

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F703691

STACY GENTRY, EMPLOYEE	CLAIMANT
ARKANSAS OIL FIELD SERVICES, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., C/O AIG CLAIMS SERVICE INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 27, 2010

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

Claimant represented by HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Specifically, the Administrative Law Judge found that the claimant rebutted the statutory presumption that his accident was substantially occasioned by his use of illegal drugs used in controvention of a physician's orders. Based upon our de novo review of the

record, we find that the claimant has failed to meet his burden of proof. Accordingly, we find that the claimant has failed to rebut the statutory presumption that the illegal drugs were substantially occasioned the claimant's injury.

The claimant was employed by the respondent employer for four or five months before the incident happened on April 8, 2007. The claimant was standing on pipe casings that were being stacked on a rack by the forks of a forklift. The claimant was working with others cleaning the threads of the pipes with a pressure washer. The pipes were 5 1/2 inches in diameter and 35 to 45 feet in length. The claimant described the incident as follows:

Well, that particular day we was working outside the work area, and the -- the rack itself, it was a taller rack than what we normally would use. And they had drill stems still on the rack that we normally would stack them on. But they was wanting their casings cleaned and have it ready. Just as soon as the drill stem was out of the ground, then they could slam the casing down in the ground to speed up the job is basically what they was wanting done. And that day we was on our second tier. We had already had our two tiers -- two rows, actual rows of

casing up there. And I was up there putting down the runs. And I call runs two by fours. And then there's stops on each end of the two by fours. And my forklift driver, he was picking up casings outside of the job here, and he was bringing them back down to me. And I was coming forward to where you would normally -- the forklift driver, he would come up and he would just set his forks down on the -- well, either the first or second tier layer of casing. And normally if they don't roll off, then you go down and you take your foot and roll them off onto your skids or on your two by fours. And then you take them and you work them down to your stops at this point. And as I was coming back down, I was noticing how high the forks were getting up on. And the reason why because there was -- small gravel had gotten up on the forks where they was existing as a brake. And they was holding the casing up on top of the -- of the forks itself. And I was telling him to pull them up, pull them up. And the ground man, he was doing the same thing. He was hollering, telling him to pull them up, also. And he couldn't do -- the fact that the machines and everything was so loud around the area, he wasn't seeing me and wasn't seeing his ground man. And

about that time the -- you know, I was steadily trying to get his attention. The gravel was crushed by the weight of the casing, and they come off at me at a high rate of speed. And I tried to run backwards, and as I was running backwards, I realized I wasn't going to be able to outrun them. And that's when I reached down and I tried to kick one foot and as soon as I kicked with my right foot, it threw it backwards, and then they run over my left foot.

The forklift driver worked for DeSoto Rig #3. The claimant testified that it was not unusual at all for a worker to stand on top of the casings. He insisted that once one layer of casing had been placed on the rack and the layer for the next layer installed, somebody had to get up there. The claimant stated that normally, once the pipes roll off the forklifts, they stop because the wood of the rollers is soft. He stated this did not happen in this case because the forklift forks were tilted too high and allowed the pipes to have no momentum. He stated that he and others shouted for the forklift driver to stop, but the forklift driver did not hear them, and he was unable to outrun the pipes. Mr. Williamson, the company owner, testified that the

workers were told not to climb on top of the pipes.

After the incident, the claimant's ankle was swollen, stiff, sore, and difficult to move. The claimant sought treatment from the Ozark Medical Center and was transferred to Conway Regional where he underwent surgery to fix an open fracture. The claimant underwent a drug test at Conway Regional which was positive for amphetamines. A confirmation test was done by Advanced Toxicology Network and proved positive for amphetamine, methamphetamine and morphine. Hospital records indicated that the claimant was given morphine at the emergency room which accounted for that drug on the test. The claimant denied using any illegal drugs and tried to explain the test results by saying he took some unidentified over-the-counter cold or sinus medication the night before the accident. He denied taking any medication to the Conway Regional Medical Center employees upon admission. 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).

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 demonstrates that amphetamines and methamphetamine 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 the drug. The question in this case then becomes whether the claimant's denial of having used methamphetamine and amphetamines 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 amphetamines and 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).

The respondents submitted the drug test results to Dr. Henry Simmons, a forensic toxicologist. Those reports clearly indicate that the claimant's testimony regarding the cold medicine is not supported by the test results. Dr. Simmons opined in a letter dated May 14, 2008:

after considering this information, I conclude within reasonable medical and toxicological certainty that Mr. Gentry's positive urine test for "amphetamines" cannot be attributed to medically legitimate use of either prescription for over-the-counter medications.

The report states:

In addition, the MRO would have had to have excluded the use of some prescription medications as well as a Vicks Nasal Inhaler as potential sources for the amphetamine and methamphetamine. The Vicks nasal inhaler has or in

the past contained I methamphetamine which is metabolized in part to I amphetamine. Medical Review Officers can exclude the inhaler by determining during an interview with the donor that it was not used or by requesting that the laboratory fractionate the amphetamine and methamphetamine into their d and I forms. Finding that the amphetamine and methamphetamine are overwhelmingly of the I form, excludes the Vicks Inhaler as the source. [The GC/MS does not determine how much of the total amphetamine and methamphetamine found are present in d and I forms.] Although I have not talked to the MRO, it may be that the amounts of methamphetamine and amphetamine were felt to be too high to have resulted from any medically appropriate use of the Vicks product. In any case, I do not know if the urine was fractionated and I cannot identify the non-prescription cold medicines that Mr. Gentry allegedly used from his deposition. However, I have adequate information at hand to answer your question about the medical legitimacy of the finding as stated in the first paragraph of this report.

Clearly, ATN found striking quantities of three different controlled

substances in the urine that they tested. The morphine would be expected given that Mr. Gentry received it for pain control under the direction of his physicians a short time prior to the collection of the urine. However, the amphetamine and methamphetamine cannot be explained by his medical records. They do not reflect prescriptions for methamphetamine or amphetamine or a drug that would be metabolized to either of them either shortly before or after his admission to the hospital.

Finally, although the use of some non-prescription decongestants for colds can render certain screening tests positive for "amphetamines," with the exception of the Vick's Nasal Inhaler, none produce positive findings for either amphetamine or methamphetamine on GC/MS. In this case even the hypothetical, legitimate use of the Vick's Nasal Inhaler for therapeutic purposes, can be excluded within reasonable medical and toxicological certainty given the amounts found. Twenty years ago, Fitzgerald et al. Detected I methamphetamine from the Vicks inhaler in the urine from those making excessive, experimental use of the product every twenty minutes for six continuous hours.

However, the highest concentration of I methamphetamine found was only about 6000 ng/ml. In this case, 99,140 ng/ml or 16.5 times as much methamphetamine was present not to mention the amphetamine. According to Poklis et al. In 1995 using the Vicks Inhaler at the rate in the Fitzgerald work exceeds the indicated dose by 12 to 20 fold. Thus, one would have to deliberately abuse the Inhaler dramatically to achieve even a small fraction of the total methamphetamine and amphetamine found in Mr. Gentry's urine many hours after he was admitted to the hospital. The actual abuse of the Vick's Nasal Inhaler was reported in 1985 by Halle et al.

In this case, there are numerous instances where the claimant's credibility comes into question. The claimant denied using illegal drugs prior to this injury. He told hospital personnel he was not taking any medication on the date of the injury and then in a failed attempt to explain why the tests were positive, testified under oath that he took cold or sinus medicine the night before. The respondents offered the testimony of Christine Williamson, the wife of the owner of the respondent employer, who testified that the claimant told her he had done drugs on

the way from the Ozark Medical Center to Conway Regional because his pain was so bad. The drug test and the confirmation drug test support illegal drug use. Dr. Simmons' report and the supporting medical articles clearly show that the claimant's rendition of how his test showed positive results are simply not feasible. It requires speculation and conjecture to conclude that that's how the claimant had the presence of "amphetamines" in his system. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Further, Mr. Bill Williamson, the owner of the respondent employer, testified that the claimant had stolen from him in the past, and he had also personally witnessed the claimant using methamphetamines.

Simply put, we cannot find that the claimant has rebutted the presumption that his injury was substantially occasioned by the use of illegal drugs. When we consider the testimony of the claimant as well as the testimony of Dr. Simmons, Mrs. Williamson, and Mr. Williamson, we cannot find

that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Accordingly, we hereby reverse the decision of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant has successfully rebutted the presumption that the accident was substantially occasioned by the presence of drugs in the claimant's system. In fact, there is absolutely no connection between the claimant's inability to avoid being struck by the pipe and the presence of drugs in his system. The claimant and Hines both testified that there was no way the claimant could have avoided being injured once the forks

were tilted too steeply and the gravel holding the pipes gave way. The claimant testified that both he and crew members on the ground tried to get the forklift driver's attention by shouting. Once that effort failed, and the pipes began to tumble onto the rack and toward the claimant, his choices were few. His options were to jump over the oncoming pipes or jump off the rack to avoid them. Three or four pipes were coming at him at once, each one with a diameter of five-and-one-half inches. Consequently, leaping over them was clearly impracticable. At the time, he was positioned in the center of the rack and 12 to 15 feet away from the forklift; for that reason, plus the speed of the pipes, running either to his left or right and jumping off either side was not a promising option, either. Claimant instead elected to run backwards toward the rear of the rack, by the stops. When overtaken by the pipes, he put up his right foot in a futile effort to at least slow them. This resulted in the right foot being knocked away, and the pipe striking his left leg.

Simply put, the actions of the forklift driver caused the accident, not the presence of drugs in the claimant's system. Additionally, once the chain of events

was set in motion by the forklift driver, the claimant took reasonable steps to avoid injury.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner