

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F802425

LAWRENCE HILL, EMPLOYEE	CLAIMANT
CURTIS BEAN TRANSPORT, INC., EMPLOYER	RESPONDENT
COMPENSATION MANAGERS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 26, 2009

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WALTER MURRAY, Attorney at Law, 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 October 22, 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 May 7, 2008, and contained in a pre-hearing order filed May 9, 2008, are hereby accepted as fact.
2. The claimant proved by a preponderance of the evidence that he suffered a

compensable injury on December 1, 2007, while employed by the respondent.

3. The respondents failed to raise the rebuttable presumption of intoxication.
4. The claimant is entitled to reasonable and related medical treatment for his injury.
5. The claimant is entitled to temporary total disability from December 2, 2007, to a date yet to be determined.
6. The appropriate fees for the claimant's attorney is the maximum statutory attorney's fee on all applicable benefits herein and herein awarded 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 October 22, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the record, I find that the respondents did raise the rebuttable presumption of intoxication and the claimant failed to rebut the presumption. Therefore, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

The claimant was employed by the respondent employer as a truck driver. On December 1, 2007, the claimant was outside of Nashville, Tennessee, when he had an accident. The claimant flipped the trailer and caused his truck to flip as well. The claimant testified that he did not know the reason why his trailer flipped but the accident report of the incident stated that the claimant told the officer that he was "going too fast" and that his "load shifted." The claimant was taken to a nearby motel to await instructions from the respondent employer. The claimant reported to the police officer that he was not injured and did not request any medical treatment.

On the date of the accident, the claimant spoke with Mr. Wouters, the Fleet Manager. The claimant

had no less than four conversations with Mr. Wouters pertaining to the accident and he was specifically asked whether or not he was injured. The claimant told Mr. Wouters each and every time that he was not injured and did not need any medical attention. On December 3, 2007, the claimant requested to stay in the motel another day or two in order to rest. This was after the claimant was told that he had a bus ticket waiting for him to return to his home town of Atlanta, Georgia. On Monday morning, December 7, 2007, the claimant spoke with Mr. Tommy Gage, the Safety Director. During the conversations, the claimant discussed his concerns over losing his job but did not report any injury to Mr. Gage.

Ms. Brunetta Smith Jackson, the claimant's girlfriend, traveled to Nashville on December 4, 2007, to pick up the claimant at his motel. Ms. Jackson stayed the night with the claimant and then they returned to Atlanta on December 5, 2007. Ms. Jackson took the claimant to the Southern Regional Medical Center in Riverdale, Georgia. While he was at the Emergency Room at Southern Regional, the claimant called and spoke to Mr. Gage. Mr. Gage informed the claimant that he needed to obtain a drug screen in the form of a hair follicle test since he was now reporting that he suffered an injury in the accident of December 1, 2007. Because five

days had transpired between the accident date and the report to the emergency room, Mr. Gage explained to the claimant that the hair follicle test was the only reliable test. The claimant refused to take that test. The claimant has subsequently been diagnosed with problems with his back.

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 Davis v. Your Employment Services, Inc., FC Opinion filed December 5, 1996, AWCC Claim No. E415603, the Commission stated:

Clearly, an employee's refusal to submit to reasonable and responsible drug testing denies the Commission the most conclusive evidence possible, i.e., analytical data, to ascertain whether intoxicants were present in the body at sufficient levels to cause impairment. In addition, an employee's refusal to submit to reasonable and responsible testing denies the employer the employer's right under Act 796 to collect and present evidence that an injured worker's injury was substantially occasioned by the use of intoxicants. Thus, in order to provide the maximum incentive for injured workers to submit to testing, the Legislature could have provided that an injured employee's refusal to submit to reasonable and responsible testing is an absolute bar to compensation. However, we note that even a positive test result is not an absolute bar to compensation. Instead, a positive test result creates a rebuttable

presumption that the injury was substantially occasioned by the use of intoxicants and therefore shifts the burden of proof to the claimant to prove by a preponderance of the evidence that the injury was not substantially occasioned by the use of alcohol or drugs. After considering the statutory language of Act 796, the subject matter at issue, the object to be accomplished, the purpose to be served, the remedy provided, and our statutory mandate that the provisions of Act 796 are to be strictly construed, we believe that Act 796 does not require an absolute bar to workers' compensation benefits based solely on an injured worker's refusal to submit to reasonable and responsible testing. In that regard, we note that the drafters of Act 796 could have expressly provided for such a bar to compensation, but did not do so. Therefore, we believe that the mandates of strict construction compel a conclusion that Act 796 does not provide for an absolute bar to workers' compensation benefits based solely on a worker's refusal to submit to reasonable and responsible testing. Instead, we believe that a worker's refusal to submit to reasonable and responsible testing is only one factor which we must consider in determining whether a claimant's injury was substantially occasioned by the use of intoxicants. However, we also believe that the General Assembly intended that an injured worker's refusal to submit to reasonable and responsible testing would give rise to the rebuttable presumption that the injury was substantially occasioned by the use of drugs or alcohol. Therefore, we believe that the burden of proving by a

preponderance of the evidence that an injury was not substantially occasioned by the use of alcohol or drugs once the respondents prove by a preponderance of the evidence that the claimant refused reasonable and responsible drug testing.

See also, Metcalf v. Trailmobile, Full Commission Opinion filed April 2, 1997 (AWCC File No. E507991); and, Thompson v. Jeffrey Sand Co., Full Commission Opinion filed October 27, 1999 (AWCC File No. E705151).

It is clear that the claimant's refusal to submit to a drug test was enough to raise the presumption that the claimant's accident was substantially occasioned by alcohol or drugs. The claimant contended that he did take a urine test at the hospital. However, the claimant did not introduce this evidence into the record. All we have is the claimant's testimony that he took the test, but we have nothing in the record. The claimant did not introduce the urine analysis results into the record, nor did he provide any other evidence that he was not impaired. The claimant merely introduced an accident report where the observations of the reporting officer were that the claimant did not have the visual appearance of the presence of alcohol or drugs. Clearly, this is not evidence enough to rebut the presumption. We also have

the evidence that the claimant stated that he was not impaired. But the claimant has some problems with his credibility. Further, the claimant stated for four days that he was not injured and the claimant did not ask to seek medical attention. He merely went to the emergency room after his girlfriend came to Nashville to pick him up. This also brings up the question of why the claimant did not want to ride the bus as he was provided a bus ticket? The claimant stated that he did not want to ride the bus because it would make his back hurt. However, when the claimant was told about the bus ticket being available he then called the respondent employer back to say that he wanted to stay in the motel another night. He still did not report that he had an injury.

It is also of note that the claimant had prior problems with drugs. He served time as a result of a felony drug offense. Although the claimant alleged to not have any knowledge of hair follicle test being a gauge for drug use, it is very suspicious that the claimant stayed in the motel for four days before reporting to the emergency room when, by waiting four days, he knew that the urine or blood tests would probably yield results that were negative. It is also of note that when the claimant did get to the emergency room he smelled of alcohol as noted on the intake

records of the emergency room. It is the burden of the claimant to rebut the intoxication presumption and his failure to disclose the results of his urine test does not bode in his favor. That, coupled with the claimant's prior felony drug conviction, as well as the inaccuracies on the claimant's employment application concerning the amount of accidents he had been involved in and the number of tickets he had received, draws the conclusion that the claimant is not a credible witness.

Simply put, I cannot find that the claimant sustained a compensable injury. The claimant, by refusing to take the follicle drug test raised the presumption and his failure to rebut that presumption results in the claimant not being awarded any benefits. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner