ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA09-50

	Opinion Delivered June 3, 2009
JIMMY DON BALL APPELLANT	
V.	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F613700]
WORK SOURCE, INC. and EMPLOYERS INSURANCE CO. of WAUSAU APPELLEES	AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Jimmy Don Ball appeals the decision of the Arkansas Workers' Compensation Commission denying him benefits for an injury he suffered on November 29, 2006. The Commission adopted and affirmed the decision of the Administrative Law Judge, which found that appellant failed to prove that he suffered a compensable injury on November 29, 2006, and that the evidence established that appellant had alcohol in his body at the time of his injury. Appellant argues that the Commission's decision is not supported by substantial evidence. We affirm.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S.W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Perm. Total Disability Trust Fund v. Branum*,

82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See id.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority opinion.

Under Arkansas Code Annotated section 11-9-102(4)(E) (Supp. 2007), the claimant has the burden of proving by a preponderance of the evidence that the injury arose out of and in the course of his employment, was caused by a specific incident, and is identifiable by time and place of occurrence. When reviewing a decision of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Neal v. Sparks Reg'l Med. Ctr.*, 104 Ark. App. 97, --- S.W.3d --- (2008). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm. *Id.* Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.* A substantial basis exists if fair-minded persons could reach the same conclusion when considering the same facts. *Id.* Questions of weight and credibility are within the sole province of the Commission, which is not required to believe the testimony of the claimant or of any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Strickland v. Primex Technologies*, 82 Ark. App. 570,

120 S.W.3d 166 (2003). Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Id.*

Arkansas Code Annotated section 11-9-102(4)(B)(iv)(a) (Supp. 2007) provides that an injury is not compensable where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. "The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Apple Tree Serv., Inc. v. Grimes*, 94 Ark. App. 190, 228 S.W.3d 515 (2006); *Ark. Elec. Coop. v. Ramsey*, 87 Ark. App. 254, 190 S.W.3d 287 (2004).

In the instant case, evidence showed that appellant had a long history of back problems dating back to 1994. As recently as September 11, 2006, appellant sought medical attention for lower back pain below his belt line. Appellant told medical personnel that he was pushing his four wheeler up a ramp and hurt his back. On November 29, 2006, appellant was working as a maintenance man at Twin Sixes Apartment. Appellant told Fort Smith EMS that "he was stepping up onto the ladder when his other foot slipped on some pipes that were laying on the ground and he fell backwards twisting his lower back during the fall and then landing on his back." According to the Emergency Clinical Record from St. Edward Mercy Medical Center, appellant told the nurse that he "stepped back off a ladder and twisted [his]

back." The clinical record also indicated that appellant was "cussing & yelling" and that he was also "demanding [to get] off board." Appellant told Dr. Patric Anderson that he fell "about 5-6 feet" off of a ladder. According to the Emergency Room Report, appellant also infomed Dr. Anderson that "he has had some alcohol today" and that he "drinks alcohol regularly." At the hearing before the ALJ, appellant testified that he had one beer during lunch before he ate. According to appellant, he consumed the beer nearly two hours prior to his fall. Appellant described his fall to the ALJ by stating:

> After I eat, I went to Lowe's and I think Home Depot and was looking for a zip-saw to work on the sheetrock with, and I got back to work around 1:00 and I heard the tin - - the wind was blowing hard and I heard the tin flapping on the side of the building. I went around and looked and there was a piece of tin that was about to come off, and the fascia board was gone off of it and the tin was lapped over probably a foot over the edge of the building. I put a new fascia board back up there, about 15 foot long, and then started trying to wrap the tin over the edge of the building, and as I was wrapping the tin over, I put me a board on there for leverage on top of the tin and under the tin and put a drywall screw across through it and used it for leverage to pry the tin down, and was putting a screw in with my other hand that I had already started through the tin and tried to reach the wood with it, and the board that I was using, too, for leverage, the head of the screw pulled through it and let the tin come flying back out and it pushed me backwards, and I reached and grabbed the edge of the tin, caught maybe an inch of the tin with my fingers, and slipped off of it and as I was going back, I seen I was going to fall on a pipe that was laying on the ground underneath the ladder, so I kicked off with my feet to get away from that, and when I did, I landed in the middle of my back. . . . I was probably my head's height above the edge of the roof. I was at that height when this accident occurred. Straight down. It was probably straight down. The wall was probably 12 feet, but I'm assuming that I fell further than that because I was back away from the wall; I'd say probably close to 15 feet. I landed right flat of my back. It was kind of a humped spot on the ground that I landed on, too.

Appellant was taken to by ambulance to St. Edward Mercy Medical Center where an x-ray was taken of his back. Dr. Leo Drolshagen interpreted appellant's x-ray and noted that the compression fracture at T12 was "probably old." Dr. Anderson's note stated that the x-

ray revealed a T12 compression fracture, which looked old. Dr. Anderson also noted that there was no skin discoloration; that there was no pain, weakness or numbness in appellant's extremities; and that appellant did not have any tenderness at T12. Appellant was discharged with pain medication and told to follow up with his primary care physician.

Appellant presented to Dr. Joseph W. Queeney, on December 6, 2006, complaining of back pain "located primarily in the mid lumbar region" and the sacral region. Appellant also complained of numbness in his feet and in the perianal region. In his social history, appellant told Dr. Queeney that he consumed "about a 12-pack of beer a week." Dr. Queeney noted that the physical examination he performed on appellant did not reveal "tenderness to percussion over the thoracolumbar region. In fact, the patient states 'that feels good.'" Appellant also did not have tenderness in his sacrum and coccyx region. Dr. Queeney reviewed an MRI performed on appellant's lumbar spine on December 5 and noted that edema was present "within the sacrum between S2 and S3." He also noted edema "within the vertebral body of T12." According to his note, Dr. Queeney believed that "some of these findings do look old." He ordered a CT scan of appellant's thoracic, lumbar, and sacral spines "to see if this will help to determine the age of this and the degree of retropulsion of the bone." The CT scan of appellant's lumbar spine conducted on December 11, 2006, revealed a burst fracture at T12, a small central disc protrusion at L4-5, and a small left lateral disc protrusion at L3-4. The CT scan of appellant's thoracic spine also revealed the burst fracture at T12. Another CT scan was performed on appellant's lumbar spine on May 25, 2007. That scan revealed that the fracture at T12 was healing. Dr. Queeney's progress note

for June 7, 2007, indicated that the May CT scan showed "progression of the thoracic compression fracture at T12 with retropulsion of bone and burst component." Dr. Queeney also stated in that note, "[I] think that this does represent an injury that did occur back with his workman's compensation injury. I do not think that a chronic condition would do this. It does not really follow with that." Dr. Queeney's progress note for July 23, 2007, indicated that appellant's burst fracture at T12 was stable.

Dr. Queeney's October 22, 2007 deposition was admitted into evidence at appellant's hearing. In that deposition, Dr. Queeney stated that he was not aware of any prior back complaints appellant had before his November 29, 2006 fall. Dr. Queeney said that pushing a four wheeler up a ramp could "produce the pain in the back, but not the parasthesias in the perianal region." However, he stated that getting thrown from a vehicle after it rolls seven times "would certainly be a traumatic event that could cause a T-12 fracture." Dr. Queeney testified that the gluteal pain appellant complained of in February 2005 was "pretty close" to the area of appellant's sacral pain appellant first presented to him with. He also stated that "when someone has a T-12 compression fracture, you would expect for them to be tender around the fracture site. . . . [T]he lack of tenderness . . . would raise my suspicion [that the fracture was old]." However, Dr. Queeney said that he had seen one other person who had a similar fracture with very little pain.

On cross examination, Dr. Queeney stated:

> [T]his kind of compression fracture is from an axial load – that's a load from your head down to your feet. Yes, that kind of fall would be the type of an accident that could produce that axial load necessary – if he would have landed on his buttocks. Okay, [a]nd that would be sufficient force to cause the kind of burst fracture that we see here

> at T-12. Edema is a an abnormal accumulation of fluids. Edema is more frequently found in a newer type of injury. And then you're going to try to pin me down on what "new" means. The more recent the injury, the more the amount of edema that you tend to see. Although, edema can still be present in a vertebral body for maybe six months after an injury. If this had been an old injury, more than six months old, would I expect to see edema? Again, there's nothing that's absolute about this, but I think it would be very unlikely. And, here, where he's had, on November 29, 2006, and I see a week later on December 6, I would expect to see edema from that kind of a fall. I would expect to see a significant amount of edema. And I did see some edema on that date.

On redirect, Dr. Queeney stated that some of appellant's symptoms could be "caused by a chronic condition, rather than this T-12 burst fracture." According to Dr. Queeney, appellant's "numbness in the scrotum and difficulty with erections" could be caused by "some nerve impingement in the sacral area."

The ALJ issued his opinion on April 21, 2008. In that opinion, the ALJ stated that he did not find appellant's testimony credible to "prove the occurrence of an employment related incident or accident on that date and to prove a causal relationship between this incident and his back difficulties." The ALJ found that the evidence was sufficient to prove that appellant had "some amount of alcohol in his body at the time of the alleged employment related accident and injury," giving rise to the presumption that appellant's accident and injury were substantially occasioned by the presence of alcohol in his system. The ALJ stated that the emergency room records indicated that appellant "stated that he had consumed alcohol that day"; appellant testified that he had a beer one to two hours "prior to the alleged accident and injury"; and the emergency room records showed appellant "exhibited somewhat unusual behavior" by "cursing, yelling, and removing himself from the backboard against medical advice." The ALJ found appellant's description of his "alleged employment related accident"

given at the hearing to be "inconsistent with the history he related when initially seeking medical treatment[.]" The ALJ also found appellant's description to be "inconsistent with the various physical findings observed and noted." There was no indication of "abrasions, bruises, redness, or swelling" anywhere on appellant's body. The ALJ stated that it was "difficult to believe that the claimant could have fallen from a height of 12 to 15 feet and landed flat on his back on a "hump spot" on the ground without any visible evidence of trauma to the soft tissue of his back." The ALJ further stated:

> The medically established and objectively documented physical injuries or defects to the claimant's back also appear incompatible with the mechanics of the injury described by the claimant. In his deposition, Dr. Queeney indicated that the compression or "burst" fracture of the T12 vertebra could have resulted from a fall on November 29, 2006. However, his opinion is clearly based upon the assumption that the claimant landed on his buttocks, not flat on his back. As Dr. Queeney indicated a compression or "burst" fracture occurs when axial pressure (i.e. pressure from top to bottom or bottom to top) is applied to the spinal column. This is not the type of trauma that would have been produced by the fall described by the claimant, either in his testimony or in the initial history he related to personnel at the St. Edwards Mercy Medical Center emergency room. The force of trauma that would have been produced by the fall described by the claimant would have been lateral trauma, or force applied to the spinal column from the side. . . . I find Dr. Queeney's expert opinion to be convincing. However, I do not find it sufficient to support a finding that this fracture was due to a fall that occurred on November 29, 2006.
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> Curiously, following the alleged employment related accident on November 29, 2006, the claimant made no complaints with his back in the area of the T12 vertebra. In fact, it was noted that he was not even tender when pressure was applied directly to this area. Even Dr. Queeney recognized that this would be highly unusual and he recalled only one instance where a similar lack of complaints was exhibited.
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> [T]he claimant has failed to prove by the greater weight of the credible evidence that the medically established and objectively documented physical injuries or defects involving his back were causally related to any specific employment related incident on November 29, 2006. If, in fact, such an employment related accident, as the

> claimant describes, actually occurred, the claimant has further failed to prove that this accident was not substantially occasioned by the presence of alcohol in his body. For the foregoing reasons, I find that this claim must be denied.

Appellant appealed the decision to the Commission, which affirmed and adopted the ALJ's opinion. The Commission filed its opinion on November 17, 2008. This timely appeal followed.

Appellant argues that the Commission's decision is not supported by substantial evidence. We disagree. Viewing the evidence in the light most favorable to the Commission, as we must, substantial evidence supports its denial of benefits. Appellant had a long history of back problems and the type of fracture that was present at T12 was inconsistent with appellant's different accounts of events. None of appellant's versions of his fall could generate the type of axial force necessary to cause the compressed fracture at T12. Additionally, appellant was not tender at T12, there were no bruises or any other visible signs of injury at T12, and Drs. Anderson and Drolshagen both opined that appellant's compressed fracture at T12 was old. Reasonable minds could reach the Commission's conclusion that appellant failed to prove he suffered a compensable injury leading to his compressed fracture at T12 on November 29, 2006. Therefore, we affirm.

Because appellant failed to prove he suffered a compensable injury on November 29, 2006, we do not reach his argument that substantial evidence does not support the Commission's conclusion that his fall was substantially occasioned by the presence of alcohol.

Affirmed.

VAUGHT, C.J., and KINARD, J., agree.