

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705885

DANNY SIGMON,
EMPLOYEE

CLAIMANT

TOP DOG MASONRY,
EMPLOYER

RESPONDENT

FIRST COMP INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 1, 2008

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

Claimant represented by the HONORABLE EVELYN BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE WILLIAM FRYE,
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed May 28, 2008. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 7, 2007, the relationship of employee-employer-carrier existed between the parties.
3. On June 7, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$400.00 for total disability and \$300.00 for permanent partial disability.

4. On June 7, 2007, the claimant sustained various compensable injuries primarily to his L2 vertebra and left ankle. Specifically, the claimant has proven by the greater weight of the credible evidence the occurrence of physical injuries to this portion of his body that are established by medical evidence which is supported by objective physical findings, that arose out of and occurred in the course of his employment, that were caused by a specific incident, that are identifiable by time and place of occurrence, that resulted in internal physical harm to his body, that required medical services, and that resulted in disability.

5. The respondents have proven that the claimant had the presence of the illegal drug Methamphetamine in his system at the time of his employment related accident and injury. However, the claimant has proven by the greater weight of the credible evidence that the presence of this illegal drug did not substantially cause his accident or injury. Thus, Ark. Code Ann. §11-9-102(4)(B)(iv) does not bar the claimant from receiving appropriate benefits under the Act.

6. The medical services rendered to the claimant for his compensable injuries by Emergency Medical Services, by personnel at the Northwest Medical Center, by and the direction of Dr. Christopher Arnold and by and at the direction of Dr. Michael Standefer represent "reasonably necessary medical services" under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services. This liability is subject to the medical fee schedule established by this Commission.

7. The claimant was rendered temporarily totally disabled by the effects of his compensable injuries from June 8, 2007 through September 18, 2007. Specifically, the claimant has proven by the greater weight of the credible evidence that during this period he continued within his healing period from the effects of his compensable injuries, had not returned to work, and was, in fact, totally disabled from regular gainful employment.

8. The respondents have denied the occurrence of any compensable injury to the claimant on June 7, 2007, and have controverted this claim in its entirety.

9. The appropriate attorney's fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits awarded and on any indemnity benefits which may hereinafter become due and payable to the claimant.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the May 28, 2008 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's

decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant rebutted the presumption that his accident was substantially occasioned by the presence of methamphetamine in his

system and awarding benefits. In my opinion, the claimant has failed to rebut the presumption.

Act 796 of 1993 made substantial changes in the law regarding an injury substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders. As amended by Act 796, an injury which is substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders is not compensable, just as under prior law. However, under the amended law, every employee is deemed by his performance of services to have impliedly consented to testing for any of these substances in his body, and the presence of any of these substances creates a rebuttal presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order. Ark. Code Ann. § 11-9-102(4) (B) (iv) (a) (Supp. 2005).

Prior to the passage of Act 796 of 1993, it was the employer's burden to prove that an employee's accident was caused by intoxication or drug use. Express Human Resources III v. Terry, 61 Ark. App. 258, 968 S.W.2d 630 (1998). However, Act 796 of 1993 shifted this

burden of proof by requiring the employee to prove by a preponderance of the evidence that alcohol or drug use did not substantially occasion the injury, if alcohol or drugs were found in his body after an accident. Id. The Commission is required to determine whether the claimant has met his/her burden of proof in rebutting the presumption. Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996). Moreover, whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Id.

A statutory presumption is a rule of law under which the finding of a basic fact compels the finding of a presumed fact, unless sufficient evidence to the contrary is presented to rebut the presumption. See, Black's Law Dictionary, (5th Ed.). If evidence which is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. Ross v. Vaught, 246 Ark. 1002, 440 S.W.2d 540 (1969); Curtis Circulation Co. v. Henderson, 232 Ark. 1029, 342 S.W.2d 89 (1961); Ford & Son Sanitary Co. v. Ransom, 213 Ark. 390, 210 S.W.2d 508 (1948); and Ball v. Hail, 196 Ark. 491, 118 S.W.2d 668 (1938). Just as the determination of the weight to be given to the evidence is a matter

within the province of the trier of fact, the determination of the weight to be given to the presumption is a matter within the province of the trier of fact. Dunn v. Dunn, 255 Ark. 764, 503 S.W.2d 168 (1973). In this regard, the presumption should be given the weight necessary to "best serve the interest of justice." Id.

With regard to the effect of the testimony of an interested party on a presumption, the Arkansas Supreme Court made the following statements in Dunn, supra, (Barnhart, Use of Presumptions In Arkansas, 4 Ark. L. Rev. 128, 141 (1950):

Except as the court may be restrained by constitutional requirements of due process of law..., there would seem to be no reason in law or logic why there should not be accorded to any or all presumptions the weight which the court feels would best serve the interest of justice. If dissipation by a bare denial from an interested witness seems to accord too trifling in effect to a presumption, the court would seem justified to require more before the presumption is rebutted.

Therefore, the question of whether the testimony of an interested party is sufficient to rebut the presumption remains a question for the trier of

fact. However, in determining if the testimony of an interested party is entitled to sufficient weight to overcome the presumption in itself, it must be remembered that the testimony of interested parties is not to be treated as undisputed in determining the weight it is to be accorded. Ball, supra; Phelps v. Partee, 208 Ark. 212, 185 S.W.2d 705 (1945). A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Further, it is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). The Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

In the present claim, the evidence shows that methamphetamine was present in the claimant's system at the time of the injury. Therefore, we begin with the assumption that the claimant's injury was substantially

occasioned by the drug. The question in this case then becomes whether the claimant's denial of having used methamphetamine on that date of the accident is sufficient to constitute a preponderance of the credible evidence and rebut the presumption that the accident was substantially occasioned by the use of methamphetamine. The Commission has previously held such testimony is insufficient to rebut the presumption. Sanders v. CFSI Temporary Services, Full Commission Opinion October 13, 1995 (Claim No. E408568).

In my opinion, a review of the evidence demonstrates that the claimant is not a reliable witness as his testimony is replete with inconsistencies. The claimant admitted that he has been a methamphetamine user for ten to eleven years. He stated that he had been through drug rehabilitation but then admitted that he had used the drug two days before his accident and he had continued to use the drug after completing rehabilitation. At the hospital, the claimant denied using drugs. However, his sister, who is a nurse, came into the emergency room and told the medical personnel "per sister, uses meth." Further, he claimant told Dr. Standefer that he had not used drugs in a couple of weeks. The claimant also admitted that his father, who

also happened to be his employer, did not know that he had smoked meth two days prior to the accident. He went on to acknowledge that his father was under the impression that the claimant had quit.

Further evidence of the claimant's inconsistent testimony is the testimony of Mr. Curtis Paul McCann. Mr. McCann testified that he put up the scaffolding and laid it out the morning of the accident and that the boards were such that they would not fall. In fact, the board was six to ten inches over a scaffold bar. The claimant testified that the board simply came out from underneath him. He even admitted during his testimony the fact the board should not fall.

In my opinion, the claimant completely lacks credibility and his testimony is simply not sufficient to rebut the presumption the accident was substantially occasioned by the presence of methamphetamine in the claimant's system at the time of the accident. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER