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James Barron v. Utah Labor Commission, Hogan & Associates Contruction, New Hampshire Insurance Co. : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

JAMES BARRON, Petitioner/Appellant, v. UTAH LABOR COMMISSION, HOGAN & ASSOCIATES CONSTRUCTION, and/or NEW HAMPSHIRE INSURANCE CO., Respondents/Appellees.	**REPLY BRIEF OF APPELLANT** Case No.: 20110313

APPEAL FROM THE UTAH LABOR COMMISSION
COMMISSIONER SHERRIE HAYASHI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case law

Statutes

ARGUMENT

The issue in this appeal is whether the Labor Commission erred in affirming the ALJ's decision, because that decision was not supported by the evidence in the record. Mr. Barron's contention is not that the ALJ's factual findings were wrong, rather that the application of those findings to the law was in error. Specifically, Mr. Barron argues that he has rebutted the presumption set forth in §34A-2-302(4)(b)(5), by showing that his illegal drug use was not the major contributing cause of his injury. Nevertheless, Respondent attempts to shift blame for the accident to Mr. Barron when in fact Respondent's own failures put Mr. Barron and other employees at risk of serious injury.

I. RESPONDENT ATTEMPTS TO CONFUSE THE SIMPLE ISSUE PRESENTED, AND TO DISTRACT THIS COURT FROM THE TRUE FOCUS OF THIS APPEAL

Utah Code Ann. §34A-2-302(4)(b) provides five ways that an employee can rebut the presumption that the employee's illegal drug use was the major contributing cause of the employee's injury. These are: (1) the chemical test is inaccurate; (2) the employee did not engage in illegal drug use; (3) the test results do not exclude the possibility of passive inhalation; (4) a medical opinion verifies that the amount of drugs in the employee's system does not support the presumption; or (5) the illegal drug use was not the major contributing cause of the employee's injury. Mr. Barron conceded the first four alternatives prior to the hearing held before the Utah Labor Commission, and Respondent's replay of the first four alternatives have no relevancy before the court.

The statute is clear, Petitioner does not need to meet all five of the alternatives since the language is stated with an "or" and not an "and." Only one of the alternatives needs to be met. Thus, the real question is whether Mr. Barron rebutted the presumption under the fifth statutory alternative – that the illegal drug use was not the major contributing cause of the employee's injury. The evidence that was presented at the hearing established that Mr. Barron was not feeling the effects of his prior drug use; he was not acting unusual or abnormal on the day of the accident; and the employer did not provide its employees the means to comply with its own safety requirements. (R. 195, 49:8 - 16; R. 195, 133:18 - 24; R. 195, 156:14 - 23; R. 195, 132:8 - 20) Mr. Barron submits that according to this evidence, the ALJ erred in her conclusion that Mr. Barron did not rebut the statutory presumption.

In its brief, Respondent repeatedly argues that Mr. Barron was not wearing a safety harness on the day of the accident and that OSHA guidelines did not require the employer to have any safety measures in place. Respondent attempts to place the blame for the accident on Mr. Barron's alleged negligence. However, these are red herrings, and simply confuse the real issue of this appeal.

In sum, Respondent's arguments boil down to the following: (a) this Court should disregard *TylerBaker v. Superior Roofing*; (b) Mr. Barron arrived at work with a red nose and was sniffling; and (c) Mr. Barron did not follow the guidance of the safety meeting to wear a harness, watch his step and be cautious. None of these arguments refute Petitioner's position that he has rebutted the statutory presumption.

A. Petitioner Has Rebutted the Presumption by a Showing of His Job Performance

There are at least two ways that an injured worker can provide evidence that drug use was not a major contributing cause to the accident. First, the injured worker could show through his behavior that he was not impaired. Second, the injured worker could show that outside forces caused the injury, and not the presence of illegal drugs in the injured workers system.

First, Mr. Barron has shown through his own behavior, similar to *Tyler Baker v. Superior Roofing*, 97-0373, that the presence of cocaine in his system was not a major contributing cause of his accident. Petitioner acknowledges that the *Baker* decision is not controlling, yet it is still useful and provides relevant analysis to this Court. In *Baker*, the testimony of those persons that had a chance to observe the injured worker on the day of the accident, showed that the employee was not impaired (*Id.*). Similarly, in the present case, Mr. Barron's testimony that he was not impaired was corroborated by his foreman and a co-worker as well as hospital personnel (R. 194, p. 122, 124; R. 195, 133:18 - 24; R. 195, 156:14 - 23). This testimony supports and leads to the conclusion that Mr. Barron's drug use was not the major contributing cause of his injuries.

Second, the undisputed facts establish that outside forces caused Mr. Barron's injury and not the presence of illegal drugs in his system. Mr. Barron has shown that the employer's failure to provide tie-offs was the major contributing cause of his injuries. The employer knew that the job site hazards could cause serious injury to its employees (R. 64 -

74; R., 195, 40:8 - 41:8; 134:2 - 13). For this reason the employer held safety meetings, required safety harnesses to be worn by employees and installed safety railings (*Id.*). After the accident it used safety/caution tape and brought up a tie off machine (R. 195, 132:8 - 133:6).

Nevertheless, on the day of the accident, the employer had not ensured that its employees had a means by which to use these safety precautions. No tie off was available to employees on the second story, no safety tape was marking the edges of the second story and no safety railing was in place (ironically, the employees were installing one that day) (R. 195, 132:8 - 133:6; R. 195, 137:17 - 138:12). Presumably, such precautions are used to prevent the normal-behaving, non-impaired employee from falling off and suffering serious injury. But in this case, each one of these safety measures were withheld by the employer.

However, Respondent argues that outside forces are limited to some kind of physical force. As we can see from Mr. Barron's accident, outside forces can also include inaction on the part of some person or entity. Certainly, a falling sledgehammer or a rear-end motor vehicle accident are examples of outside forces that would equally cause injury to an impaired worker as it would a non-impaired worker.

Likewise, an employer failing to provide a tie off necessary for a safety harness to be useful would be an outside force. Again, presumably the safety harness with the tie off are required to prevent an employee, impaired or not, from walking through an unprotected hole

or off an unprotected ledge resulting in serious injury. Inaction, as well as action, can cause injury and thus be considered an outside force.

B. Hearing Evidence is Consistent that Petitioner Was Not Impaired

Mr. Barron testified that on the day of the accident, he was not feeling the effects of his prior cocaine use. (R. 195, 49:8 - 16) This testimony was consistent in every way with that of Brady Parker, the foreman (R. 195:14 - 23). Mr. Parker did not contradict Barron's testimony one iota. Neither Parker nor any of Barron's co-workers noticed anything abnormal about Petitioner's appearance, other than Parker thought it possible that Barron had a head cold due to a red sniffling nose. (R. 195, 156:14 - 23). Given the fact that the day of the accident was a cold, wintery day in February, a red sniffling nose would not be unusual.

In actuality, Parker's behavior leads to the conclusion that he didn't suspect Barron was impaired. After the morning briefing, Parker assigned Barron to work on installation of a safety railing, and then later on a drain pan (R. 195, 20:6-15; R. 195, 91:1 - 17). Barron was given these different assignments by Parker who saw no indication that Barron was impaired or somehow unfit to work that day.

Mr. Beeson also concurred with Mr. Parker's testimony regarding Barron's behavior. Mr. Beeson testified that he had observed Barron that morning when he gave Barron a ride to work and while working in the same area and Mr. Beeson did not notice anything abnormal about Barron's appearance. (R., 195, 133:18 - 24). The fact that he later tested positive for marijuana and was terminated has no bearing on his observation of Mr. Barron's

behavior on the day of the accident. Especially when his testimony was consistent with Mr. Parker's testimony.

Respondent's only argument that Mr. Barron's behavior showed impairment was that his nose was red and he was sniffling. The only reason Respondent cites to the red, sniffling nose is to somehow imply that Barron snorted cocaine the morning of the accident. However, there was no evidence presented by Respondent that a red, sniffling nose indicates anything other than a person's nose is red and sniffling.

Interestingly, in this same paragraph of its brief, Respondent argues that a co-worker's observations about Mr. Barron's appearance and behavior are merely "subjective judgment" and cannot be used to rebut the presumption. (Appellee's Brief at 21). Immediately following this argument by Respondent, it states that the subjective observation of a red sniffling nose is evidence of impairment. Consequently, the court must decide whether Respondent believes a red sniffling nose is more convincing of impairment than its foreman and employee's observation that Petitioner was working without any signs of impairment.

C. Respondent's Own Omissions Establish Outside Forces Caused the Injury and not Mr. Barron's Positive Drug Test.

Respondent's own behavior establishes that significant on-the-job work site hazards existed to its employees and constitute an outside force. The risk for injury to employees was significant and apparently involved substantial efforts by the employer to establish safety measures to protect its employees. As previously stated, the employer held safety meetings, provided safety harnesses requiring tie-offs, had safety tape, had a tie-off machine available

(placed on the second story, *after* the accident, where Petitioner was working), and was having employees install a safety handrail on the second story. (R. 64 - 74; R. 151-154; R. 195, 18:20-24; R. 195, 39:11-15; R. 195, 133:1 - 6). However, the evidence shows that those safety measures were not in place on the second story where employees were working that morning. (R. 195, 132:8 - 133:6; 137:23 - 138:12)

Respondent emphasizes – by mentioning in its brief three separate times – the fact that the employer held safety meetings regarding the need for employees to wear a safety harness, watch their step and be cautious (Appellant's Brief p. 9, 21, 23). However, incredibly, the employer failed to provide a means by which the safety harness could serve its purpose (R. 195, 132:8 - 133:6; 137:17 - 138:12). Mr. Barron had no reason to wear the harness because the employer provided no place to where he could attach his safety harness (*Id.*). Mr. Beeson, another of Mr. Barron's co-workers, validated Mr. Barron's testimony regarding the lack of a tie off or other safety measures. (R. 195, 137:23 - 138:12; R. 195, 133:1 - 6; R. 195, 132:8 - 25). The reasonable person would have to conclude that the reason for the tie off is because even a cautious, conscientious, unimpaired worker can make a mistake and fall.

For this reason, the employer's behavior has no congruency. It tells employees they must wear safety harnesses yet provide no means to make them useful. Then, incredulously, the employer tells the employee he is at fault for his life threatening injuries because he was not wearing a safety harness. Respondent should not be able to hide behind a shield of safety

meeting requirements to avoid liability for a workplace accident when it did not provide any means to comply with the requirements.

Further, without any citation of fact or reference to the record, Respondent argues that Mr. Barron failed to follow the employer's guidance because his senses were dulled by the cocaine use. Respondent states that evidence was presented at the hearing that when impaired by cocaine, a person is "less likely to pay attention and have dulled senses" (Appellant's Brief p. 22). The fact is, no such evidence can be found in the record. Certainly, the reasonable person would conclude that cocaine use will impair attention and dull the senses if used moments before working. However, the testimony from a foreman and coworker is that Mr. Barron was not impaired in his ability to perform the job he was assigned to do was not impaired.

Moreover, the ALJ found that Barron could not attach his lanyard to anything "because there was no place to tie off to, especially because he was moving between areas in which he was working". (R., 157). This is important, because no matter how many safety briefings take place and no matter how many safety measures exist, if there are no means by which to use those safety measures then it is reasonable to conclude that accidents will happen. Even if Barron was wearing his safety harness, he would still have been injured because the employer chose not to provide a tie-off to employees that they could *actually use*. Given the circumstances, it was unreasonable for the ALJ to conclude that the working conditions provided to Mr. Barron were not the major contributing cause of his injuries.

II. RESPONDENT IS ATTEMPTING TO PLACE A BURDEN OF PROOF ON PETITIONER WHICH IS NOT REQUIRED.

Respondent goes to great lengths to cite cases and give reasons why Mr. Barron should be required to marshal the evidence. However, what Respondent fails to realize is that Mr. Barron is not disputing the findings of fact in this case. This distinction is important, because the standards are different. When factual findings are not disputed, this Court must "assume that the record supports the findings of the trial court and proceed to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Heber City Corp. v. Simpson,* 942 P.2d 307 (Utah 1997). In actuality, Barron is disputing the ALJ's conclusions of law, for which marshaling of evidence is not required. *Id.* Specifically, Mr. Barron alleges that it was error for the ALJ to conclude as follows: "There is no showing that some outside force caused the Petitioner to fall. I conclude the Petitioner has not rebutted the presumption." See Page 5 of the ALJ's Order. Therefore, since Petitioner does not dispute the factual findings in this case, no marshaling is required. *Heber City Corp. v. Simpson,* 942 P.2d 307 (Utah 1997).

However, even if marshaling of the evidence were required, Mr. Barron has complied with this requirement. In the "Statement of Facts" section of his brief, he spends an entire page discussing the fact that he had used cocaine, tested positive for this drug after the accident and that Barron's co-workers did not notice any unusual or abnormal about Barron's appearance. This section of his brief also discusses Dr. Slawson's review of the results of

the drug test. Mr. Barron is not attempting to hide, evade or gloss over his drug use. He was up front about it at the hearing and in his brief to this Court.

CONCLUSION

The ALJ's Order is inconsistent with the evidence presented in this case, and therefore the Commission abused its discretion in affirming that Order. The facts as found in the record clearly rebut the presumption that Mr. Barron's drug use was the major contributing cause of his work accident and resulting injuries. Consequently, he should have been awarded compensation benefits. Based on the substantial amount of evidence that exists to show that Barron was behaving normally, and that the employer did not use the safety measures it knew were important to prevent serious injury, the ALJ's order that Petitioner had not rebutted the presumption was not reasonable.

Respondent, in its brief, tries to confuse the issue and place burdens on Petitioner that are not required under the law or the rules of this Court. However, these are simply distractions and the bottom line is that the evidence presented at the hearing does not support the ALJ's conclusions of law. Rather, the evidence reasonably supports the conclusion that Mr. Barron properly rebutted the statutory presumption found in Utah Code Ann. §34A-2-302. Based on the above, the Labor Commission's Order should be reversed.

DATED this 3 day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of October, 2011, I mailed, first class mail postage prepaid, a true and correct copy of the foregoing pleading to the following individuals:

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