

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109225

LARRY ROSE	CLAIMANT
CITY OF WALDRON	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 27, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by CHRIS BRADLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 24, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on May 9, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On July 24, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant was involved in a motor vehicle accident on July 24, 2001, while working.

4. The claimant is entitled to a weekly compensation rate of \$264.00 for temporary total disability and \$198.00 for permanent partial disability.

5. The claimant has a 15 percent anatomical rating.

6. All medical has been paid to date.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injuries to her neck and back.

2. Medical bills already paid and future medical.

3. Temporary total disability as already paid.

4. Attorney's fees on all benefits paid and or awarded.

5. Permanent and total disability or entitlement to wage loss.

6. Rehabilitation program for the claimant.

In regard to the foregoing issues the claimant contends that he is entitled to total permanent disability, or alternatively, permanent partial disability in excess of the anatomical rating, and is entitled to appropriate rehabilitation benefits.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury inasmuch as the accident was substantially occasioned by the use of illegal drugs.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted the respondents' answers to interrogatories marked Claimant's Exhibit No. 1 and medical information marked Claimant's Exhibit No. 2, 3 and 4. The

respondents submitted the claimant's answers to interrogatories marked Respondents' Exhibit No. 1, Form AR-N marked Respondents' Exhibit No. 2 and a medical report marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was 46 years old and was employed by the respondent working at their water treatment plant. The claimant testified that on the morning of July 24, 2001, his wife had driven him to work. The claimant testified that at work his supervisor, Tommy Star, told him that he would be brush hogging around the plant. The claimant remembered that when he received these instructions Travis McCurter and Terry Street were present. The claimant testified that he and Travis McCurter would have to move some equipment from the City Street barn over to the water plant to do the mowing. The claimant testified that Mr. Street was there to run some tests that morning and was not to go with them to pick up the equipment. The witness testified that he and Mr. McCurter drove about a mile and a half to the street barn and hooked onto a trailer. The claimant testified that when he got to the street barn he first loaded a skid steer onto the trailer and took it to the waste water plant, backed it off the trailer and went back to the street barn for the tractor. The claimant testified that at first he put air into the back tire of the tractor and loaded it onto the trailer. The claimant testified that Travis McCurter was with him this entire time and did help him put air in the tractor tire but mostly was just standing back and

watching. The claimant testified that once the tractor was loaded he put the ramps under the tires to brace it off and started off for the gas station where it was to be repaired.

The claimant testified that about three quarters of a mile from the street barn, the trailer started to jack knife around and he lost control of the vehicle eventually slamming them into a ditch. The claimant testified that there were no other vehicles involved in this accident and he was driving the truck. The claimant testified that he immediately radioed for Tom Star and the mayor and then he called for the city police. The claimant testified that he did not think he was injured at the time but that Travis McCurter was rubbing and holding his neck. The claimant testified that it took these people about four to five minutes to get there and he explained what had happened. The claimant testified that his supervisor took him to the hospital where he was given a drug test. The claimant agreed that it was his understanding that the drug test was positive for marijuana.

The claimant testified that at no time during the day of the accident had he ingested any marijuana. The claimant did testify that the evening before, July 23, 2001, at about 6:00 p.m., he had maybe three or four "hits" on a marijuana cigarette. The claimant testified that he did not use marijuana every day but did use it maybe once a week. The claimant testified that as a result of this accident he was not placed under arrest for DUI or given a ticket by the police.

The claimant agreed that initially he did not think that he was injured but shortly after he was taken home, his neck began to stiffen up and he could not turn it. The claimant testified that as soon as his wife came home she took him to the emergency room at the Scott County Hospital and shortly after they left the emergency room they contacted the respondent. The claimant testified that as a result of his injury he was seen by Dr. Bennett, Dr. Queeney, Dr. Martimbeau, Dr. Swicegood, Dr. Dodson and Dr. Capocelli as well as Dr. Short. The claimant agreed that Dr. Capocelli operated on him and it was his understanding that he has been assessed with an impairment rating of 10 percent to the neck and 5 percent to his low back. The claimant further testified that he has been unable to return to work since July 24, 2001. The claimant also agreed that initially all of his doctor's bills were being paid by workers' compensation and he also has received payments of some benefits while he was off work.

The claimant testified that he went as far as the ninth grade in school and he has never received his GED. The claimant testified that he has never received any additional formal education either vocational or otherwise since leaving high school. The claimant testified that he has not been in the military and his work history has primarily been that of manual labor.

On cross examination, the claimant testified that, to his knowledge, there were no defects with the truck or with the trailer except that there were no trailer brakes. The claimant testified that he used the trailer fairly often and it had never had trailer

brakes. The claimant was asked what caused the wreck and the claimant testified that the tire of the trailer broke off when the tractor shifted as they were turning off of one road onto another street. The claimant agreed that one of the tractor tires, the right rear tire, was leaking air and that was why they were taking it to a service station. The claimant testified that when the event began to happen, they jack knifed to the left then he straightened the vehicles out and then they jack knifed in the other direction and he was again able to straighten it out. The claimant testified that then it jack knifed completely and he could not straighten it back out. The claimant agreed that he jack knifed three different times while he was negotiating a curve and going down a hill picking up speed. The claimant testified that after the accident he observed that the back right tire of the trailer had completely broken down.

Tommy Star testified on behalf of the claimant stating that he had been employed by the respondent for six and one half years as the water and waste water superintendent. Mr. Star testified that on the morning of the claimant's accident, the claimant had come to his office and sat at his desk with others present to receive instructions for the day as they did every day. This witness testified that he spent approximately thirty minutes with and around the claimant on the morning of July 24, 2001, and he did not seem any different that morning than he did any other morning. This witness testified that when he arrived at the scene of the accident the first thing he noticed was that the tractor was

sitting up on the back of the truck. Ms. Star testified that anytime a piece of equipment is to be hauled such as the tractor, they are suppose to be secured down with straps. This witness testified that it was the responsibility of the claimant to have secured the trailer and that Mr. McCurter was only part time summer help and was only to do as directed by the claimant. Mr. Star testified that he took the claimant to be drug tested because that is part of the personnel policy with the respondent's business. Mr. Star testified that on the way to the hospital, the claimant admitted to him that he had smoked marijuana the night before and the two of them had discussed the consequences of this act.

On cross examination, Mr. Star agreed that he had asked the claimant to come back to work for the respondent, further stating that the claimant was a very good worker. Mr. Star agreed that when he saw the trailer at the scene of the accident, there were no straps to secure the tractor. Mr. Star testified that there was nothing wrong with the trailer and even though the right side of the trailer was in a bank and he could not see the right tire they were able to pull the trailer out and back to the street barn.

Curtis McCurter testified that he was 19 years old and knew the claimant. Mr. McCurter testified that he remembers the claimant loading the tractor and hauling the tractor but does not remember anything about securing or tying down the tractor. This witness testified that he did not observe the claimant smoking marijuana that day nor did he think that the claimant was acting "weird." When asked about the accident, Mr. McCurter testified

that they were coming onto City Lake Road off of the bypass going about 35 miles per hour and all of a sudden the trailer started shaking. Mr. McCurter stated that he and the claimant looked at each other and wondered what was going on, looked back and saw that the trailer had started to move sideways and it pushed back into the truck and into the ditch. This witness testified that he could not say what was making the trailer behave the way it did and he did not think that the claimant was driving too fast. On cross examination, Mr. McCurter testified that the claimant had told him after the accident that he had smoked a marijuana cigarette the night before.

Fritz Haga testified that he was working for the Waldron Police Department on the day of the claimant's motor vehicle accident. Officer Haga testified that when he arrived at the scene he observed one of the respondent's pick ups with a homemade trailer attached off in the ditch on the north side Lake City Road. The trailer was jack knifed and the tractor had run up onto the back tailgate part of the bed of the pick up. The officer testified that he did not do a crash factor exam on the trailer but did ask the claimant and Mr. McCurter what had happened. Officer Haga indicated that his report sets forth that the right fender and tire of the trailer were damaged and he had testified that the right rear tire was up against the ditch bank. Officer Haga testified that neither Mr. McCurter nor the claimant appeared to be under the influence of any drugs or alcohol. The officer testified that he did not see any grievous error which would justify writing

the claimant a ticket. On cross examination, Officer Haga agreed that he could not tell whether the trailer's right rear wheel had blown out or was damaged by the accident. On redirect Officer Haga testified again that he did not see anything in the claimant's behavior to cause him to suspect that he was under the influence of any drug.

The medical records set forth that this claimant did sustain injuries as a result of his motor vehicle accident of July 24, 2001, which resulted in surgery and ultimately an impairment rating to his neck and low back.

Ark. Code Ann. §11-9-102(5)(B)(iv) reads:

(B) "Compensable injury" does not include:

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of the physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in the contravention of the physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in the contravention of the

physician's orders did not substantially occasion the injury or accident.

The threshold issue in this case is whether the claimant has overcome the presumption that his use of marijuana caused his motor vehicle accident. After a review of this entire record, I find that the claimant has failed to rebut the presumption that his use of marijuana did not contribute to or substantially occasion the accident which occurred on July 24, 2001. The claimant did not tie the tractor down to the trailer which should have been done and the tractor shifted on the trailer resulting in the accident. Testimony has been unrebutted that the trailer when pulled out from the ditch was capable of being pulled back to the street barn or that if the right rear wheel was damaged, this damage occurred when it hit the ditch. I, therefore, find that the claimant has not met his burden of proving by a preponderance of the evidence that his use of illegal drugs did not substantially occasion his accident and resulting back injuries.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 24, 2001, the relationship of employee-employer-carrier existed between the parties.
3. The claimant was involved in a motor vehicle accident on July 24, 2001, while working.
4. The claimant is entitled to a weekly compensation rate of \$264.00 for temporary total disability and \$198.00 for permanent partial disability.

5. The claimant has a 15 percent anatomical rating.

6. All medical has been paid to date.

7. The claimant has failed to rebut the presumption that his use of illegal drugs did not substantially occasion his accident and resulting injuries. See discussion above. All see Ark. Code Ann. §11-9-102(4) (B) (iv).

ORDER

The claimant has failed to rebut the presumption that his use of marijuana substantially occasioned his accident and resulting injuries. Therefore, this claim for benefits should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE