APPEAL NO. 062507-s
JANUARY 31, 2007

This appeal arises pursuant to Texas Workers' Compensation Act, TEX LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 6, 2006. The hearing officer determined that the respondent (claimant) sustained a compensable injury to his right hand on _____, and that the claimed injury did not occur while the claimant was in a state of intoxication as defined by Section 401.013, and the appellant (carrier) is not thereby relieved from liability for compensation.

The carrier appealed, contending that the hearing officer failed to apply the proper legal standards to the claimant's proof requirements, that expert scientific or medical evidence is required to prove the metabolism rate and that otherwise the hearing officer's decision is not supported by the evidence. The carrier attaches two additional pieces of evidence to its appeal contending that those documents are newly discovered evidence. The claimant responds, urging affirmance of the decision and objecting to the documents attached to the carrier's appeal.

DECISION

Reversed and a new decision rendered.

It is undisputed that the claimant had been given a preemployment drug screen on March 29, 2006. The claimant began working on March 30, 2006, and went to work at a drilling rig at 5:45 a.m. on _____. It is also undisputed that the claimant sustained a crush injury to the ring finger of his right hand at about 10:30 a.m. on _____. The claimant was taken to the hospital emergency room shortly thereafter and had surgery on his right hand. A drug screen performed at the hospital tested positive for amphetamine and positive for methamphetamine. The claimant testified that after the preemployment drug test on March 29, 2006, he had met a friend and "snorted" a line of methamphetamine.

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.[1] Section 401.013(c), amended effective September 1, 2005, provides that

[1] Section 481.002(5) of the Health & Safety Code Ann. defines a "controlled substance" as a substance listed in Schedules I through V or Penalty Groups 1, 1-A or 2 through 4. Section 481.002(6)(A) defines a "controlled substance analogue" as a substance with a chemical structure substantially similar to the chemical structure of a controlled substance in Schedule I or II or Penalty Group 1, 1-A or 2. Methamphetamine is listed in Section 481.102 Penalty Group 1 and in Section 481.032 as a Schedule II stimulant. Amphetamine is listed in Section 481.103 Penalty Group 2 and in Section 481.032 as a Schedule II stimulant. The Appeals Panel has long held that there is no

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 drug screen performed at the hospital established a rebuttable presumption that the claimant was intoxicated based on the positive presence of both amphetamines and methamphetamines. No evidence was presented that establishes that methamphetamines and amphetamines are the same substance or that one is the natural derivative of the other. The hospital listed the test results for methamphetamines and amphetamines separately and they are listed separately in the Health and Safety Code.

In the Background Information section the hearing officer discusses the claimant's testimony regarding his use of methamphetamine and states that the claimant testified that "he had the normal use of his mental and physical faculties at the time of the accident." Actually the claimant was asked "Do you feel you were intoxicated at the time of this injury" to which the claimant replied "No, ma'am" (transcript page 17). No attempt was made to define intoxication to the claimant or elicit testimony about the normal use of his mental and physical faculties.

The hearing officer also commented in the Background Information section that "It is common knowledge that methamphetamine is a short acting drug that can be detected some time after its effects have worn off." The hearing officer committed reversible error by applying a "common knowledge" standard on the metabolism rate of methamphetamines. The rate and means by which the body metabolizes different substances is not subject to common knowledge and the rate at which methamphetamines and amphetamines are metabolized by the body and can continue to be detected or cease to affect the individual's mental and physical faculties may well be different for different individuals depending on weight, body habitus and other factors. Metabolism rates of methamphetamines and amphetamines require expert evidence. Furthermore, the hearing officer made no comment or finding regarding the positive drug screen for amphetamines, and the resulting rebuttable presumption of intoxication for amphetamines. Accordingly, we reverse the hearing officer's determinations that the claimant sustained a compensable injury to his right hand on _____, and that the injury did not occur while the claimant was in a state of intoxication. We render a new decision that the claimant did not sustain a compensable injury on _____, and that the claimant has failed to rebut the presumption of intoxication established by the hospital drug screen test.

The carrier also argues that under the 2005 amendment to Section 401.013(c) establishing a rebuttable presumption of intoxication based on a blood test or urinalysis "the Claimant's lay testimony should no longer be considered to be sufficient to overcome the legal presumption of intoxication." We disagree. Section 410.165(a) makes the hearing officer the sole judge of the relevance and materiality of the evidence

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dispute that amphetamines and methamphetamines are controlled substances. Appeals Panel Decision (APD) 971971, decided November 10, 1997; APD 971208, decided August 11, 1997.

and the weight and credibility to be given to the evidence. The 1989 Act, as amended, does not require that the rebuttable presumption of intoxication of Section 401.013(c) can only be rebutted by expert scientific or medical evidence and we decline to establish such a requirement. Under the facts in this case, the claimant's one line statement that he was not intoxicated did not overcome the rebuttable presumption of intoxication; the hearing officer erred in applying a "common knowledge" standard on the metabolism rate of methamphetamine; and the hearing officer erred in failing to comment or make findings on the rebuttable presumption of intoxication based on the positive amphetamine test result.

The carrier attached to its appeal a statement dated "11-30-06" from the "rig manager" regarding the claimant's condition on _____, and a drug test report dated April 5, 2006, giving quantitative values to the _____, hospital drug screen test. The carrier asserts those documents are newly discovered evidence. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, APD 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to the lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence. We believe that due diligence would have required an interview of the rig manager before the CCH, especially where the claimant's conduct and alertness on the date of injury was at issue. There is no evidence that the rig manager initially gave an untruthful answer or concealed his knowledge from the carrier. Similarly, although the carrier asserts it only became aware of the existence of the quantitative values of the drug test after the CCH, exercise of due diligence would have disclosed the report dated April 5, 2006. Although we have reversed the hearing officer's decision in this case we did so without consideration of the submitted material, submitted for the first time on appeal.

SUMMARY

We reverse the hearing officer's decision that the claimant sustained a compensable injury to his right hand on _____, and that the claimed injury did not occur while the claimant was in a state of intoxication as defined by Section 401.013 and the carrier is not thereby relieved from liability for compensation. We render a new decision that the claimant did not sustain a compensable injury on _____, and that the claimed injury occurred while the claimant was intoxicated as defined in Section 401.013 thereby relieving the carrier from liability for compensation.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge