

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109225

LARRY ROSE,
EMPLOYEE

CLAIMANT

CITY OF WALDRON,
EMPLOYER

RESPONDENT

ARKANSAS MUNICIPAL LEAGUE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 5, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE MICHAEL HAMBY, Attorney at
Law, Greenwood, Arkansas.

Respondents represented by HONORABLE CHRIS BRADLEY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed and
remanded.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed August 27, 2003. The administrative law judge
found, "The claimant has failed to rebut the presumption
that his use of illegal drugs did not (sic) substantially
occasion his accident and resulting injuries." After
reviewing the entire record *de novo*, the Full Commission
finds that the claimant proved by a preponderance of the
evidence that illegal drugs did not substantially occasion
the injury or accident. The Full Commission therefore

reverses the administrative law judge's denial of the claim. We remand for further findings outlined below.

I. HISTORY

The testimony of the claimant indicated that he was employed as a plant operator for the city of Waldron, Ark. in July 2001. The claimant testified that he arrived at work at 7 a.m. on the morning of July 24, 2001. The claimant testified that he and part-time employee Travis McCurter "had to move some equipment from the city street barn over to the wastewater plant and he was just riding with me to help." The claimant testified:

Q. Where did you have to go and what did you have to do?

A. We drove a mile - about a mile and half to the street barn and hooked onto a trailer.

Q. Who is we?

A. Me and Travis McCurter.

The claimant testified that he drove a skid steer onto the trailer and transported the skid steer to a wastewater plant, and then returned to the barn and drove a tractor onto the trailer. The claimant testified:

Q. What did you do after you had the tractor loaded?

A. Proceeded to put the ramps under the tires and brace it off.

Q. What did you do then?

A. Proceeded to go to the gas station, which was about a half a mile from the plant where we was at.

Q. And what did you do once you got to the gas station?

A. We didn't make it to the gas station....

Q. And what happened?

A. The trailer proceeded to jackknife me around and I lost control of the vehicle and slammed into a ditch....

Q. When this accident happened, about what time of day was it; do you know?

A. It was after 10 o'clock.

Travis McCurter testified:

A. We was coming onto City Lake Road off the byroad that we was on and we was coming around the curve and we was going about - oh, maybe 35, and all of a sudden the trailer started shaking. Me and Larry looked at each other and wondered what was going on and looked back and it was starting to move sideways and then it got bad and pushed back into the truck into the ditch....

Q. Do you think something went wrong with the trailer to make it do that?

A. There really ain't no telling.

The parties stipulated that the claimant "was involved in a motor vehicle accident on July 24, 2001, while working." Fritz Haga was a captain with the Waldron Police

Department on the date of accident. Mr. Haga testified regarding what he observed:

A. A trailer was jackknifed and the tractor was run up on the back tailgate part of the bed of the pickup....

Q. Was the right rear tire and fender on that damaged when you got there?

A. Yes, sir, it was, some....

Q. And I take it in this case that you didn't find any suspicion in your mind of drug usage as a contributing factor in this accident?

A. No, sir, I did not.

Q. Mr. Rose nor Mr. McCurter either one appeared to be under the influence to you as an officer?

A. No, sir, they did not....

Q. And I also notice that no citations were issued here. Did you find that you really couldn't determine what the cause of the accident was; therefore, you didn't issue a citation?

A. Well, I didn't determine that it was - or did not come to a conclusion that it was anything that deserved or needed to be ticketed.

Q. In other words, if you thought that he was going an excessive speed or driving reckless you would have written him up?

A. Yes, sir, I would. And I could have wrote him a ticket for failure to maintain control, but, you know, like I'm saying, that is the officer's call and I just didn't think - I mean, in a case like this, like you said, if there had been 3 or 400 feet of skid marks or something, well, then I would have wrote him a ticket.

Q. In other words, you didn't see any egregious operation of this vehicle?

A. No, sir, I did not.

The record contains a Urine Chemistry laboratory report from St. Edward Mercy Medical Center, July 24, 2001. At 11:13 a.m. on July 24, 2001, the claimant tested positive for "THC." The record also contains a laboratory report from Mercy Hospital of Scott County, dated July 24, 2001. From a sample entered at 11:32 a.m. on July 24, 2001, the claimant tested positive for "tetrahydrocannabinol."

The claimant testified that he did not "ingest" any marijuana on July 24, 2001. The claimant testified that he took "maybe three or four hits" from a marijuana cigarette around 6 p.m. the previous evening, July 23, 2001. The claimant testified that he then slept for nearly nine hours and was sober on July 24, 2001. Tommy Starr, the claimant's superintendent at the time of the accident, testified that he did not know the claimant used marijuana, and that the claimant did not appear to be impaired on July 24, 2001. Tommy Starr also testified, "there was never anything wrong with that trailer."

Dr. Nathan Bennett saw the claimant on July 24, 2001 after the accident and assessed, "Cervical Strain secondary

to Motor Vehicle Accident." Dr. Bennett planned conservative treatment and wrote, "He will remain off work and return in two weeks for follow up or sooner if his symptoms persist or worsen. In the interim if his symptoms improve he may come back in for recheck and a release to return to work." The claimant testified that he never returned to work following the July 24, 2001 accident. The claimant's testimony indicated that the respondents initially provided medical treatment and temporary total disability compensation. On July 25, 2001, the claimant signed an Employee's Notice Of Injury. The claimant wrote on the Notice Of Injury that a tire on the back right-hand side of the trailer "broke down causing to lose control of truck. When I hit the ditch the trailer jacket (sic) knifed and the tractor coming up (sic) on the back of the truck."

On August 10, 2001, Dr. Bennett assessed "herniated disk of the cervical spine" and "cervical spinal stenosis." Dr. Bennett planned additional conservative treatment and referred the claimant to a neurosurgeon. The record indicates that Dr. Anthony L. Capocelli, Jr. performed a cervical diskectomy and fusion on May 6, 2002.

Dr. Bradley M. Short independently evaluated the claimant on October 29, 2002. Dr. Short opined:

Mr. Rose has reached maximum medical improvement, and with utilization of the AMA Guide to the Evaluation of Permanent Impairment, 4th Edition, it is my opinion that he would rate a partial permanent impairment to the person as a whole of ten percent for his cervical spine and five percent for his lumbosacral area. This is from page 113, Table 75, II - Intervertebral disc or other soft tissue lesions. When these are combined with the combined values chart on page 322 and 323, this extrapolates into a fifteen percent partial permanent impairment to the person as a whole.

In regard to whether in my opinion Mr. Rose's current complaints are related to his industrial accident of July 2001, in my opinion his complaints are consistent with his industrial accident of July 2001.

The parties stipulated that the claimant had a 15 percent anatomical impairment rating, and that all medical had been paid to date. (The claimant's attorney informs the Commission that benefits were paid through approximately March 25, 2003.)

Mr. Rose claimed entitlement to additional worker's compensation. The claimant contended that he was entitled to "total permanent disability, or alternatively, permanent partial disability in excess of the anatomical rating, and is entitled to appropriate rehabilitation benefits." The respondents contended that the claimant did not sustain a compensable injury, "inasmuch as the accident was substantially occasioned by the use of illegal drugs."

The parties agreed to litigate the following issues:

- (1) Compensability of the claimant's injuries to his 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; and
- (6) Rehabilitation program for the claimant.

After a hearing before the Commission, the administrative law judge determined 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." The administrative law judge therefore denied the claim; claimant appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. § 11-9-102(4)(B) provides that "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 physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a

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.

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

In the present matter, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 24, 2001. The parties stipulated that the claimant was involved in a motor vehicle accident on July 24, 2001, "while working." The testimony indicated that the claimant loaded a tractor on a trailer, to be pulled to another location by a truck. The claimant testified that when he drove the tractor onto the trailer, he "Proceeded to put the ramps under the tires and brace it off." Tommy Starr testified that the tractor should have been secured with straps. There is no evidence before the Commission, however, that the claimant's decision to put ramps under the tires and "brace it off," rather than secure the tractor with straps, as preferred by Mr. Starr, was the result of marijuana intoxication. The Commission notes that none of the claimant's co-workers or even the

investigating police officer thought that the claimant was under the influence of the illegal drug marijuana on the morning of July 24, 2001. The claimant, who the Full Commission finds to be a credible witness, testified that he was sober at the time of the accident.

The claimant testified, and his Notice Of Injury corroborates, that the trailer jackknifed, causing the vehicle he was driving to go into a ditch. Travis McCurter credibly corroborated the claimant's testimony. We note the administrative law judge's conclusion that the claimant improperly loaded the tractor onto the trailer as the result of marijuana intoxication, and that therefore, "the tractor shifted on the trailer resulting in the accident." The Full Commission finds that the administrative law judge's conclusion in this regard is based on speculation and conjecture, which can never supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). There is simply no indication of record that an unsecured tractor caused the accident. We note the investigating law enforcement officer's conclusion that the claimant had not acted recklessly, and that there was no indication the claimant was intoxicated from marijuana. The

police officer also corroborated the claimant's testimony that there was a bad right rear tire on the trailer.

The Full Commission recognizes that the claimant tested positive for "THC" and "tetrahydrocannabinol" on July 24, 2001, after the accidental injury. The presence of this chemical creates a rebuttable presumption that the injury or accident was substantially occasioned by illegal drugs. See, Ark. Code Ann. § 11-9-102(4)(B)(iv)(b), *supra*; Brown v. Alabama Elec. Co., 60 Ark. App. 138, 959 S.W.2d 753 (1998). But this is a *rebuttable* presumption. Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Woodall v. Hunnicutt Construction, 340 Ark. 377, 12 S.W.3d 630 (2000). In the present matter, the Full Commission finds that the claimant proved, by a preponderance of the evidence, that the illegal drug marijuana did not substantially occasion the injury or accident. We can find no evidence of record that the presence of marijuana in the claimant's system in any way caused or contributed to the July 24, 2001 accident.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not

substantially occasion the injury or accident occurring on July 24, 2001. The Full Commission therefore reverses the opinion of the administrative law judge, and we find that the claimant sustained a compensable injury on July 24, 2001. The Full Commission remands this matter to the administrative law judge. We direct the administrative law judge to conduct those proceedings necessary to adjudicate the claimant's entitlement to reasonably necessary medical treatment, temporary total disability compensation, anatomical impairment, wage-loss disability, rehabilitation, and attorney's fees. For prevailing on appeal to the Full Commission, we award the claimant's attorney a fee of \$500, pursuant to Ark. Code Ann. § 11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner
Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant successfully rebutted the presumption that his injuries were substantially occasioned by the claimant's use of marijuana. In my opinion, a review

of the evidence demonstrates that the claimant has failed to rebut the statutory presumption that his accident was substantially occasioned by his use of illegal drugs. I find that the claimant's use of illegal drugs substantially occasioned the accident. Following the accident, the claimant tested positive for the presence of active chemical in marijuana. Ark. Code Ann. § 11-9-102(4)(B)(iv) provides that the presence of illegal drugs shall create a rebuttable presumption that the injury was substantially occasioned by the use of illegal drugs.

The claimant was moving a tractor and did not tie it to the trailer. The tractor shifted on the trailer which resulted in the claimant losing control of his employer's vehicle. The claimant testified that the right rear trailer tire gave out, causing the trailer to lose control and jack-knife. However, the police report prepared contemporaneously with the accident reveals that the right rear trailer tire was damaged as a result of the accident. There is no mention in this report of the right rear trailer tire causing the accident. The claimant's testimony is the only evidence indicating that the wheel was damaged prior to the accident. The claimant's testimony, in my opinion is not enough to rebut the presumption. Consequently, when I

review the remainder of the credible evidence, I find that the presence of an illegal drug is responsible for the claimant's poor judgment in failing to secure the tractor to the trailer, and that this action substantially occasioned the accident and injuries. Therefore, I must dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner