

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G808236

SAMUEL W. BUCHANAN (DEC'D), EMPLOYEE CLAIMANT

VICTORY LUMBER, LLC, EMPLOYER RESPONDENT NO. 1

SUMMIT CONSULTING, LLC
INSURANCE CARRIER/TPA RESPONDENT NO. 1

DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND RESPONDENT NO. 2

OPINION FILED OCTOBER 11, 2022

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

Claimant (Jennifer Perks, the alleged widow) represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Claimant (Arlene Buchanan, mother of minor children) represented by the HONORABLE RYAN PHILLIP, Attorney at Law, Magnolia, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeal an opinion and order of the Administrative Law Judge filed May 31, 2022. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The deceased Claimant's alleged beneficiaries did not prove by a preponderance of the evidence the Claimant sustained a compensable injury on December 6, 2018. Specifically, they failed to rebut the statutory presumption that the Claimant's fatal injury was substantially occasioned by the use of illegal drugs, particularly methamphetamines.
3. Respondents No. 1 have asserted the statute of limitations has expired. However, since this is found not to be a compensable claim, this issue need not be adjudicated. *Malone v. MidSouth Mfg., Inc.*, 2003 AR Wrk. Comp. LEXIS 638, Claim No. F100223 (Full Commission Opinion Filed April 28, 2003). See also *Estrada v AERT, Inc.*, 2014 Ark. App. 652, 449 S.W. 3d 327.
4. Because of the above finding concerning compensability, the balance of the issues in this case are rendered moot and will not be addressed in this Opinion.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore, we affirm and adopt the May 31, 2022 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

After my de novo review of the record in this claim, I dissent from the majority opinion finding that (1) the deceased Claimant's alleged beneficiaries did not prove by a preponderance of the evidence that the claimant sustained a compensable injury on December 6, 2018; and (2) the claimant failed to rebut the statutory presumption that the Claimant's fatal injury was substantially occasioned by the use of illegal drugs, particularly methamphetamines.

A.C.A. §11-9-102(4)(B)(iv) governs the compensability of the claimant's injury under the facts of this case. This section states, in pertinent part:

Compensable injury does not include:

...

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) 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.

...

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Woodall v. Hunnicut Construction*, 340 Ark. 377, 12 S.W.3d 630 (2000).

"Substantially occasioned" means that there must be a direct causal link between the use of alcohol [or illegal drugs] and the injury or accident." *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

The claimant's wife, Jennifer Perks, gave credible testimony that the last time that the claimant took methamphetamines was two days prior to his work accident. Perks testified further that the claimant did not

use methamphetamines on the day of the workplace accident. Perk's testimony was supported by the testimony of the claimant's supervisor, Kevin Holliday.

Holliday offered testimony that he met with the claimant on the morning of the accident between 5:45 a.m. and 6:15 a.m. at the company's morning meeting. Holliday admitted that he did not notice anything unusual about the claimant's appearance or about his actions that day. Holliday also admitted that he had no reason to believe the claimant was intoxicated. According to Holliday, if he had suspected the claimant was intoxicated, he would not have allowed him to work that day. The evidence shows that the claimant's accident happened at 7:45 a.m., a mere ninety (90) minutes after the morning meeting concluded.

The present case is analogous to *Ward v. Hickory Springs Mfg.*, 248 S.W.3d 482, 97 Ark. App. 311 (2007). In *Ward*, Mr. Ward suffered a degloving injury to his genitalia and scrotum when his clothing became entangled in a machine he was operating. Mr. Ward tested positive for morphine and marijuana three days after the accident. The Full Commission found that the positive drug test gave rise to the presumption that the accident was substantially occasioned by the use of drugs; however, that presumption was rebutted by the testimony of Mr. Ward's co-workers who all testified that he did not appear to be under the influence at any time. The finding of the Commission was affirmed.

Here, as in the *Ward* case, the claimant's supervisor testified that he did not appear to be under the influence. The individuals who spent the most time in close proximity to the claimant on the day of the accident were the claimant's supervisor (Holliday) and the claimant's wife (Perks). As stated above, Holliday had no reason to suspect that the claimant was under the influence of methamphetamines and Perks unequivocally stated that the claimant was not under the influence of methamphetamines. The testimony of both of these witnesses supports a finding that the claimant was not under the influence of methamphetamines on the day of his workplace accident.

I also find it noteworthy that there is no medical expert who was able to testify that the claimant was impaired at the time of his work accident. (See *Ark. Elec. Coop. v. Ramsey*, 87 Ark. App. 254, 190 S.W.3d (2004)). Dr. Jennifer Forsyth, the medical examiner who performed the claimant's autopsy, testified that she could not offer an opinion as to whether the claimant was intoxicated at the time of his death. Dr. Forsyth also testified that she was unable to say within a reasonable degree of medical certainty that the claimant was impaired at the time of his death. Dr. Forsyth offered, "I can't speak to behavior actions, intellect, or decision-making capacity."

Additionally, I note that the respondent-employer was fined by OSHA for a violation related to the claimant's accident. After the claimant's

work accident, OSHA investigated. The respondent-employer was cited with a “Serious” violation for violating 29 CFR 1910.147(c)(4)(i), i.e., “Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section.” The OSHA citation reveals the following:

(a) On or about December 6, 2018[,] and at times prior thereto, procedures were not developed, documented or utilized to control hazardous energy when employees need to access the cover on the John Deer [sic], model 544J, front-end loader. This condition exposed employees to a struck-by hazard from the raised bucket.

I find that it is just as likely that the claimant’s accident was caused by the hazardous working condition created by the respondent-employer’s failures as it was caused by the claimant’s alleged use of methamphetamines. Thus, I do not believe that we can say without conjecture and speculation that the claimant’s work accident was substantially occasioned by the use of methamphetamines.

Based on the aforementioned, I find that the claimant successfully rebutted the presumption that his accident was substantially occasioned by the use of methamphetamines.

For the foregoing reasons, I dissent from the majority opinion.

M. Scott Willhite, Commissioner