

IN THE UTAH COURT OF APPEALS

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BC Towing and/or Workers'	)	MEMORANDUM DECISION
Compensation Fund,	)	(Not For Official Publication)
	)	
Petitioners,	)	Case No. 20060610-CA
	)	
v.	)	F I L E D
	)	(July 27, 2007)
Labor Commission and Kenneth	)	
R. Laier,	)	2007 UT App 258
	)	
Respondents.	)	

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Original Proceeding in this Court

Attorneys: Hans M. Scheffler, Salt Lake City, for Petitioners  
Phillip B. Shell, Murray, and Alan L. Hennebold, Salt  
Lake City, for Respondents

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Before Judges Billings, Davis, and Thorne.

THORNE, Judge:

Petitioner BC Towing seeks judicial review of a decision of the Utah Labor Commission (Commission), granting permanent total disability compensation to respondent Kenneth R. Laier. We affirm.

Laier worked as a tow truck operator for BC Towing until March 3, 2001, when he was severely beaten by multiple assailants while towing an illegally parked vehicle. Laier suffered serious physical and psychological injuries as a result of the incident. BC Towing paid Laier workers' compensation benefits, including medical expenses and disability/rehabilitation benefits in the amount of \$195 per week, from the date of the incident until May 1, 2003. From May to September 2003, Laier performed full-time employment as a driver for a plumbing supply company. Laier was terminated from that job after testing positive for marijuana use and has not worked since.

In June 2004, Laier sought compensation benefits arising from the 2001 incident. A Commission Administrative Law Judge (ALJ) determined that Laier continued to suffer a permanent 14%

whole person impairment from the incident, that he was permanently and totally disabled as a result, and that he could perform neither his previous work nor other work reasonably available to one with his skills and experience. In light of these findings, the ALJ awarded Laier \$205 per week in benefits. BC Towing requested a Commission review to address several issues, including the ALJ's failure to consider Laier's four months of employment in 2003 and the termination of that employment because of Laier's drug use. The Commission reexamined Laier's claim in light of his post-injury employment and termination, but did not alter the ALJ's decision except for reducing the award back to \$195 per week.<sup>1</sup>

BC Towing seeks review of the Commission's award in this court, arguing several theories of relief. BC Towing first argues that Utah public policy, as expressed in statutory law, condemns drug use and requires the denial of benefits in Laier's circumstances. In support of this argument, BC Towing cites to Utah Code section 34A-2-302, which denies workers' compensation benefits for injuries caused by the claimant's use of illegal drugs. See Utah Code Ann. § 34A-2-302(3)(b) (2005). Although we acknowledge Utah's expressed policy against illegal drug use, section 34A-2-302 does not govern the situation before us. Further, BC Towing's argument ignores the actual findings of the Commission in regard to the continuing effects of Laier's 2001 injuries on his employability.

It is clear that "[i]f the record shows no more than that the employee, having resumed regular employment after the injury, was fired for misconduct, such as a violation of the employer's drug-free workplace rules, . . . with the impairment playing no part in the discharge, it will not support a finding of compensable disability." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 84.04 (2007) (footnotes omitted). However, if there is additional evidence that "the claimant has been hampered by the impairment in obtaining or holding other employment, the question is not so one-sided." Id. Here, the Commission found that Laier continued to suffer significant and disabling physical and psychological problems arising from the 2001 incident, including traumatic brain injury, acute stress disorder, and major depressive disorder. The Commission also characterized Laier's 2003 employment as

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<sup>1</sup>One of BC Towing's issues before this court is the ALJ's increase of Laier's weekly compensation from \$195 to \$205. Because the Commission lowered Laier's compensation rate back to \$195 in its own review order, we do not further address the issue here.

sheltered because it was arranged through the Easter Seals organization and because Laier required continuous assistance from his supervisor in order to perform his job duties. Thus, per the Commission's findings, Laier had not "resumed regular employment" and continued to be "hampered by [his] impairment in obtaining or holding other employment." Id. Under these circumstances, we see no conflict in this case between Utah's policy of discouraging drug use and its policy of requiring the compensation of injured workers.

BC Towing next argues that Laier failed to establish the various elements of a workers' compensation claim under Utah Code section 34A-2-413. See Utah Code Ann. § 34A-2-413(1) (Supp. 2006). Specifically, BC Towing argues that Laier's 2003 employment demonstrated that he was capable of being gainfully employed; that the Commission abused its discretion in basing certain findings on Laier's unsupported testimony; and that Laier's 2003 employment negated any causal connection between the 2001 injury and Laier's current unemployment.

We will affirm the Commission's findings if they are supported by "'substantial evidence when viewed in light of the whole record before the court.'" Ameritemps, Inc. v. Labor Comm'n, 2005 UT App 491, ¶8, 128 P.3d 31 (quoting Utah Code Ann. § 63-46b-16(4)(g) (2004)), aff'd, 2007 UT 8, 152 P.3d 298. Here, there is substantial evidence that Laier continues to suffer disabling physical and psychological trauma arising from the 2001 incident. Although we disagree with BC Towing's assertion that Laier's testimony is the sole source of evidence regarding his current condition and capabilities, we are aware of no prohibition concerning the Commission's acceptance of Laier's testimony as convincing even if it is self-serving. Cf. Glauser Storage, L.L.C., v. Smedley, 2001 UT App 141, ¶24, 27 P.3d 565 ("Clearly, the fact-finder is in the best position to judge the credibility of witnesses and is free to disbelieve their testimony. Even where testimony is uncontroverted, a trial court is free to disregard such testimony if it finds the evidence self-serving and not credible." (quotations and citation omitted)). And, as we note above, the Commission made specific findings regarding Laier's 2003 employment and the reasons that it did not consider that period of employment to be fatal to Laier's continuing disability claim. In light of the whole record, the Commission's award is supported by substantial evidence, and we accordingly decline to disturb the Commission's decision.

Finally, BC Towing argues that the Commission's decision to award benefits commencing on September 13, 2003, the date that Laier was terminated from his post-injury employment for failing

a drug test, rewards Laier's drug use and constitutes an arbitrary and capricious decision. Again, this claim ignores the Commission's findings about the continuing nature of Laier's disabilities and the sheltered nature of Laier's 2003 employment. We see nothing arbitrary or capricious in the Commission's decision. Rather, the Commission's decision appears to strike a reasonable balance, compensating Laier for his continuing disability while not requiring BC Towing to pay benefits for the brief period of time that Laier was able to provide for himself.

For these reasons, we affirm the Commission's decision awarding Laier permanent total disability payments in the amount of \$195 per week.

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William A. Thorne Jr., Judge

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WE CONCUR:

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Judith M. Billings, Judge

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James Z. Davis, Judge