ROGER JOHNSON, Employee,
v.
R.C. FABRICATORS, INC. Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1404987

Mailed Date: April 10, 2015
April 9, 2015

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on February 5, 2015, in the Hearing Room of the Board, in Milford, Delaware. Final deliberations concluded on April 2, 2015.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Sean Gambogi, Attorney for the Employee

Cheryl Ward, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

Roger Johnson ("Claimant") injured himself in a work accident on October 30, 2013, while he was working for R.C. Fabricators ("Employer"). On August 7, 2014, Claimant filed a Petition to Determine Compensation Due, which was scheduled for a full merit hearing on February 5, 2015. At the beginning of the merit hearing, Claimant presented a Motion to Exclude Testimony of Dr. Ali Hameli, Employer's expert medical witness, who had been deposed the day prior to the hearing. Employer's counsel was presented with the Motion to Exclude on the morning of the hearing as well. Because Employer received the Motion on the morning of the hearing and did not have the opportunity to respond, Employer was allowed (10) days from that date to file a written response to Claimant's Motion. In response to Claimant's Petition, Employer asserts the defenses of forfeiture based upon Claimant's intoxication and willful failure or refusal to use a reasonable safety appliance, pursuant to 19 *Del. C.* § 2353(b).

At the time of the alleged work injury, Claimant's average weekly wage was $1,911.58, resulting in a compensation rate of $660.79.

After the conclusion of the hearing, the parties were allowed to submit further evidence in the form of depositional testimony and closing arguments, all of which was completed on March 27, 2015. Final deliberations on the matter occurred on April 2, 2015. This is the Board's decision on the merits

SUMMARY OF THE EVIDENCE

Michael McCanney testified on behalf of Claimant. He was Claimant's co-worker and had been working there for three years at the time of the accident. Mr. McCanney explained that Claimant was already employed there when Mr. McCanney came to the job and several employees would stay at a local hotel some nights during the job. Mr. McCanney testified that

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he was not aware of any drug use that occurred the night before the work injury and he stayed in the hotel the night before it occurred. He did not witness Claimant use drugs the night before the work injury, but he went to bed around 9:00 p.m. or 10:00 p.m. Mr. McCanney explained that Employer holds a meeting for employees before starting the work day and he does not believe Claimant was impaired at the meeting the

morning of the work injury. They normally have a fifteen to twenty minute morning break, but he usually goes to his vehicle and he does not believe he was with Claimant during the break on the day of the work injury. Mr. McCanney reported that they have a foreman who is responsible for telling the employees when weather makes it unsafe to work, but he does not remember any conversations about weather being a factor on the day of the work injury.

Mr. McCanney explained that on the day of the injury, they were running acoustic deck, which is a sheet of corrugated metal with insulation, that is placed over the steel members, which vary in size, but average two and a half feet wide by twenty feet long. They fabricated a metal hook to move the sheets more easily because the sheets weigh approximately 150 - 200 pounds. Mr. McCanney described a process called "tying off" wherein workers wear a harness or a lanyard that prevents them from falling. Employer has a policy that requires tying off for any work done higher than six feet. He reported that usually employees will abide by the policy, but there are times when they do not - like when they are working far from the edge. Mr. McCanney testified that he was tied off on the day of the work injury. He believes that fifty feet is the standard retractable they use, but they also have retractables that are thirty feet. He explained that the retractable is anchored to the roof and he believes that the retractable would prevent injury because it is designed to stop you immediately if you move forward suddenly. It engages and locks like a seat belt. When Claimant was putting the sheets in place, he was

walking on beams. Mr. McCanney reported that during his work with Claimant, he did not perceive Claimant to be impaired. He remembers sliding a piece of metal close into position and Claimant went out on the beam to grab the sheet to position it and when he turned back he saw Claimant reaching for a bar joist before he fell to the ground. Sometime after the incident Mr. McCanney spoke to Mark Hynson about the incident and completed an "Incident Report." The report indicates that the "hook slipped," but Mr. McCanney did not actually see Claimant fall.

On cross examination, Mr. McCanney testified that he did not know if Claimant was tied off or not at the time of the work injury. He knew that Employer's policy was that if you violated once you were sent home and then ultimately were terminated. Employer's drug policy is that if you use drugs you are terminated.

Jason Pisano testified on Claimant's behalf. At the time of the work injury, he was a friend and co-worker of Claimant's. The night before the incident he stayed with Claimant and another co-worker at the hotel near the work site. He does not recall anyone using drugs the night before the work injury, but he believes they all drank alcohol "pretty much every day after work." Mr. Pisano testified that he did not witness anyone using marijuana or cocaine that evening. According to Mr. Pisano, all the employees who stayed at the hotel the night before the work injury went to bed at approximately 10:00 or 11:00 p.m., woke up around 6:00 a.m. the next day, and got dressed and ready for work. He does not believe Claimant was impaired on when they arrived at work on the morning of the work injury.

Mr. Pisano testified that he knows Claimant was not tied off at the time of the injury because Claimant fell, but he remembers that Claimant had been tied off at other times during that day. Mr. Pisano testified that there are times when employees do not tie off "if you forget

to," but the policy is that employees should be tied off at any height over six feet. Mr. Pisano explained that the retractable device they use extends fifty feet and it can throw the worker off balance if he moves too fast. Mr. Pisano did not believe they were not under time constraints on the day of the work injury.

On cross examination, Mr. Pisano reported that Employer's policy regarding tying off was if

an employee is working at a height above six feet then tying off is mandatory and one violation of the policy will get an employee sent home and a second violation will get the employee terminated. Mr. Pisano explained Employer's drug policy as zero tolerance policy and employees are terminated for violating it. Mr. Pisano testified that he knows Claimant was not tied off when he fell because if he had been he would not have hit the ground.

Marc Hynson testified on Claimant's behalf. At the time of the work injury, Mr. Hynson was the foreman on the job. He stayed at the same hotel with the other employees around the time of the work injury and he does not believe that any employees used drugs, but he does believe some of them drank alcohol when they were off the job. On the day of the work injury, he did not recall interacting with Claimant in the morning before the work day began. Mr. Hynson testified that he could not remember whether Claimant appeared to be impaired the morning of the work injury, but had he perceived him to be impaired, he would not have allowed him to work on the job site that day. Mr. Hynson explained that just before the work injury occurred, he saw Claimant's hard hat from the ground and he asked Claimant if he had an adjustable he could borrow and Claimant gave him an adjustable to use. Mr. Hynson reported that he walked about thirty feet away and heard a yell and then a "thud" and when he turned around Claimant was on the ground. Mr. Hynson testified that there would be no reason for Claimant not to be tied off because the sheets they were laying were only thirty feet maximum

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and the retractable is 50 feet, so there is plenty of room to move around after you lay the sheet. When Claimant handed him the wrench, he was wearing the harness. He believes they were working from a height of approximately fourteen to sixteen feet . The normal procedure is to tie off above the head, but they were working on a flat roof, so the only place to tie off was the roof.

On cross examination, Mr. Hynson admitted that he did not know if Claimant was tied off when he fell, but the lead was not on him after the fall when Claimant was on the ground. He admitted that Claimant probably would not have hit the ground if he had been tied to the lead when he fell. As soon as Claimant fell, Mr. Hynson called the paramedics and stayed with Claimant the entire time. Mr. Hynson reported that the paramedics cut off Claimant's harness, but Claimant did not want them to cut his pants. When they cut his pants there was an ace bandage with a bag of clear liquid that was about two by four inches near his ankle. When they cut off his pants, Claimant was shaking and appeared to be in shock. When they cut him from the harness, he was not tied to the retractable, which is indicative that he was not tied off at the time of his fall. The police were there and Claimant was airlifted from the scene. Mr. Hynson confirmed that Employer's policy regarding failing to tie off is first a verbal warning, then a day off, and then termination.

Marc Klair, Employer's Safety Coordinator of six years, testified on Claimant's behalf. Mr. Klair reported that when Employer hires a new employee they go through all the safety procedures and provide them with a harness. In his opinion, as the Safety Coordinator, it was not the proper or safe procedure for Claimant to untie to get the tool for Mr. Hynson. He believes Claimant should have told Mr. Hynson to get the tool from someone who could reach it safely.

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Mr. Klair was not on the site on the day of the work injury. He reported that the normal protocol for investigation for an injury is: 1) call emergency responders if necessary; 2) he reports to the site; 3) the foreman takes statements from all witnesses; 4) he reviews the statements and completes a report based on those. In this case, Mr. Hynson took statements from witnesses on the day of the injury and then Mr. Klair went down the next day and reviewed those. He prepared a report for the event the day after the work injury. He believes the best practice for attaching safety leads is to attach it above the

worker's shoulders if possible. There are different degrees of weather conditions that affect how they perform their jobs. Different degrees of rain makes decking too slippery to work, but that is not a decision he can make for the employees.

On cross examination, Mr. Klair reported that all new employees receive training and information on safety and drug policies, accident investigation and a safety handbook. Claimant signed a document acknowledging he had received a copy of the safety handbook. There is a written policy for "Zero Tolerance for Tie Off which Claimant acknowledged receiving on September 21, 2012. Claimant signed a "Zero Tolerance Policy" for drugs and alcohol on September 11, 2012. Employer conducts random drug screenings of employees twice a week. They do part of the test in house. If it shows positive they send it out to Omega labs for further testing. Claimant has been drug tested before and all the results were negative. Based upon the statements from the witnesses, Mr. Klair's understanding of the incident was that Claimant was not tied off and fell from the roof. After the incident, they ordered further drug testing to be done, but it could not be done right away. Mr. Klair did not receive a police report of the investigation. In his opinion, it was unusual for Claimant not to be tied off while doing that job.

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Claimant testified that he is forty-three year old, lives in Maryland and has been a steel worker for twenty-six years. He began working on the job where he was injured in September 2013. On the night before the incident, he stayed in a hotel with Mr. McCanney and Mr. Pisano because his home was nearly three hours away from the job site. The night before the work injury, he left work, stopped at the store to get a drink and snack and then went back to the hotel. He testified that he does not believe he had any alcohol the night before the work injury, but he admitted he did smoke marijuana and he did cocaine. He smoked the marijuana with two of his co-workers around 5:30 or 6 p.m. and did cocaine around 6:30 or 7:00 p.m. Claimant explained that he and his co-worker shared an amount of cocaine that was about the size of a quarter. Claimant reported that when he took the drugs he felt impaired and when he went to bed he also felt impaired. Claimant testified that after 7:00 p.m. the night before the injury he did not use any other drugs or alcohol.

Claimant reported that on the morning of the work injury he woke up at 6:15 a.m. and did not feel impaired. He went to work and had the morning meeting with his co-workers. Prior to the work injury, they had laid approximately forty sheets of decking. Claimant reported that he was wearing a safety helmet at the time of the work injury. He explained that they were using hooks to lift and move metal sheets over the joists. Claimant testified that, after the morning break, when he went back on the roof, he did not tie off because "no one was tied off." He explained that they felt safe because they were not that high up and there was an open hole nearby that made him think it would be unsafe to use the tie. Claimant explained that, in his experience, at approximately ten feet, it is possible to jump down and not be injured. The retractable makes the job more difficult because it always puts pressure on the worker and pulls

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the worker back. Claimant reported that when he was placing the third sheet, the hook slipped and he fell.

Claimant reported that when Mr. Hynson asked him to retrieve a tool he untied the retractable because it was more than 50 feet away, so he untied to go get the tool. The fall occurred within five to ten minutes after that. He reported that his anchor was behind him at the time of the fall, but he does not believe it would have made it to where he was going. He did not believe it was safe to use the retractable because there was an open hole and the retractable would continue to pull him back into the hole. He does not believe the retractable would have engaged before he hit the ground. He believes his foot slipped and the hook came out, which caused him to fall. He tried to catch himself but was unable to do so. He

recalls that it was misting rain because when the helicopter tried to land at Christiana it could not land because of weather.

On cross examination, Claimant admitted that he does cocaine once or twice a year and marijuana approximately once a month. Claimant admitted that he had a bag of urine on his leg because he smokes marijuana and wears it after he smokes it so that he will pass Employer's random drug screenings. He reported that he was wearing it approximately a week before the work injury to prevent him from testing positive with Employer's random drug screens. Claimant disclosed that he had smoked marijuana the night before the work injury and the week before that. He testified that he wears the bag of urine to pass the drug test whenever he has been smoking marijuana. He reported that he told the police and paramedics that he smoked marijuana and that was why he had the urine in the bag.

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Claimant admitted he did not report his concern about the hole in the roof or his concern about his inability to use the retractable. Claimant testified that neither he nor any of the other employees were tied off after the morning break. He admitted that he was incorrect when he testified earlier that he had to untie the retractable to get the tool for Mr. Hynson. Claimant reported that he bought marijuana the week before the work injury and a co-worker brought it the night before. They bought the cocaine from someone around the hotel. Claimant is no longer employed by Employer or anyone.

Dr. Ali Hameli, a forensic pathologist and forensic toxicologist, testified by deposition on Employer's behalf. The parties stipulated as to Dr. Hameli's qualifications. Dr. Hameli had reviewed all pertinent records from Claimant's work injury. Dr. Hameli reported that a blood sample taken from Claimant twenty-seven (27) hours (at approximately 1:40 p.m. on October 31, 2013) after the work injury resulted in findings of Benzoylecgonine, which is a metabolite of cocaine and Carboxy THC, which is a metabolite of marijuana. Based on the amount of cocaine metabolite remaining in Claimant's blood twenty-seven (27) hours after the incident, Dr. Hameli concluded that Claimant ingested a moderate amount of cocaine within a few hours immediately prior to the work injury because it would not have remained in his system at that level for that amount of time otherwise. Dr. Hameli could not pinpoint the exact time that Claimant ingested the marijuana prior to the accident because marijuana stays in the system longer.

Dr. Hameli described the effects of taking marijuana as having a deteriorating effect on concentration and judgment, and producing vertigo and impairment of motor activities like balance and other physical activities. He described the effects of cocaine as hallucinations, nausea, vomiting, blurred vision, dizziness, and impairment of observation, judgment and

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attention. According to Dr. Hameli, a combination of these two substances would have a "considerable deteriorating effect on the physical activities that [Claimant] had at the time of exercising his duties." Dr. Hameli concluded that the combined effect of those substances was a substantial factor in contributing to Claimant's work injury and it played a significant role in that work injury.

On cross examination, Dr. Hameli explained that frequent users of cocaine may develop a habit that requires them to use a greater quantity of the substance, but taking a greater amount of the substance does not increase that user's tolerance of the substance or decrease the impact the substance has on the user. Dr. Hameli explained, "[y]ou don't develop a tolerance toward the impact and effect of it, but your behavior may be changed." Dr. Hameli concluded within a reasonable degree of medical certainty that Claimant was impaired by cocaine and marijuana at the time of the work injury and that impairment substantially contributed to the work injury itself. Dr. Hameli based his conclusions on

"my education, my information attending all kinds of seminars and my personal experience examining 60,000 cases and 12,000 autopsies and all the background and all the laboratory tests."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

Claimant seeks to establish the compensability of an alleged October 30, 2013 work injury. The Delaware Workers' Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." DEL. CODE ANN. tit. 19, § 2304. Because Claimant has filed the current petition, he has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). Claimant has the burden to establish that the alleged incident and injury occurred. *Morris v. Gillis Gilkerson,* Inc. Del.

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Super., C.A. No. 94A-09-006, Lee, J. (Aug. 11, 1995) at 8, citing *Grays Hatchery & Poultry Farm v. Stevens,* Del. Super., 81 A. 2d 322, 324 (1950). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kaufman's Furniture,* Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (October 30, 1997), *aff'd,* 706 A.2d 26 (Del. 1998). Claimant has an obligation to prove that an injury occurred, as well as when that injury occurred. *General Motors Corp. v. Ciccaglione,* Del. Super., C.A. No. 91A-05-10, Toliver, J. 1991 WL 269935 (December 10, 1991). "Furthermore, the practicalities of all compensation cases require sufficient findings of fact by the Board so that the parties can calculate what monetary benefits are owed. *Id.* at *4.

In this case, the parties stipulated that Claimant injured his right shoulder, right hip, and ribs in the course and scope of his employment when he fell from a roof. The parties also stipulated that Claimant's treatment with Christiana Care, Drs. Brady and Handling at First State Orthopedics, Dr. Pfaff and ATI physical therapy are reasonable, necessary and related to the work injury. The issues are whether Claimant's injuries occurred as a result of intoxication and/or Claimant's willful failure or refusal to use a reasonable safety appliance, such that his rights have been forfeited pursuant to 19 *Del. C.* § 2353(b).

Intoxication

In workers' compensation actions, the negligence of an employee is not a defense. 19 *Del. C.* § 2314. However, an employee can forfeit the right to compensation for an injury if the injury was the result of the employee's own intoxication. 19 *Del. C.* § 2353(b). For this defense to be effective, the intoxication itself must be the cause of the injury. *Stewart v. Oliver B. Cannon & Son, Inc.,* 551 A.2d 818, 821 (Del. Super. 1988). If the intoxication merely "accentuates" an injury otherwise compensable, the intoxication is irrelevant. *See Penn Del*

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Salvage, Inc. v. Wills, 282 A.2d 613, 614 (Del. 1971). The burden of proof on proving that an employee's intoxication caused the injury is on the employer. 19 *Del. C.* § 2353(b).

In this case, Claimant himself admitted using both marijuana and cocaine at least the night before the work injury. In addition, Claimant admitted to using marijuana so frequently that he wears a bag of urine to evade Employer's random drug screens. Claimant admitted to having smoked marijuana the night before the work injury and the week before the work injury, which is why he was wearing the bag of urine for the week leading up to the work injury. Claimant admitted that he and his co-workers purchased cocaine at the hotel where they were staying the night before the work injury and that they smoked a bowl of marijuana that same night.

Claimant testified that neither he nor his co-workers drank alcohol the night before the work injury, but two of his co-workers who testified on his behalf reported that they drank alcohol, but did not do illegal drugs. Claimant testified that he did cocaine and smoked marijuana with the two co-workers who stayed in the hotel with him and those two co-workers were Mr. McCanney and Mr. Pisano. Mr. McCanney testified that he was not aware of any drug use that occurred the night before the work injury. Mr. Pisano testified that he did not recall anyone using drugs the night before the work injury, but that they all drank alcohol "pretty much every day after work." The foreman of the job, Mr. Hynson, testified that he could not remember whether Claimant appeared to be impaired the morning of the work injury or not. Thus, Claimant's own witnesses' testimony either contradicted his or was vague and, for that reason, is lacking in credibility.

Employer presented evidence, in the form of medical testimony from Dr. Hameli, a forensic pathologist and toxicologist, who concluded that Claimant ingested a moderate amount

of cocaine within a few hours immediately prior to the work injury and marijuana at some point prior to the work injury. Dr. Hameli concluded further that the combined effect of the cocaine and marijuana was a substantial factor in contributing to Claimant's work injury and his use of those substances played a significant role in that work injury. He described the effects of taking marijuana as deteriorating concentration and judgment, producing vertigo and impairment of motor activities like balance and other physical activities. The effects of cocaine were hallucinations, nausea, vomiting, blurred vision, dizziness, and impairment of observation, judgment and attention. According to Dr. Hameli, the combination of marijuana and cocaine would have a "considerable deteriorating effect on the physical activities that [Claimant] had at the time of exercising his duties." Dr. Hameli concluded within a reasonable degree of medical certainty that Claimant was impaired by cocaine and marijuana at the time of the work injury and that impairment substantially contributed to the work injury itself. The Board finds Dr. Hameli's unrefuted expert testimony credible and persuasive. Therefore, the Board finds that Claimant forfeits his right to receive compensation for the work injury because the work injury was a result of his own intoxication.

Willful Failure to Use Safety Appliance

In some cases, an employee may forfeit the right to receive compensation for a work injury if that employee has failed to use a safety appliance. If a Claimant is injured because of a "willful failure or refusal to use a reasonable safety appliance provided for the employee" the Claimant shall not be entitled to recover damages from that injury. DEL. CODE ANN. tit. 19, § 2353(b). An act is only considered "willful" if it is "done intentionally, knowingly, purposely, and without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently." *Stewart v. Oliver B. Cannon & Son, Inc.,* 551 A.2d 818, 823 (Del.

Super. 1988)(citing *Lobdell Car Wheel Co. v. Subielski,* 125 A. 462 (Del. Super. 1924)). "Willful" is more than just a volitional act. *Delaware Tire Center v. Fox,* 411 A.2d 606, 607 (Del. 1980).

Claimant testified that while he was wearing a safety helmet at the time of the work injury, he was not tied off because "no one was tied off." Claimant testified that he was not tied off because he felt safe at that height and believed at that height he could jump down and not be injured. Claimant believed that the retractable made the job more difficult because it puts pressure on and pulls back. Claimant also testified that there was an open hole nearby where they were working so he did not tie off because he believed it would be dangerous to do so. Both Mr. McCanney and Mr. Pisano testified that while most employees use the retractables regularly, there are times when they do not for safety reasons or convenience reasons. Mr. Hynson testified that Claimant was wearing

the harness that attaches to the retractable at the time of the fall, as well as a helmet. All of Claimant's witnesses testified as to the content of Employer's Tie Off Policy and the consequences for violations of that policy; however, there was no evidence that Claimant had ever been cited for having violated that policy prior to the work injury. Claimant is an experienced steel worker and testified as to justifiable reasons for not using the retractable on the particular day and those reasons do not rise to the level of "willful" failure to use the device without justifiable excuse. Therefore, the Board does not find that Claimant forfeits his benefits based upon his willful failure to use a safety appliance.

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STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Employer has proven that Claimant suffered a work injury as a result of his own intoxication and Claimant has forfeited his right to recover damages and/or compensation or medical services pursuant to 19 *Del. C.* § 2353(b)(3). Therefore, Claimant's Petition to Determine Compensation Due is denied.

IT IS SO ORDERED THIS 9th DAY OF APRIL, 2015.

INDUSTRIAL ACCIDENT BOARD

/s/_____
MARY DANTZLER

/s/_____
PATRICIA MAULL

/s/_____
HEATHER WILLIAMS
Workers' Compensation Hearing Officer

Mailed Date: 4-10-15

/s/_____
OWC Staff