

2011

James Barron v. Utah Labor Commission, Hogan & Associates Construction, New Hampshire Insurance Co. : Brief of Appellant

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.

BRIEF OF APPELLANT

Case No.: 20110313

**APPEAL FROM THE UTAH LABOR COMMISSION
COMMISSIONER SHERRIE HAYASHI**

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UTAH APPELLATE COURTS

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JURISDICTION

A Petition For Review was filed with the Utah Court of Appeals on April 14, 2011. This Court has jurisdiction over this matter pursuant to Utah Code Ann. §78A-4-103(2)(a) and Rule 14(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE ON APPEAL

Did the Labor Commission err in affirming Administrative Law Judge Marlowe's denial of Mr. Barron's claim for disability compensation under the Utah Workers' Compensation Act, deciding that Mr. Barron had not rebutted the presumption that his drug use was the major contributing cause of his injuries? (Record, 191)

STANDARD OF REVIEW

The Utah state legislature has granted the Labor Commission discretion to determine the facts and apply the law in workers' compensation claims. Utah Code Ann. §34A-1-301. Because the agency has been granted this discretion, its orders are reviewed for reasonableness and its action will be upheld "unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion". *AE Clevite, Inc. v. Labor Comm'n*, 996 P.2d 1072, 1074 (Utah Ct. App. 2000). Further, the Commission's findings should only be affirmed if they are "supported by substantial evidence when viewed in light of the whole record before the court". *Smith v. Mity Lite*, 939 P.2d 684, 686 (Utah Ct. App. 1997). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Id.* at 686. Additionally, this Court recently

held that “we resolve any doubt respecting the right to compensation in favor of the injured employee”. *Smith’s Food and Drug, Inc. v. Labor Commission*, 2011 UT App. 67.

APPLICABLE STATUTORY PROVISIONS

Utah Code Ann. §34A-2-302. Employee's willful misconduct -- Penalty.

The entire statute is lengthy and is therefore set forth verbatim in the addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the case

Petitioner James Barron filed a claim under the Utah Workers’ Compensation Act, seeking benefits for injuries he sustained while working for Hogan & Associates Construction. On February 25, 2009, Petitioner reported to work, met with his supervisor and other employees and was assigned to work on a safety railing on the second floor, approximately 14 feet above the ground. About an hour after he began working, Mr. Barron was asked by his supervisor to stop working on one project and begin another. To perform the new task, he needed a welding torch. Through no fault of his own, as he was unwinding the torch hose and walking backwards across uneven decking, he fell off the edge of the decking. Mr. Barron landed on his back on the concrete below and suffered severe injuries, including several fractures to the cervical, thoracic and lumbar vertebrae, right elbow fractures, left wrist fractures, liver laceration, pelvic fractures, and possible intracranial bleed.

There is no dispute that a work accident and injury occurred. The dispute arises because Mr. Barron later tested positive for cocaine after he was taken to the hospital. Therefore, the Administrative Law Judge found that pursuant to Utah Code Ann. §34A-2-302, the employer was entitled to a rebuttable presumption that use of the cocaine was the major contributing cause of the injury. At the hearing, Mr. Barron submitted evidence that the unprotected edge and the lack of a place to tie off were the actual cause of the injury, but the ALJ found that he had not rebutted the presumption.

B. Course of Proceedings

Mr. Barron filed an application for hearing with the Labor Commission on December 14, 2009, requesting permanent partial disability compensation. (R., 1 - 87) On April 5, 2010, Mr. Barron filed an amended application, to include a claim for medical expenses and care. (R., 102 - 122) On January 18, 2010, Hogan filed an answer admitting that Mr. Barron suffered a work-related injury, but claimed that benefits should be denied because Mr. Barron tested positive for cocaine at the time of the accident. (R., 91 - 95) A hearing was held on September 16, 2010, in front of Administrative Law Judge Deidre Marlowe. (R., 156) On December 30, 2010, Judge Marlowe issued Findings of Fact, Conclusions of Law and Order denying compensation benefits and awarding medical benefits. (R., 156 - 161) On January 31, 2011, Mr. Barron filed a Motion For Review with the Labor Commission. (R., 162 - 168) On March 15, 2011, the Labor Commission entered an Order Affirming ALJ's Decision. (R., 189 - 192) On April 14, 2011, Mr. Barron filed a Petition For Review with this Court.

C. Disposition of the Court

On December 30, 2010, the ALJ issued an Order denying Mr. Barron's claim for compensation benefits. (R., 156 - 161) On January 31, 2011, Mr. Barron filed a Motion For Review with the Labor Commission. (R., 162 - 168) On March 15, 2011, the Labor Commission entered an Order Affirming ALJ's Decision. (R., 189 - 192)

STATEMENT OF FACTS

1. On February 25, 2009, James Barron (hereinafter "Barron") was working for Hogan & Associates Construction, performing iron construction work. (R., 195, 14:2 - 8)
2. Upon arriving at work on February 25, 2009, Barron met with his foreman to receive his assignment for the day. (R., 195, 17:20 - 25)
3. Barron was assigned to install a temporary safety handrail on the second floor, on top of a deck that was 14'3" high. (R., 195, 18:20 - 24; 160:3 - 10)
4. After working on this task for approximately one hour, Barron was approached by his foreman, who assigned him to put in a frame for a drain opening. (R., 195, 20:6 - 15)
5. Barron was retrieving the tools that he needed to complete this task, and was walking backwards while unrolling a torch hose, when he unwittingly stepped off the unprotected edge of the second floor decking and fell to the concrete floor below. (R., 195, 20:19 - 22:23)

6. At the time of the accident, Barron had a safety lanyard with him on the decking, but he could not tie off at the time of the fall because there was no available place to attach his lanyard. (R., 195, 39:11 - 15)

7. 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)

8. Additionally, Barron’s co-worker, RC Beeson, testified that there was no place to tie off on the second floor deck. (R., 195, 137:23 - 138:12)

9. Mr. Beeson also testified that after the accident, he placed on the second floor deck yellow safety tape and a green machine, to which the employees could attach their lanyards. (R., 195, 133:1 - 6)

10. The safety measures were put into place only after the accident occurred, in an effort to comply with OSHA standards. (R., 195, 132:8 - 25)

11. As a result of the accident Barron suffered severe injuries, including several fractures to the cervical, thoracic and lumbar vertebrae, right elbow fractures, left wrist fractures, liver laceration, pelvic fractures and possible intracranial bleed; he was transported by ambulance to receive medical treatment. (R., 157)

12. Barron was later assigned a 52% whole person impairment rating for his injuries and conditions. (R., 194 p. 63)

13. On the day of the accident, a drug test was performed at the hospital, and Mr. Barron tested positive for cocaine. (R., 158)

14. At the hearing for Barron's claim, he testified that he had shared a quarter gram of cocaine two days prior to the accident with a friend. (R., 158; 195, 48:25 - 49:1 - 5)

15. Barron also testified that he experienced a high for about an hour, but that on the morning of the accident he was not feeling any effect of the cocaine. (R., 195, 49:8 - 16)

16. At the hearing, Mr. Beeson testified that he gave Barron a ride to work on February 25, 2009, and that he was working in the same area as Barron that morning, and did not notice anything abnormal about Barron's appearance. (R., 195, 133:18 - 24)

17. Barron's foreman, Brady Parker, also testified at the hearing that Barron seemed to have a head cold but he did not notice anything else about Mr. Barron's appearance. (R., 195, 156:14 - 23)

18. Dr. Matthew Slawson, at the University of Utah's Center for Human Toxicology reviewed the results of Barron's drug test, and stated that three possibilities were likely:

- a. The cocaine use occurred more recently than 48 hours prior to the drug test;
- b. The amount of cocaine ingested was quite larger than the amount indicated;
- c. The individual is a chronic cocaine user which could result in a longer detection period for cocaine use. (R., 194 p. 88)

19. On December 30, 2010, the ALJ issued an Order denying Mr. Barron's claim for compensation benefits and awarding medical benefits. (R., 195, 156 - 161)

20. On January 31, 2011, Mr. Barron filed a Motion for Review of the ALJ's Order. (R., 162 - 168)

21. On March 15, 2011, the Labor Commission issued an Order Affirming ALJ's Decision. (R., 189 - 192)

SUMMARY OF THE ARGUMENT

Mr. Barron is entitled to receive compensation benefits because he was injured during the course of his employment. The ALJ specifically found that Mr. Barron met the causation requirements, but denied benefits because Barron had not rebutted the statutory presumption that his illegal drug use was the major contributing cause of the accident. Mr. Barron did test positive for cocaine on the day of the accident; however, the evidence submitted at the hearing established that the cocaine in his system at the time of the accident was not the major contributing cause of his injuries. Rather, it was the working conditions that Barron was assigned to, specifically the unprotected edge and lack of a tie off. Since Mr. Barron's cocaine use was not the major contributing cause of his injury, the ALJ erred in ordering that Barron did not rebut the presumption.

Further, the Labor Commission erred in affirming the ALJ's order because the evidence from the hearing so clearly shows that the major contributing cause of the accident was the lack of anything for the employees to tie off on the second floor of the building. Barron provided testimony that he was not feeling the effects of the cocaine that he ingested two days prior to the accident. His supervisor did not notice anything unusual regarding his

behavior. His co-worker testified that Barron was not acting in any kind of unusual or irrational manner. He had performed his job normally for at least an hour prior to falling off the decking. The hearing testimony also clearly establishes that no tie off place existed for the workers to use while performing their tasks fourteen feet off the ground. Thus, the Labor Commission's action in affirming the ALJ's decision constitutes an abuse of discretion and should be reversed.

ARGUMENT

The Labor Commission erred in affirming the ALJ's decision because Judge Marlowe's Findings of Fact, Conclusions of Law and Order are not based on the evidence that was presented at the hearing of Mr. Barron's application for benefits. Mr. Barron has rebutted the presumption set forth in §34A-2-302, by showing that his illegal drug use "was not the major contributing cause of the injury". Utah Code Ann. §34A-2-302(3)(b). The record is clear that no one at the job site suspected Barron was in any way impaired, and no evidence was presented that Mr. Barron was incapable of performing the jobs he was assigned by his employer to do. Additionally, the record is clear that Barron fell as a result of an unprotected edge on the second floor deck and the unavailability of a place to attach his safety lanyard which resulted in him falling off an unfinished and unprotected second story ledge of a building. Consequently, Barron is entitled to receive full compensation benefits for his work accident.

I. THE LABOR COMMISSION ERRED WHEN IT CONCLUDED THAT MR. BARRON HAS NOT REBUTTED THE STATUTORY PRESUMPTION REGARDING THE MAJOR CONTRIBUTING CAUSE OF HIS WORK ACCIDENT.

Mr. Barron is entitled to receive compensation benefits because he was injured during the course of his employment. The ALJ specifically found that Petitioner “meets the causation requirements”. (R., 158) The ALJ then concluded that due to the fact that (1) Barron tested positive for drugs after the accident; and (2) there was “no showing that some outside force caused the Petitioner to fall”, Mr. Barron was not entitled to benefits. (R., 160) However, the evidence establishes that Barron rebutted the statutory presumption that the drug use was the major contributing cause of his accident, as set forth in U.C.A. §34A-2-302. The ALJ’s Order does not conform with the evidence that was presented at the hearing; consequently, the Commission abused its discretion when affirming the ALJ’s decision.

The Commission discounts Barron’s reliance on the case of *Tyler Baker v. Superior Roofing, et. al*, Utah Labor Comm’n 97-0373, because it was decided before §34A-2-302 was revised in 2000. (The *Baker* decision is attached as part of the addendum.) However, even though the “rebuttable presumption” language of the statute was added after *Baker* was decided, the case is still applicable to the present case. Having a presumption that illegal drug use caused the accident may place a higher burden on the injured worker, but the fact that the statutory presumption exists does not change the issue at hand. In this case, as in *Baker*, the

injured worker has to prove that the illegal drug use was not the reason for the accident. Utah Labor Comm'n 97-0373.

In *Baker*, the employee reported for work and was assigned to deliver materials to a job site but his truck broke down, requiring mechanical assistance. (*See Addendum*). After the company mechanic had repaired the truck, the employee continued to the job site but collided with his supervisor's truck, and police were called to the scene. *Id.* The employee was taken to the hospital, where he admitted to using marijuana and cocaine within the previous 48 hours, and a drug test was positive for these two drugs. *Id.* The ALJ denied the employee's claim for benefits; however, on appeal the Labor Commission found there was a lack of evidence connecting the employee's prior drug use to the work accident. *Id.* The Commission emphasized that multiple people had occasion to observe the employee -- the mechanic, supervisor, police, and medical personnel -- but there was no testimony or medical evidence that the employee was impaired. *Id.* Ultimately, the Labor Commission found that the evidence did "not establish that [Petitioner's] drug use was the major cause of the accident", and remanded the case for a "determination of the amount of disability benefits compensation due to Mr. Baker". *Id.*

Just as in *Baker*, in the present case the evidence establishes that Mr. Barron's injury was not a result of his prior illegal drug use. Barron testified that he had shared a quarter of a gram of cocaine with a friend two days prior to the accident. (R., 158; R., 195, 48:25 - 49: 5) Barron stated that it gave him a high for about an hour and that he did not feel its affects

thereafter, including the morning of the accident. (R., 195, 49:8 - 16) On the day of the accident, the employer's foreman had an opportunity to observe Barron, when he made initial assignments for the day and again when he assigned Barron to another task. (R., 17:20 - 25; 20:6 - 15) The foreman testified he only remembered that Mr. Barron may have had a cold. (R., 195, 156:14 - 23) Barron was working alongside another co-worker, who observed Barron as he performed his work. (R., 195, 133:18 - 24)

Barron was not dismissed from his job or sent home for the day. There is no report that the Barron was acting unusually or that he was unfit to perform his work. (R., 195, 133:18 - 24; 156:14 - 23) Further, there is no evidence that Barron was impaired at the time of the accident. *Id.* Nothing in the record suggests that he was staggering, had red eyes, had slurred or unusual speech patterns, or any of the usual signs that an individual is impaired. There are no medical records noting impaired behavior. To the contrary, the foreman asked Barron to put in a frame for a drain opening at another location on the second floor. (R., 195, 20:6 - 15)

The accident occurred while Mr. Barron was preparing equipment for this new assignment. Barron was walking backwards, unrolling a welding torch hose, and fell through the decking where there was no barrier to prevent someone from falling. (R., 157) Obviously, a safety railing was important to have since Barron had been assigned to install a safety railing earlier. (R., 195, 18:20 - 24) A safety lanyard was also important, given the various safety discussions that were held regarding its use. (R., 195, 40:8 - 41:8; 134:2 - 13)

However, no place to tie off was available to Mr. Barron while unwinding the hose. (R., 195, 39:6 - 15; 127:1 - 10) But for the unprotected ledge and the lack of a tie off where Barron was working, the accident would not have occurred. When Barron was taken to the hospital for emergency care, there was no indication from Barron's behavior that he was under the influence of controlled substances; his "vital signs [were] within normal limits" and he was "awake, alert, and oriented". (R., 194 p. 122, 124) Therefore, Barron's drug use two days prior was not the major contributing cause to the accident, it was the unprotected ledge and no tie off being available.

Additionally, courts in other jurisdictions with "rebuttable presumption" statutes similar to Utah Code Ann. §34A-2-302, have placed importance on the testimony of co-workers regarding the injured worker's behavior prior to the accident. See *Construction Industry Workers' Compensation Group v. Chalue*, 74 P.3d 595 (Nev. 2003), where the court relied on the testimony of the worker and his supervisor to overcome the presumption that impairment caused the injuries. Similarly, the court in *Ward v. Hickory Springs Manufacturing*, 248 S.W.3d 482 (2007), gave "significant weight" to the testimony of the claimant's co-workers that indicated he did not appear to be under the influence. Just as in those cases, Mr. Barron's co-workers had ample opportunity to observe him and his behavior prior to the accident. Testimony was presented at the hearing that Mr. Barron was not behaving unusually, nor did his co-worker or supervisor have any concern that he could perform his job. Because the evidence shows that Mr. Barron's drug use was not the major

contributing cause of his injury, the Labor Commission's Order should be reversed.

II. THE LABOR COMMISSION ERRED BECAUSE THE EVIDENCE SHOWS THAT MR. BARRON'S ASSIGNED WORKING CONDITIONS WERE THE MAJOR CONTRIBUTING CAUSE OF HIS WORK ACCIDENT.

In affirming the ALJ's Order, the Labor Commission stated that Mr. Barron "has not rebutted the presumption that his drug use was the major contributing cause of his injuries". (R., 191) However, this Order is not consistent with the evidence presented at the hearing, and the Commission abused its discretion by affirming the ALJ's Order. The evidence shows that Mr. Barron took a safety lanyard with him, as required by the employer's safety rules, but that "there was no place to tie off to, especially because he was moving between areas in which he was working". (R., 157) The working conditions that Barron was assigned to on the day of the accident clearly operated as the major contributing cause of his fall and severe injuries. The decking on which Barron was walking was "narrow" and "uneven", and he was required to move between areas in which he was working. (R., 157) Further, no safety measures existed to mark an open area in the second floor deck and a tie off was not in place until after Mr. Barron's accident. (R., 195, 133:1 - 6; 137:23 - 138:12)

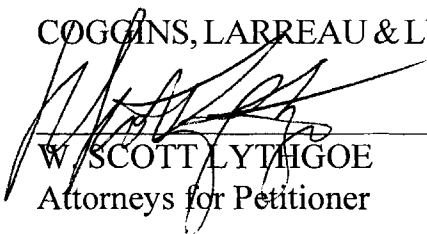
The unprotected edge on the second floor deck, plus the fact that no tie off existed, are the major contributing cause of Mr. Barron's injury. Since the working conditions that Mr. Barron was assigned to were clearly the major contributing cause of his injury, the Commission abused in discretion in holding that Mr. Barron did not rebut the presumption. Consequently, the Commission's order should be reversed.

CONCLUSION

The Commission's Order is not consistent with the evidence presented in this case, therefore the Commission abused its discretion in holding that Mr. Barron had not rebutted his presumption, and erred in affirming the ALJ's Order. Because the facts found in the record rebut the presumption that Mr. Barron's drug use was not the major contributing cause of his work accident, he should have been awarded compensation benefits. Additionally, the Commission erred in holding that Mr. Barron did not show that his cocaine use was not the major contributing cause of his injury. Clearly the major contributing cause was the unprotected decking and the unavailability of a place to tie off his safety lanyard. Based on the above, the Labor Commission's Order should be reversed.

DATED this ____ day of July, 2011.

COGGINS, LARREAU & LYTHGOE, PC



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CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of July, 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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LEGAL ASSISTANT

ADDENDUM

Title/Chapter/Section:

Go To

Search Code by Key Word

Utah

Code

Title

34A

Utah Labor Code

Chapter

2

Workers' Compensation Act

Section

302

Employee's willful misconduct -- Penalty.

34A-2-302. Employee's willful misconduct -- Penalty.

(1) For purposes of this section:

(a) "controlled substance" is as defined in Section **58-37-2**;

(b) "local government employee" is as defined in Section **34-41-101**;

(c) "local governmental entity" is as defined in Section **34-41-101**;

(d) "state institution of higher education" is as defined in Section **34-41-101**; and

(e) "valid prescription" is a prescription, as defined in Section **58-37-2**, that:

(i) is prescribed for a controlled substance for use by the employee for whom it was prescribed; and

(ii) has not been altered or forged.

(2) An employee may not:

(a) remove, displace, damage, destroy, or carry away any safety device or safeguard provided for use in any employment or place of employment;

(b) interfere in any way with the use of a safety device or safeguard described in Subsection (2)(a) by any other person;

(c) interfere with the use of any method or process adopted for the protection of any employee in the employer's employment or place of employment; or

(d) fail or neglect to follow and obey orders and to do every other thing reasonably necessary to protect the life, health, and safety of employees.

(3) Except in case of injury resulting in death:

(a) compensation provided for by this chapter shall be reduced 15% when injury is caused by the willful failure of the employee:

(i) to use safety devices when provided by the employer; or

(ii) to obey any order or reasonable rule adopted by the employer for the safety of the employee; and

(b) except when the employer permitted, encouraged, or had actual knowledge of the conduct described in Subsection (3)(b)(i) through (iii), disability compensation may not be awarded under this chapter or Title 34A, Chapter 3, Utah Occupational Disease Act, to an employee when the major contributing cause of the employee's injury is the employee's:

(i) use of a controlled substance that the employee did not obtain under a valid prescription;

(ii) intentional abuse of a controlled substance that the employee obtained under a valid prescription if the employee uses the controlled substance intentionally:

(A) in excess of prescribed therapeutic amounts; or

(B) in an otherwise abusive manner; or

(iii) intoxication from alcohol with a blood or breath alcohol concentration of .08 grams

or greater as shown by a chemical test.

(4) (a) For purposes of Subsection (3), as shown by a chemical test that conforms to scientifically accepted analytical methods and procedures and includes verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, before the result of the test may be used as a basis for the presumption, it is presumed that the major contributing cause of the employee's injury is the employee's conduct described in Subsections (3)(b)(i) through (iii) if at the time of the injury:

(i) the employee has in the employee's system:

(A) any amount of a controlled substance or its metabolites if the employee did not obtain the controlled substance under a valid prescription; or

(B) a controlled substance the employee obtained under a valid prescription or the metabolites of the controlled substance if the amount in the employee's system is consistent with the employee using the controlled substance intentionally:

(I) in excess of prescribed therapeutic amounts; or

(II) in an otherwise abusive manner;

(ii) the employee has a blood or breath alcohol concentration of .08 grams or greater.

(b) The presumption created under Subsection (4)(a) may be rebutted by evidence showing that:

(i) the chemical test creating the presumption is inaccurate because the employer failed to comply with:

(A) Sections 34-38-4 through 34-38-6; or

(B) if the employer is a local governmental entity or state institution of higher education, Section 34-41-104 and Subsection 34-41-103(5);

(ii) the employee did not engage in the conduct described in Subsections (3)(b)(i) through (iii);

(iii) the test results do not exclude the possibility of passive inhalation of marijuana because the concentration of total urinary cannabinoids is less than 50 nanograms/ml as determined by a test conducted in accordance with:

(A) Sections 34-38-4 through 34-38-6; or

(B) if the employer is a local governmental entity or state institution of higher education, Section 34-41-104 and Subsection 34-41-103(5);

(iv) a competent medical opinion from a physician verifies that the amount in the employee's system of the following does not support a finding that the conduct described in Subsections (3)(b)(i) through (iii) was the major contributing cause of the employee's injury:

(A) any amount of a controlled substance or its metabolites if the employee did not obtain the controlled substance under a valid prescription; or

(B) a controlled substance the employee obtained under a valid prescription or the metabolites of the controlled substance if the amount in the employee's system is consistent with the employee using the controlled substance intentionally:

(I) in excess of prescribed therapeutic amounts; or

(II) in an otherwise abusive manner;

(C) alcohol; or

(D) a combination of Subsections (4)(b)(iii)(A) through (C); or

(v) the conduct described in Subsections (3)(b)(i) through (iii) was not the major contributing cause of the employee's injury.

(c) (i) Except as provided in Subsections (4)(c)(ii) and (iii), if a chemical test that creates the presumption under Subsection (4)(a) is taken at the request of the employer, the

employer shall comply with:

(A) Title 34, Chapter 38, Drug and Alcohol Testing; or
(B) if the employee is a local governmental employee or an employee of a state institution of higher education, Title 34, Chapter 41, Local Governmental Entity Drug-Free Workplace Policies.

(ii) Notwithstanding Section **34-38-13**, the results of a test taken under Title 34, Chapter 38, may be disclosed to the extent necessary to establish or rebut the presumption created under Subsection (4)(a).

(iii) Notwithstanding Section **34-41-103**, the results of a test taken under Title 34, Chapter 41, may be disclosed to the extent necessary to establish or rebut the presumption created under Subsection (4)(a).

(5) If any provision of this section, or the application of any provision of this section to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application.

Amended by Chapter 295, 2000 General Session

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[Next Section \(34A-2-401\) >>](#)

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UTAH LABOR COMMISSION

TYLER BAKER,

Applicant,

v.

**SUPERIOR ROOFING CO., INC. and
INDUSTRIAL INDEMNITY COMPANY,**

Defendants.

ORDER OF REMAND

Case No. 97-0373

Tyler Baker asks the Utah Labor Commission to review the Administrative Law Judge's denial of Mr. Baker's claim for benefits under the Utah Workers' Compensation Act.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Was Mr. Baker's use of illegal substances the major contributing cause of his work accident on January 21 1997?

FINDINGS OF FACT

As material to the issue presented by Mr. Baker's motion for review, the Labor Commission makes the following findings of fact.

On the morning of January 21, 1997, Mr. Baker reported for work at Superior Roofing in Salt Lake County and was assigned to drive a company pickup loaded with roofing materials to a job site in Utah County. Shortly after Mr. Baker set out on this assignment, he called Superior to report that the company truck he was driving had broken down on Interstate 15 near Provo. Superior Roofing dispatched a company mechanic to assist Mr. Baker. At the same time, Mr. Wagner, a supervisor at Superior Roofing, became concerned that because Mr. Baker's truck was broken down the workers at the Utah County job site would not receive the materials they required. Mr. Wagner loaded his company pickup with the necessary materials and also set out on Interstate 15 to the Utah County job site.

As Mr. Wagner drove down the freeway, he came to the location where Mr. Baker's pickup was pulled off to the side of the road. He observed Superior Roofing's mechanic pulling into traffic ahead of him. Then, as Mr. Wagner passed by the site, he saw in his rear view mirror that Mr. Baker was back in his pickup and also was pulling onto the freeway directly behind him.

ORDER OF REMAND
TYLER BAKER
PAGE 2

As Mr. Wagner and Mr. Baker drove south on Interstate 15, road conditions were wet, but not icy. Mr. Wagner observed that traffic on the freeway ahead of him was coming to a stop. He applied his brakes, but could see that Mr. Baker was not slowing behind him. Mr. Wagner tapped on his brakes to alert Mr. Baker that traffic was coming to a stop. Still Mr. Baker did not slow down. Mr. Wagner then turned on his truck's emergency flashers, to no avail. Mr. Baker did not stop and collided with the rear of Mr. Wagner's truck. Mr. Baker now seeks workers' compensation benefits for the injuries he suffered in the collision.

Police investigated the accident, but did not cite Mr. Baker for driving under the influence of drugs or alcohol. He was taken to a local hospital, where he told staff that he had used marijuana and cocaine within the previous 48 hours. A drug test at the hospital produced positive results for cocaine and marijuana, but did not indicate the level of such drugs in Mr. Baker's system. At the evidentiary hearing on Mr. Baker's claim, he testified that he probably had used illegal drugs within 24 hours prior to the accident.

The notes of physicians who treated Mr. Baker immediately after his accident do not report any drug-related impairment. There is no testimony from Superior Roofing personnel that Mr. Baker was impaired in any way on the morning of the accident.

DISCUSSION AND CONCLUSION OF LAW

The Utah Workers' Compensation Act (Title 34A, Chapter 2, Utah Code Ann. 1997; "the Act") establishes a system for compensating workers injured by accidents arising out of and in the course of their employment. In most situations, the workers' compensation system is not concerned with fault. Instead, an injured worker is entitled to the benefits provided by the Act regardless of the cause of the accident. However, there are some limited exceptions to the "no fault" principle of the workers' compensation system. This case presents one such exception, found in §34A-2-302(2)(b) of the Act:

- (b) . . . disability compensation may not be awarded under this chapter . . . to an employee when **the major contributing cause** of the employee's injury is the employee's:
- (i) use of illegal substances;
 - (ii) intentional abuse of drugs in excess of prescribed therapeutic amounts; or
 - (iii) intoxication from alcohol with a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test. (Emphasis added.)

Thus, by virtue of §302(2)(b) of the Act, Superior Roofing is relieved of its obligation to provide disability compensation to Mr. Baker if the evidence establishes that his use of illegal substances is "the major contributing cause" of his accident on January 21, 1997.

**ORDER OF REMAND
TYLER BAKER
PAGE 3**

The Commission notes that Mr. Baker admits using drugs within 24 hours of the accident and that he tested positive for illegal substances after the accident. At first blush, these facts suggest that Mr. Baker's use of drugs caused the accident. However, other facts cast doubt on this hypothesis. The record does not establish the extent or precise timing of drug use. When Mr. Baker reported for work on the morning of January 21, 1997, Superior Roofing deemed him fit to drive a company truck to deliver materials to the Utah County job site. Later, after Mr. Baker's company truck broke down, Superior Roofing's mechanic had further opportunity to observe Mr. Baker. There is no report that the mechanic observed any impairment. Apparently, the mechanic permitted Mr. Baker to resume operation of the pickup truck. Then, after the collision in question, the police officers inspecting the accident did not cite Mr. Baker for impaired driving. Finally, there is no medical evidence that Mr. Baker was impaired.

Drugs and alcohol endangers not only those workers who abuse such substances, but also endangers individuals who come into contact with drug or alcohol impaired individuals. Nevertheless, under the specific provisions of §34A-2-302(2)(b) of the Utah Workers' Compensation Act, compensation may only be denied when use of an illegal substance is proved to be the major cause of the worker's injury.

In Mr. Baker's case, the evidence only establishes that he had used illegal substances some time during the 24 hours prior to his accident. The evidence does not establish that his drug use was the major cause of the accident. Consequently, Superior Roofing may not avail itself of the defense to payment of compensation provided by §34A-2-302(2)(b) of the Act. This matter will be remanded to the ALJ to complete the adjudication of Mr. Baker's claim, including determination of the amount of disability benefits compensation due Mr. Baker.

ORDER

The Commission reverses the ALJ's determination that §34A-2-302(4)(b) of the Act bars Mr. Baker's claim for disability compensation. The Commission remands this matter to the ALJ for further proceedings consistent with this decision. It is so ordered.

Dated this 20th day of February, 1998.

R. Lee Ellertson
Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

JAMES BARRON;
Petitioner,

vs.

HOGAN & ASSOCIATES
CONSTRUCTION; NEW HAMPSHIRE
INSURANCE COMPANY,
Respondents.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No. 09-1027

Judge Deidre Marlowe

Hearing: September 16, 2010

Appearances:

Scott Lythgoe for the Petitioner

Bret Gardner for the Respondents

STATEMENT OF THE CASE

James Barron filed an application for hearing on December 14, 2009 alleging an injury date of February 25, 2009 and requesting permanent partial disability compensation.

On April 5, 2010 Mr. Barron filed an amended application to include a claim for medical expenses and recommended medical care.

The Respondents filed an answer on January 18, 2010 admitting that Petitioner suffered injuries in the course and scope of his employment, however they defend on the grounds that the Petitioner was using cocaine at the time of the accident and should be denied compensation under U.C.A. 34A-2-302, or alternatively pay it at 15% reduced rate due to the Petitioner's failure to comply with safety rules. Respondents do not otherwise dispute the compensability of the claim and will continue to pay related medical bills.

FINDINGS OF FACT

Employment and Compensation

James Barron (hereinafter "Petitioner") worked for Hogan & Associates Construction as a welder and a connector of structural iron. The parties stipulated at the hearing that the Petitioner earned \$17.00 an hour and worked 31.15 hours per week, giving him a compensation rate of \$352.00 per week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

James Barron, Case No. 09-1027

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Accident

On February 25, 2009 the Petitioner was working for Hogan at Box Elder High School. He had been working on the site for about 30 days. He was working to lay down a second story deck over a structure of steel beams. Upon coming to the work site that morning, the Petitioner and others met with Brady Parker, the foreman, to learn their assignments for the day. The Petitioner was assigned to install a temporary safety handrail on the second level on top of the deck.

Testimony from Mr. Parker showed that the deck was 14'3" high. The Petitioner got his equipment and then got a ladder to climb up to the deck. Exhibits B-F are pictures of the work area. The rail was already made the Petitioner started getting welding leads ready in order to affix the handrail to the deck. The Petitioner and another employee had been welding the railing in place for awhile when the foreman came and asked the Petitioner to put in a frame for a drain opening.

The Petitioner needed a torch to cut a hole in the deck where the frame would go, which was shown as an area in front of the cinder block wall located to the right in Exhibit D. He went to get the torch, which was located more toward the back of the structure. As shown in Exhibit D, the Petitioner had a somewhat narrow area of uneven decking in which to walk on between the two points. The Petitioner reached the torch and started unrolling its hose while walking backward. As he was doing so, he fell through the decking. The hose hanging through the decking is where the Petitioner fell. (The yellow safety tape shown in Exhibit D was not up at the time.)

The employees at Hogan had safety lanyards and were required to use them. The Petitioner readily admitted that meetings were held regarding their use. Although the Petitioner had taken a 6 foot safety lanyard with him when he went up to the deck, he was not tied off at the time of the fall, because there was no place to tie off to, especially because he was moving between areas in which he was working.

Medical Treatment

In the fall the Petitioner experienced severe injuries, including fracture at C7, T8 burst fracture, T12 burst fracture, transverse process fractures at L2 and L5, comminuted fractures of the right radial and ulnar heads, complex fracture of the right elbow, left wrist intraarticular radial fracture, liver laceration, right sacral and pubic rami fractures, and a possible intracranial bleed. He was taken to an emergency room in Brigham City and from there was life flighted to Ogden Regional Hospital. Surgeries and extended follow up care were necessary to treat the injuries. ME Tab 13 contains the hospitalization records.

Dr. Joel Dall evaluated the Petitioner on May 17, 2010. He opined that the Petitioner reached maximum medical improvement from the industrial injuries on July 15, 2009. ME p. 109. He has a 40% whole person impairment. ME p. 110. As the Petitioner was taking opiates

FINDINGS OF FACT AND CONCLUSIONS OF LAW

James Barron, Case No. 09-1027

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prior to his accident, and needed no greater dose subsequent to the accident, he needs no medications as a result of his fall. ME p. 111. Flexeril is reasonably necessitated by the accident.

The medical history is significant for lumbar surgeries in 2001. The Petitioner was prescribed opiates for chronic pain associated with these surgeries and according to his testimony was taking Oxycontin at the time of the accident.

Lab Tests

On the day of the accident the Petitioner was tested for drug use and the report indicates he was positive for cocaine. The testing method used was gas chromatography mass spectroscopy, and there is no evidence of irregularities in the identification, collection or testing of the sample taken from the Petitioner at Ogden Regional. ME p. 166.

On the witness stand the Petitioner admitted he had shared a quarter gram of cocaine two days prior to the accident with a friend. He indicated it gave him a high for about an hour, and that he did not feel its effects thereafter, including on the morning on the accident.

On page 88 of the medical exhibit, Matthew Slawson Ph.D. at the Center for Human Toxicology at the University of Utah provides a letter dated April 13, 2010 indicating he had reviewed the Petitioner's drug testing result. He concluded that because the concentration of benzoylecgonine in the urine was relatively high, three possibilities were likely: 1) that the Petitioner had used the cocaine more recently than 48 hours prior to the test; 2) the amount of cocaine ingested was higher than admitted by the Petitioner ($\frac{1}{2}$ of a quarter of a gram); and 3) the individual is a chronic cocaine user, which could result in a longer detection period for cocaine use.

CONCLUSIONS OF LAW

1. Causation

Utah Code Annotated § 34A-2-401 provides that an employee who is injured "by accident arising out of and in the course of the employee's employment" can receive benefits.

In Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986), the Utah Supreme Court adopted a two-part test causation analysis. The first component deals with "legal causation" while the second addresses "medical causation."

There is no dispute that the Petitioner suffered severe injuries in the February 25, 2009 accident, arising from the course and scope of his employment with Hogan & Associates Construction. Therefore he meets causation requirements.

2. Temporary Total and Permanent Partial Compensation

The Respondents argue that the Petitioner is not entitled to indemnity benefits because he was using cocaine at the time of the industrial accident.

Utah Code Annotated 34A-2-302 provides:

(3)(b) [E]xcept when the employer permitted, encouraged, or had actual knowledge of the conduct . . . disability compensation may not be awarded under this chapter . . . to an employee when the major contributing cause of the employee's injury is the employee's:

(i) use of a controlled substance that the employee did not obtain under a valid prescription;

.....

(4)(a) For purposes of Subsection (3), as shown by a chemical test that conforms to scientifically accepted analytical methods and procedures and includes verification or confirmation of any positive test result by gas chromatograph . . . or other comparably reliable analytical method, before the result of the test may be used as a basis for the presumption, it is presumed that the major contributing cause of the employee's injury is the employee's conduct described . . . if at the time of the injury

(i) the employee has in the employee's system:

(A) any amount of a controlled substance or its metabolites if the employee did not obtain the controlled substance under a valid prescription

.....

The preponderance of the evidence shows that an acceptable method of drug testing was used and the positive result of cocaine was confirmed in the Petitioner's body at the time of his accident on February 25, 2009. Therefore the Respondents are entitled to the presumption that cocaine was the major contributing cause of the Petitioner's injury. The question then arises as to whether the Petitioner can successfully rebut the presumption.

UCA 34A-2-302(3) further provides:

(b) the presumption . . . may be rebutted by evidence showing that:

(i) [the testing is inaccurate because the employer failed to comply with statutory identification and collection requirements]

(ii) the employee did not engage in the conduct described . . .

.....

(iv) a competent medical opinion from a physician verifies that the amount in the employee's system of the following does not support a finding that the conduct described . . . was the major contributing cause of the employee's injury:

(A) any amount of a controlled substance or its metabolites if the employee did not obtain the controlled substance under a valid prescription . . .

(v) the conduct described . . . was not the major contributing cause of the injury.

There is no evidence to support that the testing was inaccurate. The Petitioner admits he engaged in cocaine use. There is no evidence from a physician to rebut the presumption. There is no showing that some outside force caused the Petitioner to fall. I conclude the Petitioner has not rebutted the presumption.

Therefore the Petitioner is not entitled to compensation benefits for his otherwise accident on February 25, 2009.

3. Medical Expenses

Under U.C.A. § 34A-2-418 the employer or the insurance carrier shall pay reasonable sums for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

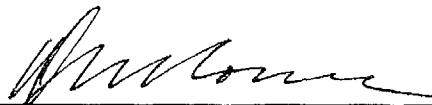
The Respondents are liable for all medical costs associated with the industrial accident.

ORDER

IT IS ORDERED that Hogan & Associates Construction and New Hampshire Insurance Company shall pay all medical expenses necessary to treat James Barron's industrial injuries according to Utah Code § 34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, and travel allowances under Utah Administrative Code Rule 612-2-20 plus interest at eight percent (8%) per annum.

IT IS FURTHER ORDERED that the remaining claims are dismissed with prejudice.

DATED this 30th day of December 2010.



Deidre Marlowe
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

James Barron vs. Hogan & Associates Construction and/or New Hampshire Insurance Company
Case No. 09-1027

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER was mailed by prepaid U.S. postage on December 30,
2010, to the persons/parties at the following addresses:

James Barron
1591 Eccles #2
Ogden UT 84401


Hogan & Associates Construction
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Centerville UT 84014

New Hampshire Insurance Company
Corp Service Co Designated Agent
2180 S 1300 E Ste 650
Salt Lake City UT 84106

Scott Lythgoe Esq
289 24th St Ste 150
Ogden UT 84401

Bret Gardner Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

UTAH LABOR COMMISSION



Clerk
Adjudication Division

UTAH LABOR COMMISSION

JAMES BARRON,

Petitioner,

vs.

HOGAN & ASSOCIATES
CONSTRUCTION and NEW
HAMPSHIRE INSURANCE COMPANY,

Respondents.

ORDER AFFIRMING
ALJ'S DECISION

Case No. 09-1027

James Barron asks the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of Mr. Barron's claim for disability compensation under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUES PRESENTED

The Utah Workers' Compensation Act provides that when illegal drugs are found in the system of an injured worker, drug use is presumed to be the major contributing cause of the worker's injury and he or she is not entitled to disability compensation. The injured worker can then rebut the presumption by showing, among other things, that drug use was not the major cause of his injury.

Mr. Barron claims workers' compensation benefits for injuries he sustained while working for Hogan & Associates Construction ("Hogan") when he fell from the second-story of a building on February 25, 2009. Mr. Barron had cocaine in his system at the time of the accident. Hogan does not dispute that Mr. Barron's injuries are work-related, but contends that Mr. Barron is not entitled to disability compensation under the presumption that his cocaine use was the major contributing cause of his injury.

Judge Marlowe held an evidentiary hearing and determined that Mr. Barron was not entitled to disability compensation because his cocaine use was presumed to be the major contributing cause of his injuries and he had not rebutted the presumption by showing otherwise. Mr. Barron challenges Judge Marlowe's decision by arguing that his drug use did not cause his injuries because he was not impaired at the time of the accident. Mr. Barron asserts that the accident occurred because Hogan did not provide proper safety measures, not because of his drug use.

ORDER AFFIRMING ALJ'S DECISION
JAMES BARRON
PAGE 2 OF 4

FINDINGS OF FACT

The Commission finds the following facts material to Mr. Barron's motion for review. On February 25, 2009, Hogan and Mr. Barron were working on constructing a multi-level building at Box Elder High School. Hogan had been at the site for about a month, and Mr. Barron was familiar with the condition and circumstances of the construction area, including the second story where he was assigned to work.

Mr. Barron was asked to cut a hole for a drain with a blowtorch, so he was moving back and forth over the temporary decking of the second story to retrieve and unroll a hose for the blowtorch. As he was unrolling the hose, Mr. Barron was walking backwards through a narrow and uneven area when he fell through the decking to the ground. Mr. Barron did not have his safety lanyard attached when he fell because there was no place to attach it while he was moving back and forth between the different areas on the second story.

Mr. Barron was taken to the hospital to treat injuries to his spine, arms, liver and a possible intracranial bleed. At the hospital, Mr. Barron tested positive for cocaine. Mr. Barron admitted to sharing a quarter gram of cocaine with a friend two days before the accident, but denied that he was impaired by its effects the day of the accident. However, Mr. Barron's assertion was not consistent with the drug test results, which indicated use of a greater amount, more recent use, or more frequent use of cocaine than he admitted.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-302 of the Utah Workers' Compensation Act prevents an award of disability compensation to an injured worker when the major contributing cause of the injury is use of a controlled substance without a valid prescription. The Act also provides that use of a controlled substance is presumed to be the major contributing cause of the injury if the injured worker has any amount of the controlled substance in his system at the time of the accident. However, this presumption can be rebutted by evidence that, among other things, use of the controlled substance was not the major cause of the injury.

Mr. Barron contends that his drug use was not the major contributing cause of his injury because there is no evidence that he was impaired at the time of the accident. Mr. Barron argues that in a previous decision, the Commission awarded disability compensation to an injured worker who had illegal drugs in his system because there was no evidence that the worker was impaired at the time of the accident, and therefore no evidence that drug use caused the injury in question. However, the Commission's previous decision in question was decided under the terms of §302 before it was amended in 2000. Under the 2000 revision of §302, Mr. Barron's drug use is presumed to be the major contributing cause of his injuries once it is established that he had drugs in his system when the accident occurred.

ORDER AFFIRMING ALJ'S DECISION
JAMES BARRON
PAGE 3 OF 4

Mr. Barron attempts to rebut the presumption by arguing that Hogan's failure to provide adequate safety measures on the second story of the building where he was working caused his injuries, not his drug use. Mr. Barron was familiar with the precarious and inherently dangerous circumstances of the construction site where the accident occurred. The evidence shows that it was Mr. Barron's own actions that caused his fall rather than some other force causing him to fall through the second-story decking. Thus, Mr. Barron has not rebutted the presumption that his drug use was the major contributing cause of his injuries. The Commission therefore concurs with Judge Marlowe's conclusion that Mr. Barron is not entitled to disability compensation.

ORDER

The Commission affirms Judge Marlowe's decision of December 30, 2010, in this matter. It is so ordered.

Dated this 15th day of March, 2011.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER AFFIRMING ALJ'S DECISION
JAMES BARRON
PAGE 4 OF 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of James Barron, Case No. 09-1027, was mailed first class postage prepaid this 15th day of March, 2011, to the following:

James Barron
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Ogden UT 84401

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Salt Lake City UT 84106

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Sara Danielson
Utah Labor Commission