

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F710842

ROBERT SORRELS, EMPLOYEE	CLAIMANT
WIL SHAR ERECTORS, EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, INC., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 17, 2008

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

Claimant represented by the HONORABLE CONRAD T. ODOM, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 excused from proceedings.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondent No. 1 appeal an opinion and order of the Administrative Law Judge filed May 20, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 13, 2007, and contained in a pre-hearing order filed December 14, 2007 are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by respondent on October 11, 2007. Specifically, I find that claimant has met his burden of rebutting the presumption that his injury was substantially occasioned by the use of illegal drugs.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

4. Claimant is entitled to temporary total disability benefits beginning October 12, 2007, the day after his compensable injury, and continuing through November 5, 2007.

5. Respondent has controverted claimant's entitlement to all indemnity benefits.

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 20, 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 opinion finding that the claimant

successfully rebutted the presumption that his accident was substantially occasioned by the use of drugs. In my opinion, the claimant has failed to meet his burden of proof and this claim should be denied and dismissed.

The claimant was employed by the respondent employer as a steel worker. On October 11, 2007, the claimant fell from the ceiling joists of a steel building after stepping onto an un-welded piece of angle iron. The claimant sustained substantial injuries. He tested positive for marijuana, opiates and benzodiazepine. The respondents denied the claim based upon the claimant's positive drug screen.

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).

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 marijuana, opiates and benzodiazepine were present in the claimant at the time of the injury. Therefore, we begin with the assumption that the claimant's injury was substantially occasioned by these drugs. The question in this case then becomes whether the claimant's denial of having used those drugs 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 those drugs. 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 this case, the claimant's self-serving denial is not enough to overcome the presumption.

The claimant testified that he had smoke marijuana three days before his fall. This assertion is uncorroborated by any other evidence. He also failed to give any valid explanation for how benzodiazepine and opiates got into his system. He merely did not know.

The respondents offered the testimony of James Marcotte, Scott Sexton and Bill Witcofski who all testified that the act of the claimant of stepping onto an un-welded bridging was unsafe. In fact, Mr. Marcotte testified that he would not have stepped onto the bridging before it had been welded and would not have let any of his employees do it either. He had no idea why the claimant did it. Mr. Sexton indicated that he would not recommend anyone step onto un-welded bridging. Mr. Witcofski explained that he was never instructed to step onto the bridging that had not been welded.

Therefore, when I consider the fact that the claimant tested positive for three different drugs after his fall, the claimant's uncorroborated assertion he smoked marijuana three days before the fall and his claim of ignorance regarding the presence of opiates and benzodiazepine, plus the fact that the activity the claimant was engaging in at the time of his fall, I cannot find that the claimant rebutted the presumption that his injuries were substantially occasioned by the use of those drugs. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER