

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**ASPLUNDH TREE EXPERT COMPANY,
Claimant Below, Petitioner,**

**vs.) No. 17-0264 (BOR Appeal No. 2051665)
(Claim No. 2016022877)**

FILED

November 22, 2017
EDYTHE NAS GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**ERIC CLEMENS,
Employer Below, Respondent**

MEMORANDUM DECISION

Mr. Clemens, a logger, was injured when he hit his face and head on a tree stump when he fell while cutting trees. We are asked to determine whether it was proper to hold the claim compensable, even though Mr. Clemens had a blood test that revealed the presence of marijuana in his system on the day of the accident. Our guidepost is West Virginia Code §23-4-2 (2015) which allows for the rejection of a claim if the employee is deemed to be intoxicated. We find that holding the claim compensable was proper as Mr. Clemens was not intoxicated at the time of the injury. We further find upon consideration of the standard of review, the briefs, and the record, that there is no substantial question of law or prejudicial error necessitating oral argument. As such, a memorandum opinion is appropriate under Rule 21 of the Rules of Appellate Procedure

Medical records from Summersville Regional Medical Center dated February 23, 2016, the date of the accident, show Mr. Clemens was admitted for a head injury with bruising of both eyes, an abrasion to the right side of his face, a laceration on the ride side of his mouth, and swelling on the left side of the face. He was transported to Charleston Area Medical Center by the Air Evac Lifeteam where he was diagnosed with a skull fracture and underwent a craniotomy and a partial craniectomy. A pre-surgical toxicology screen was positive for THC, a marijuana derivative. A maxillofacial CT scan showed panfacial fractures including bilateral nosoorbitoethmoid fractures, bilateral zygomatico complex fracture, right mandibular fracture, and frontal sinus fracture. On March 4, 2016, Mr. Clemens underwent an open reduction and internal fixation of the right jaw, open reduction and internal fixation of the condylar, repair of the comminuted zygomatico complex fracture, and repair of the laceration of the lip.

The claims administrator rejected the claim on July 6, 2016, because Mr. Clemens tested positive for marijuana on the day of the accident. During the expedited hearing on October 6, 2016, Mr. Clemens testified that all he remembers about the accident was that he was cutting down a tree and as he walked away he heard somebody call his name and then he woke up in the

hospital. He was told that a co-worker watched him get beat over the head with a hammer. He was also told he fell down an eight foot embankment. He also remembered doing a face plant onto a tree stump and getting up and then waking up in the hospital, even though he denied remembering anything about the accident. Mr. Clemens did not remember having blood drawn for lab work. Mr. Clemens admitted he smoked a joint with his girlfriend two days before the accident.

Sammy Roy, the regional safety supervisor for Asplundh Tree Expert Company, also testified during the expedited hearing. He stated that he arrived at the scene of the accident about two hours after the accident happened. The foreman told him that once the tree hit the ground, he saw Mr. Clemens lying on the ground face down. He did not see any limbs on the ground at the injury site. Mr. Roy was told Mr. Clemens must have slipped and hit his face on a stump. Mr. Roy questioned Mr. Clemens's story due to the severity of his injuries, the fact that there was not much blood at the site, and the lack of teeth found at the site. Mr. Clemens said his teeth were knocked out. There was a rumor that Mr. Clemens had been beat up and placed at the scene of the accident. Due to questions surrounding the injury, Mr. Roy asked the state police to investigate the injury. They were unable to do this due to the need for medical records.

In its November 3, 2016, Order, the Office of Judges reversed the claims administrator's rejection of the claim and held the claim compensable for an intracranial injury and fractures of the skull and facial bones. It found that the lab results that revealed the presence of marijuana in Mr. Clemens's system following the accident were unconfirmed screening results that should not be used for non-medical purposes. Additionally, the medical records failed to indicate whether the results were from a blood or urine test. West Virginia Code §23-4-2 (2015) requires a blood test. Therefore, the Office of Judges found the lab results were inadequate to preclude the claim.

The Office of Judges determined Mr. Clemens testified that he fell down an embankment at work and did a "face plant" onto a tree stump. All other possible mechanisms of injury were not supported by the evidence as they were based upon rumor and conjecture. The medical records support Mr. Clemens's assertion that he was involved in a logging accident. A co-worker drove him to the hospital. While the Office of Judges did not find all of the testimony provided by Mr. Clemens to be credible, it found that his testimony regarding the injury was credible. Accordingly, the Office of Judges concluded that a preponderance of the evidence supported Mr. Clemens's assertion that he was injured while at work. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on February 17, 2017.

Asplundh Tree Expert Company, through its attorney Melissa Robinson, argues the presence of marijuana in Mr. Clemens' system was confirmed by a blood test on the date of the accident, and therefore, he is deemed intoxicated, thus barring compensability of his claim. Mr. Clemens, through his attorney, William Gerwig III, argues the reliable evidence supports the compensability of his claim.

After review, we agree with the reasoning of the Office of Judges as affirmed by the Board of Review. West Virginia Code §23-4-2 provides in part, "[i]f any blood test for

intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the injury...” Additionally, intoxication will be deemed to be the cause of the injury when a blood test administered within two hours of the accident provides evidence of alcohol intoxication and when there is evidence of either on or off the job use of a nonprescribed controlled substance. Here, Asplundh failed to prove Mr. Clemens was given a blood test. The lab report contains nothing other than the toxicology results. The medical records are void of any request of a representative from Asplundh or the hospital to test Mr. Clemens for the purpose of determining whether he was intoxicated at the time of the accident. Therefore, Asplundh is not able to use intoxication as a reason to bar the claim. Additionally, there is no other feasible explanation for Mr. Clemens’s injuries. He was working with other people at the time of the injury. His co-workers may not have witnessed exactly how Mr. Clemens was injured, but they certainly did not report seeing him being beaten up.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Elizabeth D. Walker