

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711607

GREG E. PROCK, EMPLOYEE	CLAIMANT
BULL SHOALS LANDING, INC., EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE/ AIG CLAIM SERVICE, CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 14, 2010

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

Claimant represented by HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This matter is currently on remand from the Arkansas Court of Appeals. The Court remanded the case because our first opinion failed to reveal that we considered the testimony of two witnesses who observed the claimant on the morning of the accident. After considering the testimony of all the witnesses and all evidence of record, we find that the claimant has failed to rebut the statutory presumption that his injuries were substantially occasioned by the use of illegal drugs. Accordingly, we reverse the decision of the Administrative Law Judge and

affirm on remand.

On November 1, 2007, the claimant was using an acetylene torch to cut into a sealed metal barrel with the help of Matt Edmisten when an explosion occurred. The claimant sustained burns over approximately 48 percent of his body. He had burns to his face, arms, hands, torso and legs. The claimant was transported to the hospital where he tested positive for benzodiazepine, marijuana and opiates. The respondents controverted the claim based upon the claimant's positive drug screen. The issue currently before us is whether or not the claimant successfully rebutted the statutory presumption that his injury was substantially occasioned by the use of illegal drugs.

Pursuant to Ark. Code Ann. § 11-9-102(4)(iv), 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. Every employee is deemed by his performance of services to have impliedly consented to testing for any of these substances in his body. Moreover, 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). Act 796 of 1993 now requires the claimant 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 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).

The respondents offered the testimony of Mr. Steve Eastwold. He testified as follows:

Q Can you tell me what happened that morning, what you remember occurring?

A When I came down to the shop, parked outside the shop, I was walking into the big bay door, and Greg and Matt come down the hill in his black Wagoneer and I come out to the door and I hollered at them, and they went around the corner and stopped at the trash containers. And I hollered and they backed up. I said, "Hey, Greg, " I said, "What are you guys doing today?" He said, "Well," he says, "I've got to finish welding on the houseboat and then we'll pull another one out." And I said, "Well," I said, "When you get a chance, can you, not today, not tomorrow, just sometime before the end of next week, go up to the top of the hill and get a couple of barrels and take the top out of them?" I said, "Bring them down here to the shop, take the plugs out, make sure they're clean and do that for me, would you?" I

said, "It doesn't have to be today."

Q Okay. And you stated they -- Greg Prock and Matt Edmisten in Greg's vehicle?

A Yeah, the black Cherokee.

Q Where were they coming from?

A Top of the hill or somewhere up above the hill, somewhere up above the bathroom. I don't know. They made the turn and come on down past the front of the shop.

Q Okay. What's up at the top of the hill? What's up that way?

A The main road, main highway, main town.

Q Is it the highway that comes into Mountain Home?

A No. There's 178 Highway and then there's an offshoot that goes where you turn to go down to the boat dock.

Q Okay. When you got them to stop and spoke with them, did you notice anything odd about Greg or Matt?

A No. I didn't get close enough, though. I was --

Q Did Greg Prock avoid eye contact or look away from you?

A Neither one would really look at

me square.

Q Okay.

A Straight on.

Q And where in position to say you or the driver's side of the vehicle, where were you when you're speaking to them?

A Right -- like this. This --

Q Straight on view of the side window?

A Yes.

Mike Didway was called as a witness on behalf of the claimant to testify at the hearing. Mr. Didway has been employed by the respondent employer for seven years and he mainly worked performing maintenance on the houseboats. He testified that he has known the claimant probably all of the seven years. Mr. Didway stated that he saw the claimant on November 1, 2007, and he did not appear to be drunk or intoxicated. According to Mr. Didway, he saw the claimant in the office about 7:00 a.m. the morning of the incident. He agreed that prior to the November 1, 2007 incident, he had observed the claimant using a blow torch to cut barrels. Mr. Didway also agreed that to his knowledge this was nothing unusual for the claimant to cut the tops of barrels using a

torch prior to the November 1, 2007 incident. Specifically,  
Mr. Didway testified:

Q. Tell us what you heard or saw or observed.

A. I was on a 60-foot houseboat out in the lake coming in toward the dock area.

Q. You were operating it?

A. Yes. I was driving the boat.

Q. Okay.

A. And Roger Williams was with me. We heard an explosion, saw fire over on the left-hand side. Like I say, I was trying to drive the boat, glanced over every chance I could to see what in the world had happened, you know, and I saw Greg on fire and Matt was on fire. And at that point, I started driving the boat fast. Roger was going to jump onto the dock as soon as I got the boat to it. I just glanced every once in a while. I saw two people running off of Dock 6 with fire extinguishers in their hand. At that point, that's about the last I saw for a while because I was trying to get the boat in the stall area.

Q. All right.

A. And by the time I got around there, they were already -- the fire was extinguished off of them.

Q. Okay. Who extinguished the fire off of them?

A. I don't know that.

Q. Okay. Because you were driving the boat?

A. Uh-huh.

Q. Okay.

A. I know they were in the water because Greg come out of the water when I got around there. But there were several people there before I got there.

Q. So, obviously, they jumped in the water to get rid of the fire.

A. Uh-huh.

Q. Is that right?

A. I assume so, yes, uh-huh.

Mr. Didway further testified that as soon as the claimant got out of the water, the ambulance arrived shortly thereafter. He observed the claimant to be in pain, as he was yelling, and he could tell that he was burnt, as the skin was coming off of his hands. Mr. Didway also stated he observed Matt Edmisten, who was also on fire and running toward the water. He denied having heard the owner, Steve Eastwold, tell the claimant or any other person, never cut

open a barrel with a torch because he does not work in that area very much and did not know that was in the policy. He had seen the claimant open barrels with a blow torch at least one other time but could not recall others doing it. He was unable to recall what time the explosion took place. Mr. Didway stated that the claimant did the majority of the welding and cutting. He also denied having ever observed the claimant intoxicated while at work.

Mr. Didway's testimony corroborates that of Mr. Edmisten and the claimant to the extent that he confirmed that the three drank coffee together at the start of the work day on November 1, 2007. He stated that neither appeared to be intoxicated at that time. Finally, Mr. Didway testified that he did not see Mr. Eastwold on or around the docks at the point in time that the claimant contends Mr. Eastwold approached him to get the barrels.

Roger Williams, who also works for the respondent employer, was called to testify on behalf of the claimant. Mr. Williams has worked for the respondent employer for approximately ten years and has known the claimant since he started work there, only as a co-employee. He denied having seen the claimant on the day of the incident prior to the

explosion and fire, but did see the claimant after the incident. He testified that he was on the houseboat that he and Mike Didway had been working on. With respect to the incident, Mr. Williams testified:

- Q. Tell the Judge in your own words what you saw.
- A. We was coming into the dock. We heard an explosion. When I looked, I seen a fireball, seen two guys in it. One guy came running out, jumped in the lake, and that was Matt. The other guy was still in the fire whenever I got off the boat. Whenever I ran across the catwalk on the dock, I lost sight of it. Whenever I got over there, the other person was Greg Prock. He had already gotten in the lake and I guess that's how he got the flames put out. I couldn't -- really couldn't tell you on that part. I mean, do you want to know what I seen after that or --
- Q. Sure. Tell us -- just tell us your own observations.
- A. I -- I mean, they was burnt.
- Q. Well, that's a conclusion. You saw a big fireball. How big of a fireball?
- A. Engulfed a 50-foot houseboat for a little bit.
- Q. And was that the first thing that caught your attention, the

explosion?

A. Yes.

Q. And how much time was it between the explosion and when you saw Matt running out of the fireball?

A. Seconds.

Q. Okay. A couple of seconds you think?

A. Yeah, probably.

Q. Okay. And how long after the explosion was it that you saw Greg?

A. I don't -- I mean, it was a little bit longer. I don't -- I couldn't tell you how long.

Q. Okay.

A. It was a few seconds longer.

Q. All right. Okay. Did you see him on fire or did you see him in -- when he got in the water? Had he already gotten in the water before you saw him?

A. I seen both of them on fire.

Q. When you say on fire, could you tell me, was it just their hair on fire or --

A. No. Whenever I seen Greg, Greg was still in the fire because the fire wasn't out yet. Whenever I seen Matt, Matt come running out of the

fire pretty much on fire.

Q. Totally?

A. Pretty much.

Q. When you saw Greg, then, he was in the fireball still?

A. Yes.

Mr. Williams stated that the claimant was scorched and burned, and he testified that he observed the claimant's skin melting off his face and hands. Mr. Williams denied having ever seen the claimant intoxicated or drunk while at work, nor had he ever seen him drinking, using marijuana, crack, meth or any other illegal drug while at work. Although he had never observed the claimant under the influence of drugs or alcohol at work, Mr. Williams acknowledged that he was not around the claimant immediately prior to the accident. Mr. Williams testified that they participated in safety meetings every year, but he was never told about a policy not to use a torch on a 55-gallon barrel.

Mike Edmisten was called as witness on behalf of the claimant. He had worked for the respondent employer approximately four years at the time of the accident. He

denied being intoxicated or under the influence of any drugs on the morning of the incident. According to Mr. Edmisten, Mr. Eastwold told him and the claimant to go to the top of the hill and grab two barrels, cut the tops of them, so he could burn Styrofoam in them. He testified that he has seen the claimant open the barrels plenty of times with a cutting torch before the November 1, 2007 incident. Mr. Edmisten denied that before the explosion, the claimant appeared intoxicated or drunk, nor did he smell of alcohol.

Mr. Edmisten testified:

- Q. All right. So you have both the barrels in the back of the truck. What happens then?
- A. I load them up. We go back down to the bottom of the hill next to the houseboat where the cutting torch and the welder was at.
- Q. All right.
- A. We had cut the top of the first one off. Greg went to cut the second one off and I had went to grab it with a pair of channel locks.
- Q. Grab what?
- A. The lid.
- Q. Why were you grabbing the lid of the second barrel with channel

locks?

A. That way, when you cut it off, it doesn't fall down in the bottom because there's a little bit of oil left in the bottom of it.

Q. Okay.

A. And then you have to dump it out, you get oil all over the place.

Q. Okay. Is that the way y'all had done it before?

A. Yes.

Q. How many occasions would you say you had cut the barrels with Greg -- cut the tops of the barrels out? How many occasions had that happened?

A. I'd say 15 to 20.

Q. Okay. Over how many years?

A. Over three and a half, four years.

Q. Okay. Had you ever been cautioned or told that you were wrong to open the barrels up that way?

A. No.

Q. Had a barrel ever exploded or caught on fire before this one?

A. No.

Q. Did you feel that you were in danger as he was using the cutting torch that day?

A. No.

Q. So the explosion happens. Tell us from the time you got the channel locks on that barrel, describe in detail what happened at that point.

A. I had put the -- grabbed the lid with the channel locks. Greg had cut the barrel and the lid had curled up a little bit. So I grabbed the lid with the channel locks. Greg had proceeded cutting I'd say another six inches, six to eight inches, and that's when the barrel blew up.

Q. Okay. Do you remember did it throw you or do you remember anything about the explosion?

A. All I remember, it was instant heat on my hands and my face, and my first reaction was to jump in the lake.

Mr. Edmisten testified that when he got out of the lake, his skin was hanging off of his hands and face but the claimant's burns/injuries were worse than his.

Mr. Edmisten denied having ever seen the claimant drunk or intoxicated at work in the years that they worked together. He also denied having ever been instructed by Mr. Eastwold not to open barrels with cutting torches.

Mr. Edmisten testified that he and the claimant are friends. He acknowledged that he tested positive for

marijuana, but contended that he smoked "weed" a couple of weeks before the explosion. He could not recall if they removed the cap/bung hole from the barrel. Mr. Edmisten testified:

Q. Okay. In your deposition, you said that you and Greg were going past the shop when Steve Eastwold told you to go get the barrels and take the tops out, right?

A. Yes.

Q. Okay. And had you left the marina that morning after getting to work?

A. No.

Q. All right. Had you been anywhere in a vehicle with Greg that morning after getting to work?

A. Only to the top of the hill to get barrels.

Q. Okay. Had you been in Greg's Jeep Cherokee or Jeep vehicle, his own personal vehicle, that morning?

A. No.

Q. Okay. You had not been off the premises of the marina, up on the main road for anything?

A. No.

Q. Okay. And you're positive about that?

A. To my best knowledge, yes.

Mr. Edmisten stated that Mr. Eastwold did not tell them to use a cutting torch to take the lids off the barrels. Mr. Edmisten testified:

Q. All right. Are you testifying here today and telling this Judge that you think it's reasonable to use a cutting torch on a barrel that had oil in it without taking off the cap and seeing what's

A. That's the way I was always told to cut them.

Q. Okay.

A. Had cut them.

Q. Okay. Who told you --

A. Have seen other guys cut them that way.

Q. Are you saying Steve Eastwold told you to do that?

A. There was -- there was never -- nobody had ever told me how to cut them open.

Q. You got that from Greg?

A. There was other people that cut them open besides Greg.

Q. Okay. Using a cutting torch?

A. Using a cutting torch.

Q. Okay. And who are those people?

A. Justin Moore.

Q. Who is not here.

A. Who is not here. Jerry Fisher, who is not here.

Q. Okay. Anybody that's here that's used the cutting torch besides Greg Prock?

A. No.

The claimant testified that at the time of the hearing he was thirty-three years old, had a high school education, and had previously worked as a dairy farmer, at Wal-Mart, and Trinity Railroad, in Springfield. He had worked for the respondent employer for approximately six years at the time of the incident. On the day of the incident, he arrived at work around 8:00 a.m. The claimant testified:

Q. Okay. I want you to tell the Judge what happened that day, please.

A. I showed up there about 8:00 and went in -- I always went to the shop and clocked in first because that's where I clocked in at. And then I went on down to the boat marina and went in there where everybody sits and drinks coffee and talks about what's going on for the day. And I thought I remembered talking to Roger Williams and Mike Didway. And got

done talking there and discussing a few things and I was going to go out and work on the houseboat and do some welding there. And on my way out, met up with Steve, and he asked if we'd go up and get a couple of barrels and cut the top out of them for the Styrofoam. And went up there and got a couple of barrels. There were some barrels in front and they felt like they had some stuff in them and there was a couple in the back there and I grabbed them, tilted them and threw them over the top of other barrels. Matt put them in the back of the truck and we came back down and cut open a complete top out of the first one and then the second one, started in on it, and it blew up on us.

Q. How did you go get the barrels?

A. With a truck from the docks.

Q. Owned by the dock?

A. It's owned by the dock, yes.

The claimant denied being aware of a policy prior to November 1, 2007, regarding how to cut open barrels. He further denied that this was the first time he had ever used a cutting torch to open up a barrel. The claimant could not recall with specificity the number of times he has used a cutting torch to open barrels, but he was certain that every time he was asked to cut the lid off of a barrel, he would

use a cutting torch. However, he was uncertain if Mr. Eastwold had ever observed him using a cutting torch to open barrels, nor had he observed other people opening up a barrel with a cutting torch. According to the claimant, he was the one who generally did the welding or cutting. The claimant testified:

Q. And just tell us what happened when you were cutting open the second one; is that right?

A. Yeah, and it blew up.

Q. You heard Matt talking about what happened; is that right?

A. Yeah. I mean, I remember being on fire, or the explosion, like a big boom, and I couldn't see anything, and I knew I was on fire, of course, and I rolled around on the ground, and that wasn't helping so I dove off in the -- ran down there and dove off into the water. Came back out and I was hurting really bad. And it seemed like -- it might not have been very long for the ambulance to get there, but it sure seemed like a long time.

Q. During that time, what were you doing?

A. Standing there hurting, just wishing it'd go away.

Q. When the ambulance came, were you

and Matt together when the ambulance drove up?

A. We was standing there -- kind of standing there beside each other and then there's a whole bunch of other people who were trying to calm us down.

Q. Why were y'all excited, upset?

A. Why? Because I hurt so bad and I had skin hanging off of me and stuff, too.

Q. So the ambulance comes and do they put you right in a --

A. Yeah.

Q. Did you walk over to the ambulance or --

A. No. As soon as they got there, they --

Q. Put you on a gurney?

A. -- put me on a gurney, put me up in there.

Q. And did the same for Matt?

A. Uh-huh. That I can remember, yes.

Q. Do you recall getting medicine right away when you got in the ambulance?

A. Yes. Yes, I do, but it didn't seem like it took much of the pain away.

Q. Was it by mouth, oral, or was it by shot?

A. By shot in the arm, if I remember right.

Q. Okay. Do you know what it was? Did the ambulance driver tell you what he was giving you?

A. Huh-uh.

Q. But it didn't seem to help any.

A. Maybe - maybe calmed me down a little bit, but --

The claimant was sedated for about two weeks after being transported via helicopter to the hospital immediately following the incident. The claimant denied that during the period of time, from the time he was burned until September he was able to do any kind of work at all. According to the claimant, he went and talked to Mr. Eastwold and gave him what the doctor had given him as far as restrictions. After Mr. Eastwold did not call him back in about three weeks, the claimant filed for his unemployment since he was able to work, but was still under a restriction. Although the claimant could not recall when he first went back to see Mr. Eastwold.

The evidence demonstrates that the claimant is an

admitted frequent marijuana smoker. The claimant testified as follows:

Q All right. Your explanation for the positive drug test was that -- at least for the marijuana portion of it was that you'd smoked it a couple of weeks before, correct?

A That's correct.

Q All right. And you maintain that it was at someone's house with a group of friends, correct?

A That's correct.

Q And you don't have any of those people here to testify to confirm when you were smoking marijuana, do you?

A No.

Q All right. Told me that you smoke pot frequently, correct?

A Yeah, somewhat.

Q Okay. You told me you smoked it through the work week, it wasn't just a weekend thing, right?

A After work.

Q Right?

A After work at home, yes.

Q Three or four days a week sometimes, right?

A Sometimes.

Q You smoked at home?

A Yes.

Q You smoked it in front of you wife?

A Yes.

Q You smoked out of a glass pipe?

A Yes.

Q You smoked a traditional paper joint?

A Sometimes.

Furthermore, the claimant testified that he had quit smoking pot prior to this incident.

Q Okay. And your explanation for why you had quit smoking after being a frequent chronic smoker was that you had a job offer, correct?

A That's correct.

Q But you couldn't tell me the company name when I first asked you and you couldn't tell me the guy you talked to, right?

A I couldn't remember it at first, but I think I did end up telling you.

Q By the end of it, you came up with a name that you weren't quite sure

whether that was it, Metalogic.

A Metalogic, yes.

Q Okay.

A I believe his name is Steve, but I don't know his last name.

Q All right. You don't have Steve here, do you?

A No, I don't.

Q You don't have any letters or correspondence or applications or any employment paperwork or anything showing that he made a job offer to you in November of '07, do you?

A No. But I'm sure --

Q Or October of '07.

A -- I'm sure if it was investigated, it -- he may still have an application from me.

Q Okay. But you didn't bring that here today, did you?

A No.

It is of note that the claimant could not unequivocally identify the company he was supposedly trying to go to work for, nor could he positively identify the individual who had supposedly offered him a job. The claimant had never given Mr. Eastwold two weeks notice, and

he never went to work for this employer after the incident. In fact, the claimant tried to come back to work for the respondent employer and then later went to work for a local welding shop. Simply put, the claimant's explanation that he had quit smoking pot due to a job offer is completely unsupported by the evidence. This is evidence of the claimant not being a credible witness.

The claimant also testified that he was never told not to use the torch to cut open the tops of the barrels. However, the barrels had a warning label on them not to use a torch to open them, and the claimant admitted that he did not read any of the labels on the barrel before putting the flame to it. Furthermore, he did not open the cap on the top of the barrel to vent it. The evidence demonstrates that the claimant had previously been directed to use an air chisel to open the barrels, but he denied this. The respondents offered the testimony of Mr. Eastwold as well as the testimony of Mr. Greg Aaron in support of the assertion that the claimant was given specific instructions regarding the proper cutting of the barrels. Mr. Aaron testified as follows:

Q Were you present at any point when

Steve Eastwold instructed Greg Prock regarding how to take the tops off barrels?

A Yes.

MR. SPENCER: Objection, Your Honor, to the question because the only relevant date is the November 1<sup>st</sup> of '07 date and he just said he was not there that day.

THE COURT: Okay. Overruled. Answer the question.

A Yes, I was.

Q All right. Will you explain what Steve Eastwold said to Greg Prock regarding how to open the barrels?

A He told us to use a pneumatic air chisel to cut off the tops of the barrels because they were safer to cut off that way.

Q Okay. And how does this air chisel work? What do you do with it?

A You hook an air line on the end of the pneumatic gun and it's got a little chisel on the end and you put it against the side of the barrel and pull the trigger and it cuts a little hole, and then you just keep going around the edge of the barrel with it and it coils up the metal on the side, and it leaves a pretty smooth cut on top.

Q Okay. Kind of like a can opener, a big can opener?

A Pretty much, yeah.

Q Okay. And are you positive that Steve Eastwold explained the fact that he needed to use an air chisel to Greg Prock?

A Yes.

Q Did Steve Eastwold illustrate or show Greg how to use it?

A Yes.

In the present claim, the evidence shows that THC was present in the claimant at the time of the injury. The claimant denied using marijuana on the date of the accident. The claimant's testimony is not sufficient enough to rebut the statutory presumption. The evidence demonstrates that the claimant's testimony is filled with inconsistencies and unexplained evidence which clearly indicates that the claimant failed to rebut the presumption. The claimant testified that he arrived at work sometime between 7:00 and 8:00 a.m. He clocked in and stopped at the marina to have a cup of coffee. The claimant testified that he met Mr. Eastwold, the owner, as he walked out of the marina. The claimant had not begun any work-related activities when he

saw Mr. Eastwold. The claimant testified that this was when Mr. Eastwold directed the claimant to take the tops off two barrels so he could burn Styrofoam. However, Mr. Eastwold testified that he first saw the claimant that day when he observed the claimant and Mr. Edmisten in the claimant's personal vehicle coming from over a hill. It was at that time, while the claimant was in his Jeep, that Mr. Eastwold told the claimant to go get a couple of barrels and cut the tops off for him. Mr. Eastwold made perfectly clear during his testimony that there was no reason for the claimant to be in his own vehicle on the stretch of road that he and Mr. Edmisten had been driving on. The claimant offered no explanation, but only denied being in the vehicle with Mr. Edmisten. The claimant testified that he and Mr. Edmisten were down at the marina when he encountered Mr. Eastwold. This testimony is not corroborated by either Mr. Eastwold or Mr. Didway. We place greater weight upon the testimony of Mr. Eastwold. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Johnson v. Riceland Foods, 47

Ark. App. 71, 884 S.W.2d 626 (1994); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964).

Therefore, when we consider all of the evidence in the record, we do not find the claimant to be a credible witness. The claimant lied about being shown how to use the air chisel. He lied about where he was when Mr. Eastwold told him what to do with the barrels. The claimant's lack of personal safety is evident by his failure to even read the warning labels. Finally, we give no credit to his testimony he quit smoking pot as his reasoning for quitting smoking pot two weeks prior cannot be verified in any way, shape or form. We are not persuaded by claimant's testimony that he always used a torch to remove the tops off the barrels as evidence that his marijuana use did not contribute to his injury. On the contrary, this evidence supports the fact of claimant's admitted long-term marijuana use and his lack of personal safety.

The claimant had marijuana or its metabolic derivative in his body at the time of the accident. Therefore, under the law, it is presumed that this illegal

drug use substantially occasioned his injury. The evidence that it did not was the claimant's testimony that he always used a torch to open barrels and that he had not smoked marijuana for over a week. His testimony is supported by Mr. Edmisten that he and the claimant did not smoke pot on the day of the incident. However, Mr. Edmisten's testimony is suspect at best since he also has a pending workers' compensation claim and had a vested interest in the outcome of this litigation. Further, the testimony of Mr. Didway that the claimant did not appear impaired before the incident is not persuasive enough to overcome the presumption as there were approximately 90 unaccounted for minutes between when the claimant was seen by Mr. Didway and the incident, during which time the claimant was seen in his personal vehicle with Mr. Edmisten, an activity which he denies. When we weigh all the evidence, we do not find the claimant's testimony to be credible.

We further find that even if the claimant did not appear to be impaired while drinking coffee first thing in the morning, it is irrelevant. Mr. Edmisten and the claimant admitted that they did no work prior to going to retrieve the barrels. According to Mr. Eastwold and Mr. Didway, the

explosion occurred at around 9:30 a.m. The gap in time from when the coffee-drinking ended and the explosion occurred is curious. The entire barrel-retrieving and cutting process, could not have taken 90 minutes. Mr. Eastwold testified that he encountered the claimant and Mr. Edmisten in the claimant's vehicle, coming from the main road off the premises, at which point he asked them to cut the barrels. He testified that neither the claimant nor Mr. Edmisten would look him in the eye. He was not close enough to assess whether they appeared to be under the influence of marijuana. The gap in time between when the claimant was last seen by Mr. Didway and when he was asked to get the barrels by Mr. Eastwold together with the claimant and Mr. Edmisten's suspicious behavior of not looking Mr. Eastwold square in the face is sufficient enough to disregard Mr. Didway's testimony regarding the claimant's appearance early in the morning.

Mr. Didway confirmed that the claimant had cut barrels open with a cutting torch previously. However, he stated that he would not have used this method. Moreover, he did not see Mr. Eastwold on the dock at the point in time in which, according to Mr. Edmisten and the claimant, Mr.

Eastwold was supposed to be asking them to cut barrels.

With regard to Mr. Williams's testimony, we do not find it persuasive enough to overcome the presumption. Mr. Williams testified that he never witnessed the claimant intoxicated at work. However, he admitted that he was not around Mr. Edmisten or the claimant at the time of the explosion. Accordingly, he could not have known whether the claimant was under the influence of drugs or alcohols when the incident occurred.

Mr. Aaron corroborated Mr. Eastwold's testimony that he had shown the claimant and Mr. Edmisten how to use an air chisel to remove the top from a barrel. He was of the opinion that it is important to remove the bunghole cap from a barrel prior to cutting into it in order to release any buildup of gases inside. We find Mr. Eastwold to be more credible than Mr. Edmisten and the claimant concerning what transpired the morning of the explosion.

Therefore, based upon our de novo review of the record, we find that there is a direct causal link between the claimant's marijuana use and the explosion. We find that the claimant has failed to rebut the presumption that the accident was substantially occasioned by his use of

marijuana. That being the case, he has not proven by a preponderance of the evidence that he sustained a compensable injury. The claimant has failed to rebut the statutory presumption that the accident was substantially occasioned by his use of marijuana. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

On appeal to the Commission initially, the claimant raised a new issue arguing that if the Commission reverses the Administrative Law Judge, the claimant's due process rights are violated because the Administrative Law Judge's finding is based on credibility. Essentially, the claimant argued that the Commission violated the claimant's right to due process if it reverses a finding of credibility made by any Administrative Law Judge. We reaffirm our finding in the October 14, 2009 opinion that this argument has no merit as this issue has previously been addressed by the Court of Appeals in Stiger v. State Line Tire Service, 72 Ark. App. 250, 35 S.W.3d 335 (2000). In Stiger, the Court stated:

By allowing the Commission to "review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses," Ark. Code Ann. § 11-9-704 (b)(6)(A) (Repl.

1996) adequately protects a claimant's due-process rights. When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

See also; Stutzman v. Baxter Healthcare, 99 Ark. App. 19, 256 S.W.3d 524 (2007) and Toia v. HTI Logistics 100 Ark. App. 314, 28 S.W.3d 334 (2007).

Accordingly, for those reasons stated herein, we hereby deny and dismiss this claim.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. Ark. Code Ann. §11-9-102(4) (B) (iv) states:

The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was **substantially occasioned** by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. (Emphasis added)

Here, Mr. Prock and Mr. Edmisten used an acetylene torch to cut open an oil barrel, which blew up, resulting in terrible burns. They were given drug tests at the hospital and both turned up positive for marijuana, causing the claim to be denied due to the rebuttable presumption of Ark. Code Ann. §11-9-102(4) (B) (iv).

The only evidence of intoxication in this claim is the positive drug test. Mr. Prock testified that Mr. Edmisten was not intoxicated. Mr. Edmisten testified that Mr. Prock was not intoxicated. But as they are the two people being accused of being high, their denials really

carry very little weight. The Commission is not required to believe the testimony of the claimant or any other witness. The testimony of an interested party is always considered to be controverted. Continental Express v. Harris, 61 Ark. App. 198, 965 S.W. 2d 811 (1998). However, Mr. Mike Didway testified that he saw Mr. Edmisten and Mr. Prock that morning and they did not appear intoxicated. Their boss, Mr. Steve Eastwold, also an interested party, while insinuating that Mr. Prock and Mr. Edmisten were off smoking pot in Mr. Prock's Cherokee, admitted that if he had thought they were intoxicated when he instructed them to cut the barrels he would not have let them work.

I would also note that Mr. Eastwold's insinuation that Mr. Prock and Mr. Edmisten were smoking pot while riding around in the Cherokee, specifically relied on by the majority, is sheer conjecture and speculation, which, 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 Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). In totality, the testimony of Mr. Didway, and that of Mr. Eastwold that he would not have let Mr. Prock and Mr. Edmisten work if he thought they were high,

leads to a finding that the claimant was not intoxicated.

The evidence of record shows that Mr. Prock cut open oil barrels with an acetylene torch **all the time**. Mr. Prock testified that is how he always did it. Mr. Edmisten testified that is how they always did it. Mr. Didway testified that he had seen Mr. Prock do it that way before. Mr. Greg Aaron testified that he had seen Mr. Prock cut open oil barrels with an acetylene torch before. So even if the claimant and Mr. Prock were intoxicated, a finding I specifically do not make, as it requires conjecture and speculation, it cannot be said that the incident was substantially occasioned by the use of marijuana. The accident was substantially occasioned by Mr. Prock's habit of cutting open oil barrels with an acetylene torch. Professor Larson explains in Larson's Workers' Compensation Desk Edition, §1.03(1):

The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award.

See also Simmons First National Bank v. Thompson, 285 Ark. 275, 686 S.W. 2d 415 (1985).

Although the testimony of Mr. Didway and Mr. Eastwold establishes that the claimant and Mr. Prock were not intoxicated at the time of the incident, this is really beside the point, as the incident was not substantially occasioned by the use of marijuana. It was substantially occasioned by Mr. Prock's stupid habit of cutting open oil barrels with an acetylene torch. As the accident was not substantially occasioned by the use of marijuana, the bar presented by Ark. Code Ann. §11-9-102(4)(B)(iv), does not apply to this claim.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner