

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT BAKER,

Claimant,

v.

FINKE LOGGING CO., INC.,

Employer,

and

ASSOCIATED LOGGERS EXCHANGE,

Surety,

Defendants.

IC 2017-016189

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

Filed 3/20/20

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Lewiston, Idaho, on April 23, 2019. Scott Chapman represented Claimant, and Susan Veltman represented Defendants. The parties produced oral and documentary evidence at the hearing, took post-hearing depositions, and submitted briefs. The matter came under advisement on February 20, 2020.

ISSUES

The issues for resolution are:

1. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Temporary total disability; and

b. Attorney fees.¹

2. Whether any income benefits to which Claimant would normally be entitled should be denied pursuant to Idaho Code § 72-208 due to his intoxication.

CONTENTIONS OF THE PARTIES

Claimant suffered a compensable injury to his left arm on May 18, 2017. Defendants paid Claimant's medical bills but refused to pay his temporary disability benefits while he was in a period of recovery. Defendants wrongly rely on Idaho Code § 72-208 to support their denial. Although Claimant had indulged in drug use some days prior to the accident, he was not intoxicated at the time of his injury. His drug use was not a reasonable and substantial cause of his injury.

Defendants assert Claimant's intoxication at the time of his accident, as supported by medical evidence and testimony, was a reasonable and substantial cause of his injuries in question. The application of Idaho Code § 72-208 is appropriate under the facts of this case.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Employer representative Janice Finke, and witness and co-owner of Employer, Corby Finke, taken at hearing;
2. Joint exhibits (JE) 1 through 11 admitted at hearing;
3. The post-hearing deposition transcript of Clayton Bunt, M.D., taken on July 26, 2019; and

¹ In his opening brief Claimant did not argue for attorney fees. Although Defendants acknowledged attorney fees as an issue by including a sentence in briefing stating that attorney fees are unwarranted, Claimant did not file a timely reply brief and therefore did not put the issue of attorney fees into play. The issue is waived.

4. The post-hearing deposition transcript of Michael Ludwig, M.D., taken on September 17, 2019.

FINDINGS OF FACT

1. In May 2017 Claimant was employed as a logging truck driver for Employer. His job duties consisted primarily of hauling logs from the field to a mill in Lewiston.

2. Claimant was in the habit of washing his truck often. Sometimes Claimant would climb up truck's "reach" to access the cab's roof.² He testified he normally wore tennis shoes while washing his truck.

3. On May 18, 2017, Claimant was at Employer's shop washing his truck. He began walking up the reach to wash the truck's roof. While the reach was often partially covered with dirt and tree sap, which provided some traction, on this day the reach was clean, freshly painted and waxed. In addition, Claimant was wearing a pair of muck boots, not his tennis shoes.

4. Claimant fell and broke his left arm while attempting to scale the reach. He sought medical treatment at the hospital's emergency room in Orofino.

5. Because of the industrial nature of the accident Claimant underwent a urinalysis, which came back positive for THC and methamphetamine.³

DISCUSSION AND FURTHER FINDINGS

1. Defendants accepted Claimant's industrial accident claim. They paid Claimant's medical expenses. Claimant had an acceptable recovery from his injury. He found

² The "reach" is a metal bar which is used to attach the rear trailer to the front trailer. When the truck is not hauling logs, the rear trailer and reach are piggy backed onto the front trailer. When piggy-backed, the reach protrudes up toward, and perhaps over, the cab's roof at an angle. Claimant was attempting to walk up this bar when the accident happened.

³ He also tested positive for opioids; however, he may have received morphine after the accident but prior to the urinalysis. In any event, Defendants are not arguing opioids contributed to the accident.

employment once he reached medical stability and was released to return to work. Defendants refused to pay Claimant's temporary disability benefits during his period of recovery, relying on the provisions of Idaho Code § 72-208.

2. Idaho Code § 72-208 deals with disallowance of income benefits in certain instances when the worker's intoxication is a reasonable and substantial cause of an injury.

The statute provides in relevant part;

(2) If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated.

(3) "Intoxication" as used in this section means being under the influence of alcohol or of controlled substances

INTOXICATION

3. There is no direct evidence that Claimant was intoxicated as defined above at the time of the accident. Instead Defendants argue the following circumstantial evidence establishes Claimant's intoxication:

- Claimant tested positive for controlled substances at the hospital after the accident;
- Claimant testified that when he used methamphetamine he stayed up all night, usually sleeping a day or so afterwards and Claimant was tired on the morning of the accident;
- Dr. Bunt testified that people who are on methamphetamine can be erratic and overconfident of their abilities;
- Dr. Bunt recalled Claimant was belligerent, angry, and demanding (including calling the doctor a veterinarian), at the hospital which could be indicative of Claimant being under the influence of methamphetamine;

- Dr. Ludwig testified that methamphetamine impairs a person's judgment and effects their impulsivity as well as altering a person's ability to make rational and prudent decisions;
- Dr. Ludwig further testified that even when methamphetamine is “leaving a person's system” they can become distracted and preoccupied with obtaining more of the drug;
- Both physicians opined that Claimant's intoxication was a reasonable and substantial cause of his injury;
- Claimant's testimony regarding the timing of his drug use is not credible, and in general Claimant is not a credible witness.

Each of these allegations will be discussed in turn.

Detection of the Drugs

4. It is uncontroverted that Claimant tested positive for methamphetamine, marijuana, and opiates in the emergency room after the accident. Claimant admitted to using methamphetamine and marijuana prior to the accident. There is at least some indication the opiates were provided to Claimant after his accident in the form of morphine.

5. Importantly, the testing did not *quantify* the amount of controlled substances in Claimant's system; rather, the testing used simply provided for a positive or negative finding on various controlled substances, including methamphetamine and THC. The physicians in this case testified that methamphetamine could be detected two days after it was last used and the THC could still be detected anywhere from a few days up to several months after Claimant last used cannabis. This is consistent with the Mayo Clinic article attached as Exhibit 1 to the deposition of Dr. Bunt.

6. Moreover, there was no credible evidence presented that detection of the drug in one's blood stream or urine is the equivalent of proof of intoxication. The time over which

a person experiences an altered mental state could well be far less than the time the drug remained detectible in the person's system. As stated in the Mayo Clinic study referenced above; "[urine drug screens] do not provide information regarding the length of time since last ingestion, overall duration of abuse, or state of intoxication." Bunt Depo., Ex. 1, p. 74. Therefore, the fact that Claimant's urine tested positive for methamphetamine supports, at most, a conclusion that he had ingested the drug within 48 hours prior to the sample being taken, not that he was intoxicated at the time the sample was taken, or even five hours earlier. While the drug screen may well challenge Claimant's testimony that he last used methamphetamine on the Saturday or Sunday prior to the accident, it falls short of establishing intoxication at the time of the accident.

7. Dr. Ludwig's testimony that because marijuana and methamphetamine are not legal in Idaho and both drugs were detected in Claimant's system after the accident, such detection constituted "undeniable proof" that those drugs were a reasonable causative factor in Claimant's injury is baffling. The legality or illegality of the drugs is irrelevant to the issue at hand, to wit, whether Claimant was intoxicated at the time he fell. Dr. Ludwig's analysis on this matter carries no weight, and in fact hurts his credibility.

8. The positive "yes/no" detection test result carries very little weight regarding Claimant's active intoxication at the time of his accident.

Claimant's Sleepiness

9. Defendants' argument that Claimant was sleepy at the time of the accident does not help their case. First, it was taken out of context. While Claimant did testify he was tired and wanted to sleep when he was washing his truck on the day of the accident, his whole testimony sheds light on *why* he was sleepy. As Claimant testified; "the problem was that morning, I was just getting rushed because my ex-wife, she wanted to go in [to] town and grab some beer and

just wanted to get out of there. And I wanted to sleep because I had been working two days straight, you know, and we work 16-hour days” Tr. p. 34 LL. 8-14. To extrapolate a finding from that testimony, even when coupled with other facts in this case, that Claimant was under the influence of methamphetamine when he fell, is unsupportable. The more logical explanation is that Claimant was sleepy because he had been working extended hours. More importantly, even if Defendants could prove Claimant used methamphetamine to help him through those extended workdays, their argument would still fail because, as noted by Claimant, he was tired after coming down from the methamphetamine high, not during it. Defendants’ argument that Claimant’s sleepiness helps establish that he was under the influence of methamphetamine is unpersuasive.

Claimant’s “Overconfidence”

10. Defendants’ overconfidence argument would be more persuasive if Claimant had not climbed the reach on prior occasions. Claimant’s behavior that day was not atypical. As noted in the medical depositions, methamphetamine can cause a person to attempt things they would not normally do. Since, standing alone, Claimant’s attempt to climb the reach is not evidence of overconfidence, Defendants’ argument might be that Claimant’s attempt to climb a slick reach in muck boots as opposed to tennis shoes is evidence that he was intoxicated. Without context such an assertion is speculative at best. For example, if Claimant had indicated to his coworkers present something to the effect of “watch me climb that reach in these muck boots,” or Claimant had been manifesting some other sign of overconfidence, erratic behavior, or lack of concern, such as dancing or attempting a handstand on the reach, such behavior could point to Claimant being under the influence of methamphetamine. However, in this case there are no such facts. Claimant testified he was in a hurry to get his truck washed because his

wife was not happy being there and he forgot to take into account the fact the reach was newly painted and waxed. A lapse of prudence and foresight is not in itself evidence of intoxication.

Claimant's Hospital Behavior

11. Certainly, as Dr. Bunt testified, belligerent, angry, combative behavior can be a sign of intoxication. As Dr. Bunt also testified, Claimant's behavior could have been due to his extreme pain. For one reason or another Claimant was less than gentlemanly while in the emergency room. Because Dr. Bunt provided two plausible reasons for Claimant's bad behavior it is difficult to assign much weight this factor.

Judgement and Distraction

12. Dr. Ludwig noted in his deposition that methamphetamine impairs a person's judgment, alters their ability to make rational and prudent decisions, and can lead to impulsive behavior. He also testified that methamphetamine addiction can cause anxiety, as individuals "become perseverant on obtaining more methamphetamine, so it often becomes a distraction." Ludwig Depo. p. 9.

13. Defendants argue Claimant's behavior of walking up a newly painted and waxed reach was impulsive and imprudent. Furthermore, Claimant was distracted, as he admittedly "spaced" the fact that he had personally painted the reach and it was slick. Claimant's behavior on the day of the accident was not necessarily impulsive – he had performed this same activity several times before without incident. It may well have been imprudent, but it was imprudent each time he did it. Unless the Defendants have evidence the Claimant was under the influence each time he walked the reach, the fact that he tried to walk the reach on the day in question does not tend to establish the fact that Claimant was under the influence of drugs at the time.

14. Defendant's argument that Claimant may have been distracted on the morning of the accident may well be true. He was admittedly in a hurry to wash his truck as he had his wife with him, and she wanted to go into town. He was also admittedly tired from working the past two days. However, it would be counterproductive for Defendants to argue Claimant was distracted as a result of his methamphetamine use since, as Dr. Ludwig testified, the distraction comes not from people who are high but from people who want to get high and need to find more of the drug to do so.

Expert Testimony

15. Both Drs. Ludwig and Bunt gave written opinions that the presence of methamphetamine and cannabis contributed to Claimant's slip and fall accident. They were both deposed.

Dr. Ludwig

16. Dr. Ludwig concluded in a written report that both marijuana and methamphetamine impair judgment, and their use, in some unquantified combination, were a substantial contributing factor to Claimant's injury. The doctor made no attempt at a scholarly analysis beyond this rather conclusory statement.

17. At his deposition, Dr. Ludwig noted that marijuana reduces reaction time.⁴ He testified Claimant's cannabis ingestion was a bigger factor in Claimant's accident than was the methamphetamine, perhaps due to this reduced reaction time, although he never explained his conclusion. He acknowledged that while anyone could have fallen off the reach, Claimant voluntarily put himself in "a position of injury." As noted above, he felt any measurable

⁴ While Dr. Ludwig used the term "reduces" reaction time, he undoubtedly meant "slows" reaction time.

presence of either drug puts a person under the influence. He cited to no authority for that dubious conclusion other than Idaho statutes making possession of either drug illegal.

Dr. Bunt

18. Dr. Bunt concluded in a written letter that “on a more probable than not basis, [Claimant’s] use of methamphetamine and cannabis would be expected to contribute to his slip and fall injury.” JE 8-2. He made no attempt to support this conclusory statement with any additional information or analysis.

19. During his deposition, Dr. Bunt acknowledged that if Claimant had last used methamphetamine and/or marijuana two days prior to his accident, it would be “much less likely to be a contributing factor in this injury.” Bunt depo. p. 12.

Claimant’s Credibility

20. Defendants argue that Claimant was not truthful when testifying as to the last time he used controlled substances prior to the accident in question. They make that argument based on a table in a Mayo Clinic article listing drug detection length of time in urine. That table shows methamphetamine is detectable in urine 48 hours after it is last used. Marijuana is detectable for a minimum of three days, up to greater than a month. Claimant testified he last used methamphetamine and marijuana three days prior to the accident.

21. Defendants also cite to several other controverted instances which if true would tend to suggest Claimant’s drug use is more common than he testified to at hearing.

22. Claimant’s alleged general lack of credibility, the extent to which he used controlled substances at times before the accident, and whether he used methamphetamine and/or marijuana closer in time to the accident than three days do not avail the Defendants unless they can show he used the controlled substances in such close temporal proximity to the accident as to still

be experiencing the psychotropic effects therefrom. Since there was no evidence as to how long the psychotropic effects from methamphetamine and/or cannabis last, unless there was evidence Claimant used the substances within minutes or perhaps hours before his accident, or exhibited behavior which would clearly establish his intoxication, (for example stumbling, slurring words, bloodshot eyes, irrational behavior or speech, etc.). Defendants cannot prove Claimant was intoxicated at the time of his accident. Dr. Ludwig's definition of intoxicated as being any detectable amount through blood or urine testing is specifically rejected.

CAUSATION

23. Even if Dr. Ludwig's definition of intoxication or being under the influence is given credence Defendants still have to prove that such intoxication was a substantial and reasonable cause of Claimant's accident. It is not enough that Claimant put himself into a risky position. Defendants must prove that the controlled substances in Claimant's system substantially and reasonably contributed to him *falling* from the reach beam.

24. The evidence shows in this case the substantial factors leading to Claimant's fall included the type of shoes he was wearing and the clean and smooth condition of the beam. He slipped and fell because he lost his balance.

25. There is no credible evidence in the record that Claimant's sense of balance was impaired at the time of the accident due to his ingestion of controlled substances. No witnesses to the accident testified that they saw Claimant stumbling or having trouble with his balance immediately before his accident.

26. Because Idaho Code § 72-208 creates an affirmative defense it is up to Defendants to prove that defense, which they have not done. The evidence does not support a finding that Claimant was intoxicated, as defined by the statute, at the time of his accident, and further does not

support of finding that Claimant's prior use of cannabis and methamphetamine was a reasonable and substantial cause of his injury. Defendants patch together a theory of causation using insinuation, conjecture, generalities, and speculation. Their arguments are unpersuasive.

27. Based upon the totality of the evidence, Claimant has proven his entitlement to temporary total disability benefits while he was in a period of recovery following his industrial accident of May 18, 2017.

28. Based upon a totality of the evidence Defendants have failed to prove Idaho Code § 72-208 serves as a bar to Claimant's right to income benefits while he was in a period of recovery.

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to temporary total disability benefits while he was in a period of recovery following his industrial accident of May 18, 2017.

2. Defendants have failed to prove Idaho Code § 72-208 serves as a bar to Claimant's right to income benefits while he was in a period of recovery.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 26th day of February, 2020.

INDUSTRIAL COMMISSION

 /s/
 Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

SCOTT CHAPMAN
PO BOX 446
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SUSAN VELTMAN
1703 W HILL RD
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jsk

/s/

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FINKE LOGGING CO., INC.,

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ORDER

Filed 3/20/20

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Claimant has proven his entitlement to temporary total disability benefits while he was in a period of recovery following his industrial accident of May 18, 2017.

2. Defendants have failed to prove Idaho Code § 72-208 serves as a bar to Claimant's

right to income benefits while he was in a period of recovery.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this the 20th day of March, 2020.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
Aaron White, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

For the following reasons, I respectfully dissent.

Claimant’s intoxication was a reasonable and substantial cause of the injuries he sustained on May 18, 2017, and he should be barred from receiving temporary disability benefits pursuant to Idaho Code § 72-208. That code provision provides an exception to providing compensation to injuries sustained in the course of employer, “if intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid.” While “reasonable and substantial cause” is not specifically defined in statute, the Court has clarified that the meaning is most appropriately analogous to the substantial factor test. *Giles v. Eagle Farms, Inc.*, 157 Idaho 650 (2014).

The substantial factor test of proximate cause as ‘a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage.’

Id. 157 Idaho at 653; 339 P.3d at 538 (2014 (citing IDJI 2.30.2.)).

Applying the test to this case, I would find that Defendants' met their burden of showing Claimant's intoxication was a reasonable and substantial cause of his injury with the medical testimony of Drs. Bunt and Ludwig, and Claimant should be denied income benefits. Both medical experts opined that Claimant's use of methamphetamines and cannabis was a substantial cause of his injuries.

Dr. Bunt was Claimant's treating physician at the emergency room and had the best opportunity to assess Claimant's behavior closest to the events in question. Even though Dr. Bunt was aware that methamphetamines could show up on a urine screen for days after their use, he still found, based on a reasonable medical probability, that Claimant's drug use was a substantial factor in his accident and injury. In the facts of this case, Dr. Bunt's opinion alone is sufficiently persuasive to me to find that Claimant was intoxicated, and that such intoxication was a reasonable and substantial factor in his accident and injury. However, Dr. Bunt's opinion finds additional support in the opinion of Dr. Ludwig, who agreed with the conclusion that Claimant's intoxication was a reasonable and substantial cause of his injuries. The majority unwisely and improperly relies on the unreliable assertions of Claimant regarding his drug use, and a strained interpretation of the Mayo chart—neither of which are legally sufficient to refute the expert medical opinions of Drs. Bunt and Ludwig regarding the impact of Claimant's intoxication on his injuries.

Claimant is an unreliable witness who lies about his drug usage. Claimant denied using drugs to hospital staff, when his test results showed otherwise. Ex. 5, 2. He later testified that between Saturday and Sunday night, he got "really ripped" with his friends on alcohol, marijuana and methamphetamine. HT, 22, 19-20; 23 at 22-23; 38 at 11-12. Employer met with Claimant four days after the accident, on May 22, 2017, and requested a copy of Claimant's current CDL medical card, which should have been renewed in November 16, 2016. Claimant told Employer

(Ms. Finke) that he had lied about getting his CDL medical card renewed, violating both Employer's and DOT's policies. Claimant predicted correctly that he would fail a subsequent, post-injury drug test due, with Claimant disclosing that he was only able to pass prior drug tests because he had used his son-in-law's urine. Claimant has shown a propensity to lie about his drug usage to avoid consequences about the same. Although Claimant's self-serving behavior is understandable, it also makes him an unreliable and unpersuasive witness.

The much discussed "Mayo chart" gives practical guidelines for clinicians about the limits of detecting illegal substances in drug testing; it is not a measurement of intoxication and should not be relied on for such. Further, the Mayo chart discredits Claimant's story regarding his use of methamphetamine. According to Claimant's own admission, he consumed illegal substances between late Saturday night and Sunday morning. Because methamphetamine can be detected in the urine up to 48 hours after ingestion, Claimant's activities between Saturday and Sunday morning would place him within that 48-hour window on Tuesday. Claimant's accident did not happen until May 18, 2017—a Thursday. Claimant's version of events does not explain why he had a positive urine screen for methamphetamines outside the study's 48-hour window, *if* Claimant could be believed that his last usage of methamphetamine occurred early Sunday morning. Frankly, I would find that it is more likely that Claimant is not telling the whole story than the undisputed Mayo chart should be discarded.

Nevertheless, the case does not need to be decided on the results of the drug screening test alone or the exact timing of Claimant's drug use, because there is additional evidence to support the conclusion that Claimant's intoxication was a substantial cause of his injuries. For me, the matter comes down to the medical opinions presented by Defendants' experts.

