

2011

# James Barron v. Utah Labor Commission, Hogan & Assoc. Construction, New Hampshire Insurance Co. : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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JAMES BARRON,	:	Court of Appeals
	:	Case No.: <b>2011-0313</b>
Petitioner/Appellant,	:	
	:	Priority 7
vs.	:	
UTAH LABOR COMMISSION,	:	
HOGAN & ASSOC. CONSTRUCTION,	:	
and/or NEW HAMPSHIRE	:	Labor Commission No.: 09-1027
INSURANCE CO.	:	
	:	
Respondents/Appellees.	:	

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**BRIEF OF APPELLEE**  
**HOGAN & ASSOC. CONSTRUCTION and NEW HAMPSHIRE INS. CO.**

---

Appeal from the Utah Labor Commission

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**FILED**  
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**APPELLEES RESPECTFULLY REQUEST ORAL ARGUMENT**

**AND THAT THIS CASE BE REPORTED.**

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Appeal from the Utah Labor Commission

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## ISSUES PRESENTED AND STANDARDS OF REVIEW

**Issue 1:** Did the Utah Labor Commission err in finding that Mr. Barron has not rebutted the presumption that his drug use was the major contributing cause of his accident and injuries on February 25, 2009 while working for Hogan Construction?

### Standard of Review

To successfully challenge findings of fact made in an administrative proceeding, the party seeking to upset the findings must show that the findings are not supported by substantial evidence when viewed in light of the whole record before the court. See Intermountain Health Care v. Board of Rev., 839 P.2d 841 (Utah Ct. App. 1992).

**Issue 2:** Did Mr. Barron successfully marshal the evidence challenging the Labor Commission's findings of fact that the major contributing case of his accident was his use of drugs?

### Standard of Review

In order "to successfully challenge a trial court's findings of fact on appeal," an appellant must list all the evidence supporting the findings and then demonstrate that the evidence is inadequate to sustain the findings, even when viewed in the light most favorable to the court below. See Valcarce v. Fitzgerald, 961 P.2d 305, 314 (Utah 1998). An appellant may not merely present selected evidence favorable to his or her position

without presenting any of the evidence supporting the trial court's findings. See Whitear v. Labor Commission, 973 P.2d 982, 985 (Utah Ct. App. 1998). Utah's Courts have held:

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

## DETERMINATIVE LAW

The determinative law is Utah Code Ann. § 34A-2-302 (2009) which provides in relevant part:

(3)(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;

. . .

(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) 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 . . .

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

...

(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

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

Utah Code Ann. § 34A-2-302 (2009).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This case presents the question of whether a worker is entitled to receive workers compensation benefits disability benefits under the Utah Worker's Compensation Act.

Mr. Barron sustained an industrial injury while working for Hogan & Associates ("Hogan") on February 25, 2009. Respondents argued that Mr. Barron was not entitled to any worker's compensation disability compensation since Mr. Barron tested positive for cocaine immediately after the accident. Hogan and its worker's compensation carrier, New Hampshire Insurance Company, argued that Mr. Barron has not rebutted the presumption that his drug use was the major contributing cause of his accident. The Administrative Law Judge and Labor Commissioner have both agreed with Hogan. Mr. Barron seeks review of the decision denying him worker's compensation disability benefits.

### Course of the Proceedings

1. On December 14, 2009, James Barron, (hereinafter, "Mr. Barron,") filed an Application for Hearing with the Labor Commission seeking worker's compensation disability benefits arising from an industrial accident on February 25, 2009, while working for Hogan & Associates Construction ("Hogan") as a welder and connector of structural iron. (R., 1-87). Mr. Barron's Application for Hearing sought permanent partial disability compensation. (R., 2).
2. On January 18, 2010, Respondents, Hogan & Assoc. Construction and New Hampshire Insurance Company, the employers worker's compensation insurance carrier, (collectively, "Respondents") filed an Answer to the Application for Hearing admitting that Mr. Barron suffered a work related accident, but claimed that disability benefits were not owed to him under the Utah Worker's Compensation Act since Mr. Barron tested positive for cocaine use at the time of the accident. . (R., 91-95).
3. On April 15, 2010, Mr. Barron filed an Amended Application for Hearing to include a claim for medical expenses and recommended medical care. (R., 102-122).
4. On September 16, 2010, a evidentiary hearing was held before Administrative Law Judge Deidre Marlowe. (R., 195).

5. On December 30, 2010, the ALJ issued her Findings of Fact, Conclusions of Law and Order denying compensation benefits and awarding medical benefits to Mr. Barron. (R., 156-161).
6. On January 31, 2011, Mr. Barron filed a Motion for Review of the ALJ's Order. (R., 162-168).
7. On January 31, 2011, Respondents filed a Response to Motion for Review. (169-182).
8. On March 15, 2011, the Labor Commission entered its Order Affirming ALJ's Decision. The Commission held that Mr. Barron did not successfully rebut the presumption that his drug use was the major contributing cause of his injuries. (R., 189-192).
9. On April 14, 2011, Mr. Barron filed a Petition for Review to the Court of Appeals.

### Statement of Facts

1. On February 25, 2009, Mr. Barron was working for Hogan at Box Elder High School as a welder and connector of structural iron. (R., 195 at 14-15). He was helping to lay down a second story deck. The second story deck was 14'3" from the ground below. Mr. Barron climbed a ladder to reach the deck. (R., 195 at 160-161 ).
2. Mr. Barron needed a torch to cut a hole in the deck. He went to retrieve the torch which was located on the deck. Mr. Barron grabbed the torch and began walking backwards, unrolling the hose. As he did so, Mr. Barron walked backwards off of the leading edge of the deck and fell to the ground below. (R., 195 at 21-22).
3. On the day of the accident, Mr. Barron was tested for drug use which was **positive** for cocaine use. The positive test result was then confirmed by gas chromatography mass spectroscopy. (R., 194, MRE, 166.)<sup>1</sup>
4. On December 14, 2009, Mr. Barron filed an Application for Hearing with the Labor Commission seeking worker's compensation indemnity benefits arising from the industrial accident on February 25, 2009 while working Hogan. (R., 1-87).
5. At the hearing, Mr. Barron admitted to have used cocaine (a quarter gram) two days prior to the accident. (R., 195 at 78-80).

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<sup>1</sup> MRE refers to the Medical Records Exhibit admitted at Exhibit A and noted in the Record as R., 194.

6. Mr. Barron attempted to present testimony at hearing through a co-worker, Mr. Riley Clark Beeson, to establish that Mr. Barron was not acting strangely or impaired on the date of injury. However, Mr. Beeson himself tested positive for marijuana with Hogan on March 19, 2010, and was discharged. His testimony was biased towards Mr. Barron and was not objective. (R, 195 at 133, 142).
7. In addition, there was testimony presented by Hogan employee, Brady Parker (welding foreman) explaining that on the date of the accident, Mr. Barron arrived at work with a red nose and was sniffing. (R., 195 at 156).
8. There is also no dispute that Mr. Barron was briefed prior to the accident regarding the necessity of wearing a safety harness, watching his step and being cautious around the edges. (R., 64-74). In fact, Exhibits I and J were admitted at hearing noting that Mr. Barron had signed off on Weekly Safety Meetings on February 3, 2009 and February 20, 2008 [sic, 2009]. (R., 151-154) where he was briefed regarding the necessity of being cautious and using a harness. **Mr. Barron ignored this briefing on the date of the accident and failed to adhere to Hogan safety guidelines by not wearing a harness and failing to watch his step while working unsecured at a height of 14'3".**
9. In addition, evidence was presented at hearing by Respondents noting that Hogan was not cited for any OSHA violation as a result of the accident. (R., 195 at 161-162, 179). Mr. Andy Hogan, the Safety Director for Hogan, testified that he

participated in the OSHA investigation of the accident. Mr. Hogan reviewed several of the accident site photographs which were previously entered into evidence by Mr. Barron and explained the fact that Mr. Barron's fall from the second level to the ground below took place at a height of 14 feet 3 inches. (R., 195 at 173-177). He explained that Code of Federal Regulation 1926.760 provides that when any employee is engaged in steel erection activity on a service with an unprotected edge of more than 15 feet above a lower level, that protection, including safety net systems, and a personal fall risk system, or other positioning device systems must be implemented. Since the second level to the ground floor of the high school, upon which Mr. James Barron was working, measured a distance of 14.3 inches, there was no need, according to federal regulation, for safety protection to be implemented by Hogan for work on the second floor at the time of the accident. (R., 195 at 178-179).

10. On April 13 2010, Mathew Slawson PhD., at the Center for Human Toxicology, opined that he had reviewed Mr. Barron's drug test results. He stated that because the concentration of benzoylecgonine in Mr. Barron's drug tested urine was relatively high, three possibilities were likely: 1) the Mr. Barron had used cocaine more recently than 48 hours prior to the test; 2) the amount of cocaine ingested by Mr. Barron was more than he admitted; and 3) the Mr. Barron is a chronic cocaine

user, which could result in a longer detection period for cocaine use. (R., 194, MRE, at 88 ).

11. On December 30, 2010, the Administrative Law Judge issued her Findings of Fact, Conclusions of Law and Order. (R., 156-161). The ALJ opined that an acceptable method of drug testing was used and the positive result of cocaine was confirmed in Mr. Barron's body at the time of his February 25, 2009 accident. On this basis, the ALJ held that Respondents are entitled to a presumption that Mr. Barron's cocaine use was the major contributing cause of Mr. Barron's injury. The ALJ further opined that Mr. Barron did not provide sufficient evidence to rebut this presumption. Accordingly, the ALJ denied disability compensation benefits to Mr. Barron. (R., 156-161 ). The ALJ did award medical benefits to Mr. Barron.
12. On January 31, 2011, Mr. Barron filed a Motion for Review of the ALJ's Order. (162-168).
13. On February 22, 2011, Respondents filed a Response to Motion for Review. (169-182).
14. On March 15, 2011, the Labor Commission entered its Order Affirming ALJ's Decision. The Commission held that Mr. Barron did not successfully rebut the presumption that his drug use was the major contributing cause of his injuries. (R., 189-192).
15. Mr. Barron subsequently filed a Petition for Review to the Court of Appeals.

## **SUMMARY OF THE ARGUMENT**

Utah Code Ann. § 34A-2-302 (2009) limits eligibility for indemnity compensation to injured workers when alcohol or drug abuse is involved in an industrial accident. The Act denies indemnity compensation to workers when the major contributing cause of the employee's injury is the employee's use of a controlled substance that the employee did not obtain under a valid prescription so long as the drug testing is performed by an acceptable method. Once this is established, as is the case here, Utah law provides that the worker may rebut the presumption that the drug usage was the major contributing cause of the accident. If the presumption is not rebutted, the worker is denied workers' compensation indemnity benefits.

Medical evidence establishes that Mr. Barron's use of cocaine was the major contributing cause of the accident. Mr. Barron has failed to successfully rebut the presumption that his cocaine use prior to the accident of February 25, 2009, was not the major contributing cause for the accident. Mr. Barron fails to show that the drug test performed by Respondents failed to comply with statutory identification and collection requirements. Mr. Barron admittedly used cocaine prior to the accident - he cannot argue that his cocaine use did not give rise to the presumption that his drug use caused the accident. Mr. Barron failed to provide any medical evidence to suggest that his cocaine use was nominal, or that his drug use was in any way insufficient to find that the cocaine found in his system immediately after the accident was not the major contributing cause

for the accident. Mr. Barron's self-serving argument - that he was not impaired by cocaine at the time of the accident - or that additional protections should have been provided to him - are insufficient to rebut the presumption that Mr. Barron's cocaine use caused him to back off the edge of the second floor deck and fall to the ground below.

In addition, Mr. Barron has failed to meet his duty to marshal the evidence in support of the ALJ and Commission's findings and then ferret out the fatal flaw in that evidence.

Given this, the Labor Commission's Order Affirming ALJ's Decision should be affirmed.

## ARGUMENT

### POINT 1: THE COMMISSION CORRECTLY DETERMINED THAT MR. BARRON IS NOT ENTITLED TO INDEMNITY COMPENSATION.

#### A. *The Commission Properly Determined that Cocaine Was the “Major Contributing Cause” of the February 25, 2009 Accident.*

Utah Code Ann. § 34A-2-302 (2009) (the Worker’s Compensation Act), the law applicable on the date of Mr. Barron’s accident, limits eligibility for disability compensation to injured workers when alcohol or drug abuse is involved in an industrial accident.<sup>2</sup> The Act denies disability compensation to workers, “when the major contributing cause of the employee's injury is the employee's use of a controlled substance that the employee did not obtain under a valid prescription” so long as the drug testing is performed by an acceptable method.

Section 34A-2-302 (2009) of the Act provides in relevant part:

(3)(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**

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<sup>2</sup> Disability compensation has been defined as temporary total disability, temporary partial disability, permanent partial disability and permanent total disability compensation.

In addition, unlike the general rule in Utah where the court applies the substantive law in effect when the action was initiated, it is well settled that in workers’ compensation claims, the law existing *at the time of injury* applies. See Marshall v. Industrial Comm’n, 704 P.2d 581 (Utah 1985); Brown & Root Industrial Service v. Industrial Comm’n, 947 P.2d 671 (Utah 1997).

**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;**

...

Utah Code Ann. § 34A-2-302(3)(b) (2009) (emphasis added).

Section 34A-2-302(4)(a) addresses the acceptable method of drug testing. This section provides:

(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 . . .

Utah Code Ann. § 34A-2-302(4)(a) (2009).

The Administrative Law Judge and Commission correctly determined that cocaine was the, “major contributing cause” of the February 25, 2009 accident. The ALJ opined that, “the preponderance of evidence shows that an acceptable method of drug testing was used and the positive result was confirmed in Mr. Barron's body at the time of his

accident on February 25, 2009.” (R., 159). In addition, the Commission found that drug use was the major contributing cause of the accident. (R., 190-191). We agree.

On April 13 2010, Matthew Slawson PhD., at the Center for Human Toxicology at the University of Utah, opined that he had reviewed Mr. Barron's drug testing results. He stated that Mr. Barron tested positive for 493 ng/ML of benzoylecgonine, a metabolite of cocaine which was over 3 times the positive cut off of 150 ng/ML mandated by most workplace drug testing programs and for this particular drug test. (R., 194, MRE, 88). Moreover, the confirmation testing method used was one that conformed with Utah law – gas chromatography, gas chromatography-mass spectroscopy, (R, 194, MRE, 166-67). On this basis, the ALJ and the Labor Commission correctly presumed that cocaine was the “major contributing cause” of the February 25, 2009 accident.<sup>3</sup>

***B. Mr. Barron did not successfully rebut the presumption that cocaine was the major contributing cause of the accident.***

Under 2009 law, the presumption that drug use is a major contributing cause of injury under Utah Code Ann. § 34A-2-302(4) is rebuttable. Respondents submit that the ALJ and the Labor Commission correctly found that Mr. Barron did not successfully rebut this presumption at the hearing.

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<sup>3</sup> In any event, Mr. Barron admitted at the hearing to have used cocaine two days prior to the accident. (R., 195 at 78-80).

Utah Code Ann. § 34A-2-302(4)(b) provides:

(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 . . .

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

. . .

(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 ...

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

Utah Code Ann. § 34A-2-302 (2009).

Respondents address each of these factors in turn:

(1) Mr. Barron did not Show that The Testing was Inaccurate because the Employer Failed to Comply with Statutory Identification and Collection Requirements.

Utah Code Ann. § 34A-2-303(4)(b)(i) provides that the presumption may be rebutted if the Mr. Barron shows that the employer failed to comply with Sections 34-38-4 through 34-38-6 of the Utah Code. These statutes address the proper collection

and needed confirmation of the drug samples. Here, there is no evidence of any error in the manner of collection of Mr. Barron's drug samples. Mr. Barron fails to provide any argument challenging the presumption on this ground in his Brief.

(2) Mr. Barron Admittedly Used A Controlled Substance

Mr. Barron may also rebut the presumption by showing that he did not engage in the conduct described in Subsections (3)(b)(i) through (iii). Utah Code Ann. 34A-2-302 3)(b)(i) through (iii) provides:

(3)(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.

Utah Code Ann. § 34A-2-302.

Mr. Barron candidly admits to using cocaine – a controlled substance- that he certainly did not obtain under a valid prescription. (R., 195 at 47-51). Moreover, the

chemical testing performed on the date of injury confirms a positive test for cocaine. (R., 194, MRE, 88). Mr. Barron has failed to rebut the presumption under this subsection in his Brief.

(3) Mr. Barron has Not Provided Supporting Documentation From a Physician Showing that the Amount of Drugs in His System Was Insufficient to Support a Finding that Cocaine Was the Major Contributing Cause of His Injury.

Mr. Barron may also rebut the presumption by showing that there is, “a competent medical opinion from a physician verif[ying] that the amount of cocaine in his 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 his injury: (A) any amount of a controlled substance or its metabolites if the employee did not obtain the controlled substance under a valid prescription”. . .

Again, Mr. Barron has failed to rebut this presumption. He has not provided any medical documentation from a **doctor** showing that the amount of cocaine in his system at the time of the accident was insufficient to support a finding that cocaine was the major contributing cause of his accident. Rather, Mr. Barron continues to argue that nothing contained in the record shows that his drug use was the major contributing cause of the accident. Mr. Barron uses an incorrect standard. Medical evidence is required to rebut the presumption under this factor, not simply his own bias non-medical opinion. Mr. Barron has failed to supply sufficient medical evidence to satisfy this element which is required to properly rebut the presumption.

(4). Mr. Barron Fails to Show that His Use of Cocaine Was Not the Major Contributing Cause of His Accident.

Finally, Mr. Barron may rebut the presumption by showing that, “the conduct described in Subsections (3)(b)(i) through (iii) [ie., the use of a controlled substance] was not the major contributing cause of the employee's injury.” As correctly noted by the ALJ and the Labor Commission in its Order Affirming ALJ’s Decision, Mr. Barron has failed to meet this rebuttable presumption as well. Indeed, the ALJ found that “there is no evidence that some outside force caused Mr. Barron to fall.” Moreover, the Commission agreed by stating:

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 the 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.

(R., 191).

We again agree with the ALJ and the Labor Commission.

Mr. Barron cites to Tyler Baker v. Superior Roofing, 97-0373 (2/20/98) (a Labor Commission Order on Remand), in an attempt to support his position that cocaine use was not the major contributing cause of the accident. He argues that there is a lack of

evidence showing that drug use was the major cause of his fall. He argues that there is no evidence that he was acting unusually or unfit to perform his work and no evidence of any impairment at the time of the accident. Mr. Barron also points to testimony from a co-worker (Mr. Beeson) who testified that Mr. Barron was not acting strangely or impaired immediately prior to the accident. However, Mr. Barron fails to recognize that Mr. Beeson's testimony was limited to his own subjective judgement and in fact, it was admitted by Mr. Beeson that he himself tested positive for marijuana with Hogan on March 19, 2010, was subsequently terminated by Hogan. Therefore, the testimony of Mr. Barron's only corroborating witness is, at best, subjective and highly suspect and should be given little, if any, weight. In any event, there was testimony presented by Hogan employee, Brady Parker explaining that on the date of the accident, Mr. Barron arrived at work with a red nose and was sniffing. Evidence was also presented by Respondents that Mr. Barron was briefed prior to the accident regarding wearing a safety harness, watching his step and being cautious around the edges.(R., 151-154) . Mr. Barron failed to adhere to the company safety guidelines by electing not to wear a safety harness and by failing to watch his step while working unsecured at a height of 14'3".

In addition, the case of Tyler Baker v. Superior Roofing, *Case No. 97-0373*, cited by Mr. Barron, a Labor Commission decision, (attached to his Brief) was decided prior to the 2000 revision of §302. Under the 2000 revision, 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. Accordingly, the Baker case is inapposite to the present situation. In any event, this case is not of any precedential value in this court.

Mr. Barron further argues that the accident was caused by his miscalculation and the fact that he was working near an unprotected ledge (which he argues was caused by the employer's failure to follow applicable law), and not by his own cocaine use.

However, evidence and argument was presented at the hearing showing that when one is impaired by cocaine they are less likely to pay attention and have dulled senses, making them less aware of their surroundings and inherent dangers. Mr. Barron cannot simply rebut the presumption by stating that he slipped off the edge of the deck because the employer failed to secure the prevailing ledge. Indeed, there was no requirement under Utah or federal OSHA laws that mandated the employer to secure the ledge.<sup>4</sup> Moreover, evidence was presented that Mr. Barron was briefed prior to the accident regarding the

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<sup>4</sup> Andy Hogan also testified on behalf of Hogan. Mr. Hogan's testimony established that he participated in the OSHA investigation of the accident. Mr. Hogan reviewed several of the accident site photographs which were previously entered into evidence by Mr. Barron and explained the fact that Mr. Barron's fall from the second level to the ground below took place at a height of 14 feet 3 inches. Mr. Hogan also testified that Hogan was not cited by OSHA for any safety violation. He explained that Code of Federal Regulation 1926.760 provides that when any employee is engaged in steel erection activity on a surface with an unprotected edge of more than 15 feet above a lower level, that protection, including safety net systems, and a personal fall risk system, or other positioning device systems must be implemented. Since the second level to the ground floor of the high school, upon which Mr. Barron was working, measured a distance of 14.3 inches, there was no need, according to federal regulation, for safety protection to be implemented at the time of the accident. (R.195 at 172-179).

necessity of wearing a safety harness, watching his step and being cautious around the edges. (R., 151-154). Mr. Barron ignored this briefing and failed to adhere to Hogan safety guidelines by electing not to wear a harness and by failing to watch his step while working unsecured at a height of 14'3".

Mr. Barron further argues that outside forces caused him to fall since the decking was "narrow" and "uneven." (Appellant's Brief, at 13). This is simply incorrect. This is not the type of case, as Mr. Barron would have the Court of Appeals believe, where an outside event was the cause of the accident. Consider the following example: If a sledge hammer falls through the hole of a work site from one floor to the next, striking an injured worker on the head, even though the injured worker may test positive for cocaine, it can be argued that the workers' cocaine use did not cause the sledge hammer to fall through the floor and strike or injure him. Rather under this scenario, it was an outside event that caused the sledge hammer to fall and strike the worker. The workers' drug use was not the major contributing cause of the accident. Moreover, if an employee, intoxicated with alcohol, is struck by a motor vehicle from behind while waiting in a motor vehicle at a stoplight, it could be argued that the injured motorist's use of alcohol was not the major contributing cause of the accident, but rather the negligence of the driver of the second automobile.

In this case, however, there was no evidence to suggest that an outside force caused Mr. Barron to walk backwards off of the leading edge. Simply walking off of the

edge of the second floor, without more evidence, cannot rebut the presumption. This is the very type of accident which occurs when a worker arrives at a job site impaired with cocaine and then attempts to undertake dangerous work at a construction site. In short, Mr. Barron has failed to successfully rebut the presumption that his cocaine use prior to the accident was not the major contributing cause of the accident. Therefore, Mr. Barron's claim for disability compensation should be denied.

**POINT 2: MR. BARRON HAS FAILED TO MARSHALL THE EVIDENCE.**

Mr. Barron has failed to marshal the evidence challenging the Labor Commission's findings of fact that the major contributing cause of his accident was his use of drugs. His failure to properly do so requires that the Court of Appeals affirm the Labor Commission's Order Affirming ALJ's Decision.

Utah appellate courts accord great deference to a trial court's findings of fact because the trial court is "in the best position to assess" the evidence, determine the facts and "gain a sense of the proceeding as a whole." In re R.N.J., 908 P.2d 345, 347 (Utah Ct. App. 1995). Thus, a party challenging the Labor Commission's factual findings has the burden of establishing that those findings are not supported by substantial evidence when viewed in light of the whole record before the court. See Intermountain Health Care v. Board of Rev., 839 P.2d 841 (Utah Ct. App. 1992); Utah Admin. Code 63G-4-403(4)(g); Whitaker v. Labor Commission, 973 P.2d 982, 984 (Utah Ct. App. 1998). Substantial evidence is that quantum and quality of relevant evidence that is adequate to

convince a reasonable mind to support a conclusion. See Mountain Fuel Supply Co. v. Public Service Comm'n, 861 P.2d 414, 428 (Utah 1993). Substantial evidence is more than an scintilla of evidence though less than the weight of evidence. See Commercial Carriers v. Industrial Commission, 888 P.2d 808, 711 (Utah Ct. App. 1994). Although this burden is a heavy one, it is reflective of the fact that appellate courts "do not sit to retry cases submitted on disputed facts." Hoth v. White, 799 P.2d 213, 216 (Utah Ct. App. 1990).

In order "to successfully challenge a trial court's findings of fact on appeal," an appellant must list all the evidence supporting the findings and then demonstrate that the evidence is inadequate to sustain the findings, even when viewed in the light most favorable to the court below. See Valcarce v. Fitzgerald, 961 P.2d 305, 314 (Utah 1998). "The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). An appellant may not merely present selected evidence favorable to his or her position without presenting any of the evidence supporting the trial court's findings. Whitear v. Labor Commission, 973 P.2d 982, 985 (Utah Ct. App. 1998). Utah's Courts have held:

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting

evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City, 818 P.2d at 1315.

When an appellant fails to meet the heavy burden of marshaling the evidence, appellate courts are bound to assume the record supports the trial court's factual findings.

See Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994). In fact, appellate courts have shown no reluctance to affirm when the appellant fails to meet its marshaling burden.

West Valley City, 818 P.2d at 1315.

Mr. Barron has failed to meet his marshaling duty. Mr. Barron fails to list all the evidence supporting the factual findings of the Commission and then demonstrate that the evidence is inadequate to sustain the findings, even when viewed in the light most favorable to the court below. Mr. Barron simply presents that facts that are most favorable to his position arguing that the work conditions that Mr. Barron was assigned to on the date of the accident operated as the major contributing cause of his fall since the decking was narrow and uneven and Mr. Barron was not tied off. These arguments are insufficient to meet Mr. Barron's duty to marshall the evidence. Indeed, Mr. Barron has not presented in a comprehensive and fastidious order, "every scrap of competent evidence" introduced at the hearing which **supports** the very findings the he now resists. Moreover, Mr. Barron fails to identify the "fatal flaw" in the evidence warranting reversal

of the ALJ and the Labor Commission's findings. On this independent basis, his appeal fails.

### CONCLUSION

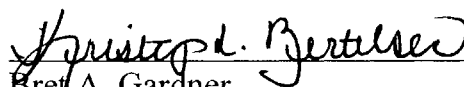
The Labor Commission's Order Affirming ALJ's Decision should be affirmed. Mr. Barron has failed to successfully rebut the presumption that his cocaine user prior to the accident of February 25, 2009, was not the major contributing cause for the accident. Mr. Barron has not shown that Respondents incorrectly performed the drug test outside of statutory identification and collection requirements. Moreover, Mr. Barron testified that he used cocaine prior to the accident and, therefore, he cannot argue that his cocaine use did not give rise to the presumption that his drug use caused the accident. Mr. Barron fails to provide any medical evidence to suggest that his cocaine use was nominal, or that his drug use was in any way insufficient to find that the cocaine found in his system immediately after the accident was not the major contributing cause for the accident. Mr. Barron's argument is, at best, self-serving that he was not impaired by cocaine at the time of the accident - or that additional protections should have been provided to him. Such argument is not sufficient to rebut the presumption that Mr. Barron's cocaine use caused him to back off the edge of the second floor deck and fall to the ground below.

In addition, Mr. Barron has failed to meet his duty to marshall the evidence in support of the ALJ and the Labor Commission's findings, and then ferret out the fatal

flaw in that evidence. His failure to meet this standard also requires the Court to affirm the Commission's Order Affirming ALJ's Decision.

Respectfully submitted this 29<sup>th</sup> day of August, 2011.

BLACKBURN & STOLL, LC



Bret A. Gardner

Kristy L. Bertelsen

Attorneys for Appellees, Hogan & Assoc.

Construction and New Hampshire Insurance  
Co.

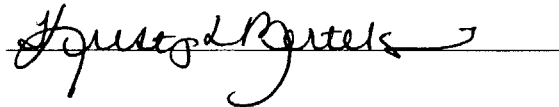
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid and/or hand delivered on the 29<sup>th</sup> day of August, 2011, to:

Utah Court of Appeals	(8 copies, one w/ original signature)
Scott M. Matheson Courthouse	(w/disc)
450 South State Street	(Hand Delivery)
P.O. Box 140230	
Salt Lake City, Utah 84114-0230	

Alan L. Hennebold, General Counsel	(1 copy; Mailed)
Labor Commission of Utah	
160 East 300 South	
P.O. Box 1466	
Salt Lake City, Utah 84114-6615	

W. Scott Lythgoe	(2 copies; Mailed)
289 24 <sup>th</sup> Street, Suite 150	
Ogden, Utah 84401	



Tab A

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

Page 2

### 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

Page 3

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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.

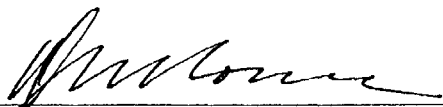
The Respondents are liable for all medical costs associated with the industrial accident.

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 30<sup>th</sup> 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  
940 N 1250 W  
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

## Tab B

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**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**

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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 15<sup>th</sup> 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**  
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**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 15<sup>th</sup> day of March, 2011, to the following:

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