

21-0853

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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**JUSTIN HART,**

**Claimant/Petitioner**

**vs.**

**PANHANDLE CLEANING  
AND RESTORATION, INC.,**

**Employer/Respondent**

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**BRIEF OF CLAIMANT/PETITIONER JUSTIN HART**

**RE: Appeal No.: 2056780  
JCN No.: 2021004803**

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**I. ASSIGNMENT OF ERROR:**

The Office of Judges and Board of Review erred in finding that the statutory defense of self-intoxication, as stated in W.Va. Code §23-4-2(1), could not be overcome, even when the alleged intoxication is three one thousandths of a percent over the statutory limit.

**II. STATEMENT OF THE CASE:**

The following facts were *undisputed* before the Office of Judges:

1. On September 13, 2020, Claimant/Petitioner Justin Hart (Claimant) was an employee of Employer/Respondent Panhandle Cleaning & Restoration (Employer). Claimant worked for Employer off and on for five years and continuously for the two years leading to September 13, 2020. *See*, Claimant's affidavit attached as Exhibit A.
2. In the five years leading up to September 13, 2020 at no time did anyone associated with Employer raise any issues with Claimant being intoxicated, smelling of alcohol, smelling of any substance or being impaired in any way. *Id.*
3. On September 13, 2020, Claimant's work day started at 7:00 a.m. He woke up between four and five a.m. and was on time to the Panhandle Cleaning & Restoration offices at 42 38<sup>th</sup> Street, Wheeling, West Virginia. *Id.*
4. When Claimant woke up, he did not feel hungover, sluggish or in any way impaired by any substance or alcohol. He had drunk heavily the night before. *Id.*
5. At Employer's Wheeling office, only Claimant and Taylor Smith, a coworker, were present. They waited about twenty minutes before leaving for their job task for the day. *Id.*
6. The job for the week was to work at the Mr. Bee Potato Chip Factory in Parkersburg, West Virginia. Taylor Smith drove from Wheeling to the job site in Parkersburg, West Virginia. *Id.*
7. At no time during the two-and-a-half-hour commute, did Taylor Smith comment that Claimant appeared or sounded intoxicated or that Claimant smelled of alcohol or any other substance. *Id.*
8. Upon arriving at the Mr. Bee Potato Chip Factory, Claimant spoke to his immediate supervisor, Art Willingham, as well as the project supervisor, Tracy Stuart. The entire team was around for about a half hour before getting to work on the job tasks at hand.

9. At no time did Art Willingham or Tracy Stuart question Claimant about being sober, impaired in any manner or comment that Claimant smelled of alcohol or any other substance. *Id.*
10. Claimant's supervisors must have been confident in his sobriety, as they assigned him to work seventeen feet above a concrete floor in a lift.
11. Claimant was working with a temporary employee on September 13, 2020. Claimant started working up in the ceiling of the factory around 8:30 a.m. *Id.*
12. Claimant would communicate with the temporary employee using hand signals or yelling back and forth to each other. At no time did the temporary employee question Claimant about being impaired by alcohol or any other substance, nor did the temporary employee indicate that Claimant seemed tipsy, sluggish or in any way impaired. *Id.*
13. Claimant had a conversation with supervisor Art Willingham around lunch time. Claimant was on the ground at that time and within speaking distance of Willingham. At no time did Willingham state that Claimant appeared impaired, sluggish or under the influence of alcohol or any other substance, that Claimant smelled of alcohol or raised any concerns whatsoever about Claimant's ability to perform his job. *Id.*
14. The rest of the crew was going to lunch and Claimant told Art that he wanted to keep working and would take lunch if and when he needed. *Id.*
15. Within thirty minutes of that conversation, Claimant was back working on the ceiling. His break-a-way harness was not long enough to reach the next tie-off. When Claimant unclipped from the one point of support, he fell through a supporting platform board while trying to tie-off onto the other point support. *Id.*
16. Claimant fell seventeen feet and landed on the concrete ground. He was on the ground for some period of time before he was able to yell and get the temporary employee's attention. The temp then went and got the rest of the crew who came to Claimant's side. *Id.*
17. Art Willingham, Tracy Stuart and most of the rest of the work crew were surrounding Claimant and in very close proximity to him. At no time did anyone state that Claimant appeared intoxicated, sluggish or that Claimant smelled of alcohol or any other substance. *Id.*
18. Tracy Stuart accompanied Claimant to Camden Clark Hospital and stayed by his side unless he was asked to leave the room by a physician. At no time while Claimant was at Camden Clark Hospital did Tracy Stuart mention anything about him appearing or acting intoxicated or smelling of alcohol or any other substance. *Id.*
19. Tracy Stuart followed the ambulance to Ruby Memorial Hospital. He stayed with Claimant the entire time he was at Ruby Memorial Hospital, unless asked to leave by

a physician. At no time at Ruby Memorial Hospital did Tracy Stuart state that Claimant appeared to be intoxicated or smelled of alcohol or any other substance. *Id.*

20. Claimant did not feel intoxicated, and in his opinion was not intoxicated. Claimant safely performed his work, at heights, for roughly three and a half hours before he fell. *Id.*

Claimant admits to being a heavy drinker. In fact, Claimant did drink the night before he was injured. This is arguably what led to his blood alcohol testing as positive at the emergency room where he was taken after his fall.

As a result of his fall, Claimant suffered serious bodily injuries, including, but not limited to:

- Fracture of the left femoral neck.
- Fracture of the left olecranon.
- Fracture of the left radial head.
- Fracture of the left pelvis.

Claimant completed a WC-1 (Exhibit B) and filed it in a timely manner. The claims administrator order of September 23, 2020 denied the claim. (Exhibit C) The sole basis for denial was the claims administrator's belief that Claimant was intoxicated and that his intoxication was the cause of his injury.

In support of his protest Claimant submitted an affidavit attesting to all the facts set forth above, (Exhibit A) the operative note (Exhibit D) for his care, a WC-1, and other medical records. Employer submitted the emergency room records demonstrating Claimant had a .053 BAC on the date of injury, the order denying the claim and medical records from a subsequent emergency room visit where Claimant was intoxicated.

The Office of Judges issued a May 11, 2021 (Exhibit E) order which affirmed the claims administrator's denial. The order indicated that the Claimant did not prove by a preponderance of evidence the claim was improperly denied pursuant to W.Va. Code §23-4-2.

The Office of Judges order stated as follows:

“The claimant’s argument that he rebutted any presumption that his intoxication caused the fall is well taken. **While following the statute does lead to a flawed, perhaps absurd, presumption in the present case**, it can not be ignored that the statute does not provide for a rebuttable presumption. The statute states that, when the elements are met, the employee is “deemed intoxicated” and “the intoxication is the proximate cause of the injury”. Therefore, the Order must be affirmed”. (Emphasis added)

Claimant filed a timely appeal to this order. The Board of Review order dated September 17, 2021 affirmed the ALJ’s decision. (Exhibit F) It is Claimant’s position that the statute’s language stating that an employee is “deemed” intoxicated can be rebutted. As such, this appeal has followed.

### **III. CONCLUSIONS OF LAW AND CITATIONS OF AUTHORITY**

1. The Workers Compensation Appeal Board shall reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are: (1) In violation of statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W.Va. Code §23-5-12(b) (1995).

2. The resolution of any issue shall be based on a weighing of all evidence pertaining

to the issue and a finding based on a preponderance of evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. If after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted. W. Va. Code §23-4-1g.

3. If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. W.Va. Code 23-5-15(c).

4. Three elements must coexist in compensability cases: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E.2d 698 (1970).

5. Notwithstanding anything contained in this chapter, no employee or dependent of

any employee is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee, caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of determining the existence or nonexistence of evidence of intoxication: provided, that the employer must have a reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for an intoxication is given following an accident, the request of the employer or otherwise, and if any of the following are true, the employee is deemed intoxicated, any intoxication is the proximate cause of the injury:

1. If the blood test is administered within two hours of the accident and evidence that there was, at the time, more than five one hundredths of one percent, [.05] by weight, of alcohol in the employee's blood .... W.Va. Code §23-4-2(1).

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

#### **V. ARGUMENT**

On the date of the injury, Claimant, halfway through his workday, fell through a supporting platform, while attempting to transition his safety harness from one point of contact to another. These facts are undisputed. It is also undisputed that Claimant showed no signs of intoxication during his workday. Nothing was suspected at any time by his employer or anyone else. Blood

was taken and tested in the emergency room, even though Employer did not have any suspicion that Claimant was intoxicated.

It is true Claimant is a heavy drinker. He drank the night before his injury. However, there is no evidence that he was acting or exhibiting any inappropriate or awkward behavior. Claimant's affidavit stands uncontested. He had conversations with his supervisors. He had conversations with coworkers. He was in the car for a long trip with a coworker who never mentioned him smelling or acting intoxicated. This was several hours before the fall. His supervisors, who he conversed with prior to injury, felt secure enough to have him work at great height on an elevated platform.

There is no evidence at all to suggest that alcohol was the cause of his injury. It is true that Claimant tested *three one thousandths* of a percent over the presumptive limit. This testing was done at the emergency room as part of a standard blood test. There is no evidence of record to suggest that the emergency room physicians suspected alcoholism or intoxication. In fact, those records are silent as to the Claimant exhibiting any signs of intoxication.

The denial is based on W.Va. Code §23-4-2 which states that a claimant is "deemed" intoxicated and that the intoxication is the proximate cause of the fall. What the statute *does not say* is whether or not this "deemed" intoxication is rebuttable. Something can be "deemed" to be a cause, but can be overcome. As the statute is silent in this regard, it is Claimant's position that such a presumption can be overcome.

Employer argues that the statute creates a presumption that the claim is barred and such presumption is "irrebuttable". There is nothing in the statute that states that there is an irrebuttable presumption. That term does not appear in the statute.

The statute creates a presumption. Here, Claimant has overcome that presumption. He worked for hours and communicated with his employer. No evidence has been suggested that

anyone thought he was intoxicated. No issues were raised about his performance on the job. No evidence has been set forth that anyone even suspected he was intoxicated. As such, Claimant has overcome any presumption found in W.Va. Code §23-4-2.

The Office of Judges was clearly troubled with the application of W.Va. Code §23-4-2 in this claim. In the twenty-five years the undersigned has been pursuing these matters for injured workers, an Administrative Law Judge has never used the term “absurd” to describe an outcome. However, in this circumstance, with these facts, the outcome is in fact “absurd”. No one suspected Claimant was intoxicated. Claimant did not act intoxicated. He fell through a supporting board and sustained serious injuries. Employer did not ask for a blood test, but by circumstance, one was ordered in the hospital. That served the basis of denying, by three one thousandths of a percent, an otherwise completely valid workers’ compensation claim.

Claimant would ask this Court to find that the statutory language in W.Va. Code §23-4-2 can be rebutted. Had the legislature wished this statute to be irrebuttable, it would have stated so. It did not.

For these reasons, Claimant respectfully requests that the Statute be found rebuttable, thereby reversing the claims administrator’s order and find the claim compensable for all diagnoses listed on the WC-1 form as well as the emergency room records. These diagnoses would include:

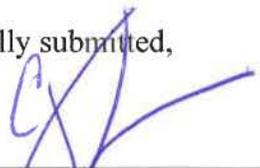
- Fracture of the left femoral neck.
- Fracture of the left olecranon.
- Fracture of the left radial head.
- Fracture of the left pelvis.

**VI. CONCLUSION**

For these reasons, Claimant/Petitioner Justin Hart respectfully requests this Honorable Court reverse the decisions of the Board of Review and Administrative Law Judge. Claimant would also ask this Court to find that he rebutted the presumption of intoxication set forth in W.Va. Code §23-4-2. Although Claimant may have been “deemed” intoxicated, he was not and any alleged intoxication was clearly not the cause of his injuries.

Respectfully submitted,

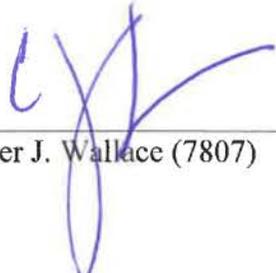
BY:

  
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*Counsel for Claimant/Petitioner Justin Hart*

**CERTIFICATE OF SERVICE**

A true and accurate copy of Claimant/Petitioner’s Brief was served on the 18<sup>th</sup> day of October, 2021, by placing a copy of same in the United States Mail with service to the following:

Steven K. Wellman, Esq.  
Jenkins Fenstermaker, PLLC  
P.O. Box 2688  
Huntington, WV 25726

  
\_\_\_\_\_  
Christopher J. Wallace (7807)

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**WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT**

Complete Case Title: Justin Hart v. Panhandle Cleaning and Restoration, Inc.  
 Petitioner: Justin Hart Respondent: Panhandle Cleaning and Restoration, Inc.  
 Counsel: The Wallace Firm, PLLC Counsel: Steve Wellman, Esq.  
 Claim No.: 2020021240 Board of Review No.: 2056780  
 Date of Injury/Last Exposure: 9/13/2020 Date Claim Filed: 10/5/20  
 Date and Ruling of the Office of Judges: 5/11/21 affirmed claim denial  
 Date and Ruling of the Board of Review: 9/17/21 affirmed office of judges  
 Issue and Relief requested on Appeal: Reverse and find Claimant suffered a compensable injury

CLAIMANT INFORMATION	
Claimant's Name:	<u>Justin Hart</u>
Nature of Injury:	<u>Hio and leg fractures</u>
Age: <u>38</u>	Is the Claimant still working? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If yes, where: _____
Occupation: <u>Laborer</u>	No. of Years: _____
Was the claim found to be compensable? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, order date: _____	

ADDITIONAL INFORMATION FOR PTD REQUESTS	
Education (highest): _____	Old Fund or New Fund (please circle one)
Date of Last Employment: _____	
Total amount of prior PPD awards: _____	(add dates of orders on separate page)
Finding of the PTD Review Board: _____	

List all compensable conditions under this claim number: Claim was denied in its entirety  
 (Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?  
 Yes  No  
 (If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below?  Yes  No  
 (If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?  Yes  No  
 If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.