 31, 2007, the Appeals Panel held that an ALJ erred in failing to make a finding regarding a positive drug screen for amphetamines which resulted in a rebuttable presumption of intoxication for amphetamines, referencing Section 401.013(c). The Appeals Panel also noted that it disagreed with the carrier's argument that under the 2005 amendment to Section 401.013(c), establishing a rebuttable presumption of intoxication based on a blood test or urinalysis, an injured worker's lay testimony could not be considered sufficient to overcome the legal presumption of intoxication.

In the case on appeal, the ALJ in his discussion notes that the hospital records "reflect an entry of, 'U Cannab Scr: Positive' under 'Laboratory or other results' at 11:28 AM on (date of injury)." The ALJ also noted a urine drug screen was ordered on (date of injury), and that a federal drug testing custody and control form in evidence shows that a specimen was collected for testing including tetrahydrocannabinol on (date of injury), at 11:30 a.m. The ALJ pointed out that a section of the form containing a space for a verification of results of negative, positive, or refusal to test was blank. The ALJ stated that he viewed this blank space as "some evidence" that no drug test was completed, and "[w]hen combined with the absence in evidence of the drug screen report and results from the lab, there is little persuasive evidence of the alleged drug screen or its results." The ALJ found that the evidence does not establish the claimant voluntarily introduced into the body any substance listed under Subsection (a)(2)(B), based on a blood test or a urinalysis. The ALJ also found that the evidence does not establish that the claimant tested positive for marijuana based on a urinalysis test on (date of injury).

In APD 171115, decided July 10, 2017, medical records in evidence reflected a urinalysis was performed on the date of injury and that the claimant tested positive for cannabinoids. The records also reflected the results were only preliminary analytical test results and that a more specific chemical method must be used to obtain a confirmed analytical result. Also in evidence was a separate urinalysis from another medical facility reflecting the claimant tested positive for cannabinoids. The ALJ stated the initial drug screen performed on the date of injury provided insufficient testing information, and found the evidence concerning drug testing was not persuasive to create a rebuttable presumption that the claimant was intoxicated and did not have the normal use of his mental or physical faculties at the time of the injury. The Appeals Panel stated Section 401.013(c) refers to a positive drug test based on a blood test or urinalysis "but does not specify any other requirements to establish a rebuttable presumption of intoxication." The Appeals Panel held the ALJ's failure to apply a rebuttable presumption was legal error, and remanded the intoxication issue to the ALJ to apply the correct legal standard.

The evidence in the case on appeal, which includes records from the hospital showing the claimant tested positive for marijuana on the date of injury, and Dr. R's peer review report discussing those hospital records, reflect the claimant tested positive for cannabinoids based on a urinalysis performed on the date of injury. The ALJ's failure to apply a rebuttable presumption to the facts of this case is legal error. Therefore, we reverse the ALJ's determination that the claimed injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, and the self-insured is not relieved from liability for compensation. We remand the intoxication issue to the ALJ for him to apply the correct legal standard as set out in Section 401.013 by applying the presumption of intoxication under Section 401.013(c) based on the positive urinalysis for cannabinoids in evidence.

COMPENSABLE INJURY

Since the intoxication issue has been reversed and remanded for the ALJ to apply the correct legal standard, the ALJ's determination that the claimant sustained a compensable injury on (date of injury), is also reversed and remanded for a decision consistent with the ALJ's determination on the intoxication issue on remand.

SUMMARY

We reverse the ALJ's determination that the claimed injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, and the self-insured is not relieved from liability for compensation. We remand the intoxication issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant sustained a compensable injury on (date of injury), and we remand the issue of compensability to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

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

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 **(a certified self-insured)** and the name and address of its registered agent for service of process is

**NAME
ADDRESS
CITY, TX ZIP CODE.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge