

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F609988 & F612976

DAVID HICKEY, EMPLOYEE	CLAIMANT
GARDISSER CONSTRUCTION, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED APRIL 16, 2009

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

Claimant represented by HONORABLE KEN OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed, in part, and affirmed, in part.

OPINION AND ORDER

Respondents appeal from a decision of the Administrative Law Judge finding that the claimant overcome the statutory presumption that his injury was substantially occasioned by the use of illegal drugs. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the claimant has failed to overcome this statutory presumption by a preponderance of the credible evidence. Therefore, we find that the decision of the Administrative Law Judge finding that the claimant sustained a compensable injury to his

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right ankle for which he is entitled to medical and indemnity benefits must be reversed. We hereby affirm the Administrative Law Judge's findings of disability related to the claimant's wrist injury.

The claimant sustained an admittedly compensable injury to his left wrist on September 5, 2006, when he fell off a ladder. While undergoing treatment for this injury, the claimant was released to work light duty. On November 22, 2006, while working walking across a metal roof to get some more screws for his screw gun, the claimant fell off the roof sustaining serious injury to his right ankle. As a result of this injury, the claimant was transported to Siloam Springs Memorial Hospital where he underwent surgery to repair fractures in his right distal fibula and distal tibial. Before claimant's release from the hospital a urine sample was taken for a drug screen test. This drug screen test returned positive for methamphetamine.

The claimant has required additional surgery on his right ankle. On June 26, 2007, the claimant was released by his treating physician to "activities as tolerated" and to "sitting work with occasional standing and walking."

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Based upon the positive drug screen, respondents controverted this claim pursuant to Arkansas Code Annotated § 11-9-102(4)(B)(iv)(a-d) which provides that a compensable injury does not include an injury where the accident was substantially occasioned by the use of illegal drugs.

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).

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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 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

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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

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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,

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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 the drug methamphetamine was present in the claimant at the time of the injury. Therefore, we begin with the presumption that the claimant's injury was substantially occasioned by the drug. The claimant did not deny having used methamphetamine prior to his injury. In fact, the claimant testified that he snorted an eighth of a gram of methamphetamine around 6:00 p.m. on the night before his injury. Although the claimant testified that he was not under the influence of this drug at the time of his fall, the respondents called Dr. Henry Simmons, Jr. to refute the claimant's testimony. Dr. Simmons is the medical director for the Arkansas Poison Center and also an Associate Professor of Toxicology and Emergency Medicine at the University of Arkansas Medical School. In addition to being a medical doctor, Dr. Simmons also has a

Ph.D in toxicology. Dr. Simmons reviewed documents pertaining to the collection of urine for a post-accident drug test, as well as the results of that test, medical records from the claimant's initial hospitalization, a portion of the claimant's deposition testimony and he sat through the claimant's hearing testimony. Dr. Simmons testified that based upon the claimant's testimony that he snorted methamphetamine around 6:00 p.m. on the night prior to the accident together with the drug screen result three days after the accident which still showed a significant concentration of methamphetamine and its metabolite in the claimant's urine, the claimant clearly had methamphetamine circulating in his body at the time of the accident. Accordingly, we find that it is statutorily presumed that the claimant's accident was substantially occasioned by the use of those illegal drugs. We further find that the claimant has failed to rebut this statutory presumption.

Dr. Simmons explained that based upon the claimant's testimony that he took the drugs around 6:00 p.m. on the night prior to the accident, despite the claimant's testimony that he was not under the influence of the

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methamphetamine when the accident occurred, the level of drugs in the claimant's system would have been a "pharmacologically significant amount of methamphetamine circulating at that time." Which when asked if the level was consistent with impairment, Dr. Simmons stated, "Well, it's - - consistent with an effect on judgement. It's consistent with an effect on - - on behavior." When asked to comment on a methamphetamine user's comment who has ingested the drug that they are fine or that they do not feel any effects from the drug, Dr. Simmons testified, "No, it doesn't surprise me to hear that, at all. Merely an inability to perceive an impairment doesn't mean that there's no impairment there - - particularly after a significant dose of drug."

On cross-examination, Dr. Simmons was asked whether he heard any testimony from the claimant to suggest that any type of impairment caused the claimant's accident, to which he responded:

Only to the extent that taking a one-eighth gram of methamphetamine at 6 p.m., the night prior to having an accident at 3 p.m., could conceivably have caused some sleep impairment, some poor quality of sleep that, based on that history, and assuming that it's

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accurate, that there could have, and would more likely than not, have been some methamphetamine still circulating in his system at that time. That under the circumstances, I can't exclude that that would have had an impact on his judgment - - and possibly on his behavior.

Dr. Simmons was then asked further questions regarding the mechanics of the injury and his expertise to which he testified:

I'm simply telling you that, to the extent that an impairment in judgment, possibly an impairment in ordinary behavior, could have affected how he behaved on the - - on the job. How he gauged the hazard attendant to that particular situation. I can't - - I can't go beyond that.

The claimant has the burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of methamphetamine which was present in his body at the time of the accident. Here, the medical evidence indicates that the claimant had a substantial amount of methamphetamine in his body to effect both the claimant's behavior and judgment. Although the metal roof was slippery on the date of the claimant's

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injury, the drugs in the claimant's system were sufficient enough to effect how he gauged this particular hazard. While other employees had slipped on the roof, they took measures to pour liquid on the roof to obtain more grip. The claimant did not offer any testimony with regard to what measures, if any, he took to acknowledge this known hazard. Thus, the only conclusion that can be drawn is that the claimant failed to take any steps to protect himself from possibly slipping off the roof. This failure to gauge the hazard he was faced with is evidence of claimant's impairment when the injury occurred. Accordingly, we are not persuaded by the claimant's testimony that he was not impaired and that the accident was just that, an accident that was not substantially occasioned by the presence of methamphetamine. On the contrary, we find that the claimant has failed to present sufficient credible evidence that the his ankle injury was not substantially occasioned by his use of illegal drugs.

The evidence reveals that claimant underwent surgery for his wrist injury on July 3, 2008. A bone graft procedure was performed on January 10, 2008, as the

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claimant's x-rays showed no new bone growth. The claimant continued to be evaluated and treated by his treating physician through April 16, 2008. Accordingly, we find that the claimant remained in his healing period from December 1, 2007, through April 16, 2008, for his compensable wrist injury and that he had not returned to work during this period of time. Therefore, we hereby affirm the finding of the Administrative Law Judge awarding temporary total disability benefits from December 1, 2007, through April 16, 2008.

Therefore, we find that the decision of the Administrative Law Judge finding that the claimant sustained a compensable ankle injury must be reversed and this claim for benefits arising out of the claimant's accident on November 22, 2006, must be and hereby is denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

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Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I agree that the claimant is entitled to benefits for his compensable wrist injury. However, as I would also award benefits for a compensable right ankle injury, I must dissent on this issue. After a de novo review of the record, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of the methamphetamine.

First, claimant testified at the hearing that the metal roof was slippery because it was dry and was coated with dust. Claimant testified that other employees had been slipping on the roof that day. In fact, claimant testified that the roof of the building was so slippery that other employees were pouring water and soda on the roof to create more grip. According to claimant's testimony, he was simply walking across the roof after picking up a drill which had been slid to him by another employee when he lost his

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balance and fell, sliding off the roof, landing on his right foot and fracturing his ankle.

Testifying at the hearing was a Dr. Simmons. Dr. Simmons is an expert and he had the opportunity to review the positive for methamphetamine test results, portions of claimant's deposition testimony, and he was also present during the claimant's testimony at the hearing. Dr. Simmons testified that the dose taken by the claimant on the night before his injury was a significant dose and that there was a pharmacologically significant amount of methamphetamine circulating in the claimant's body at the time of the accident. According to Dr. Simmons, this could lead to an impairment in the claimant's judgment. However, I find it is significant that Dr. Simmons went on to testify that he did not hear any testimony which would lead him to conclude that the claimant's judgment was impaired at the time of the accident.

Q. Okay. With regard to what you mentioned about it circulating in his system and the possibility that it could affect his judgment, did you hear him testify to anything that suggested that his judgment was impaired?

A. No, sir, I did not.

In summary, claimant has the burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of methamphetamine which was present in his body at the time of his injury. Here, the evidence indicates that the roof on which claimant was working on November 22, 2006 was slippery because of dust on its surface. This had resulted in other employees slipping and other employees pouring liquids on the roof in order to obtain more grip. The claimant's testimony regarding the slipperiness of the roof was not rebutted by any witnesses from respondent. Although Dr. Simmons testified that the amount of methamphetamine in claimant's system could have affected his judgment, he was not aware of any evidence which would indicate that claimant's judgment was actually impaired at the time of the fall. In other words, it appears that this accident was the result of claimant's falling on a slippery roof and not the result of impaired judgment caused by the use of methamphetamine. Accordingly, I find that

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claimant has rebutted the presumption that his injury was substantially occasioned by the use of illegal drugs.

For the aforementioned reasons I respectfully concur, in part, and dissent, in part.

PHILIP A. HOOD, Commissioner