IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF ROBERT DETMER,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY OF NEVADA,
Respondent.

No. 40908

FILED

DEC 01 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying a petition for judicial review in a workers' compensation case. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Robert Detmer, an ironworker, fell to his death at his place of work while attempting to climb a steel beam. Evidence in the administrative record suggested that Detmer became fatigued and called for assistance, which, unfortunately, came too late to save him. Post-mortem blood testing revealed the presence of 618 ng/mL of methamphetamine and 68 ng/mL of amphetamine in his system. An expert consultant who reviewed the test results concluded that the presence of drugs in Detmer's system may have contributed to the accident. Based upon the blood test results, respondent Employers Insurance Company of Nevada denied the claim for survivor's benefits lodged by appellant, the Estate of Robert Detmer.

The Estate appealed the initial determination to an administrative hearing officer and then to an appeals officer. The appeals officer ultimately denied compensation, ruling that the presence of a controlled substance in Detmer's system was the proximate cause of his

04-21895

demise.[1] The Estate filed a petition for judicial review, which the district court denied.

On appeal, the Estate asserts that the appeals officer's decision is not supported by substantial evidence, and that the appeals officer misinterpreted NRS 616C.230.

DISCUSSION

This court's review of an administrative agency's decision is confined to the record presented to the agency.[2] We determine whether substantial evidence supports the agency's decision[3] and will not reweigh the evidence or pass on the credibility of witnesses.[4] Further, questions of proximate causation are generally issues of fact left to the trier of fact to resolve.[5]

This appeal primarily concerns the application of NRS 616C.230(1)(d):

> 1. Compensation is not payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS for an injury:
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> . . . .
>
> (d) Proximately caused by the employee's use of a controlled substance. If the employee had

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[1]See NRS 616C.230(1)(d).

[2]NRS 233B.135(1)(b).

[3]Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994).

[4]Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

[5]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 665 (1998).

> any amount of a controlled substance in his system at the time of his injury for which the employee did not have a current and lawful prescription issued in his name or that he was not using in accordance with the provisions of chapter 453A of NRS, the controlled substance must be presumed to be a proximate cause unless rebutted by evidence to the contrary.

We recently considered the application of NRS 616C.230(1)(d) in Construction Industry v. Chalue.[6] In that case, we noted that the rebuttable presumption codified in the statute was unequivocal: "if an employee has marijuana in his system when injured, then marijuana caused the accident unless proven otherwise."[7] We also stated that "[t]he presence of the controlled substance does not have to be 'the' proximate cause [of an industrial accident], only 'a' proximate cause."[8] However, to rebut the presumption under NRS 616C.230(1)(d), a workers' compensation claimant need only establish by a preponderance of the evidence that the presence of a controlled substance did not cause his injuries.[9]

In addition to the positive blood test results, the appeals officer relied upon the expert opinion of a consultant from Associated Pathologist Laboratories, Dr. John Hiatt, that Mr. Detmer

> [w]as a user of methamphetamine and used it in an abusive fashion. The level of methamphetamine in his blood (618 ng/ml) was

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[6]119 Nev. 348, 74 P.3d 595 (2003).

[7]Id. at 352, 74 P.3d at 597.

[8]Id.

[9]Id.

> such that he would clearly be considered to be "under the influence" at the time of his death. The stimulant properties of the drug may have led him to overestimate his physical capabilities.

As part of the proceedings before the appeals officer, the parties also agreed to the presence of the drugs in Detmer's system and that the consulting physician was of the opinion that the drugs may have been a contributing factor in the accident. The Estate did not seek to rebut the statutory presumption by presenting evidence that the drugs did not impair Detmer, but rather, argued that flu, general weakness and the failure of the employer to place safety netting were the proximate causes of the injury. More particularly, the Estate posited that Detmer would not have died but for his employer's failure to comply with safety regulations.[10] Based upon the record, the appeals officer found that, while Detmer was wearing a safety harness, he failed to fasten it to the column he was climbing, that he became fatigued, lost his grip and fell to his death. The administrative tribunal finally concluded that the Estate failed to rebut the statutory presumption that the drugs in Detmer's system were the proximate cause of the accident, and that the failure to erect safety netting or sub-flooring did not cause the fall.

The Estate argues that the appeals officer erroneously focused on the cause of the fall and not the cause of death. In this, the Estate asserts that, because NRS 616C.230 speaks to the proximate cause of the injury, not the accident, the appeal officer's focus should have been on the

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[10]The Nevada State Occupational Safety and Health Enforcement Section cited and fined the employer, Schuff Steel, for willful occupational safety violations for failure to install safety lines, netting or temporary flooring.

insufficient safety precautions at the job site leading to Detmer's injury. The Estate thus reasons that, while the presence of drugs in Detmer's system may have caused him to lose his grip, the presence of the drugs did not cause his death; rather, the proximate cause of the injury was the employer's failure to install safety devices to prevent Detmer from falling to the ground. The Estate thus contends that this failure was a superceding, intervening force that was the true cause of death. We disagree. As noted, under Chalue, the presumption that an injury is caused by the use of illicit drugs is raised by the presence of the substance in the worker's system, and that, when ingestion or use is "a" proximate cause of the injury, the claim is non-compensable.[11] While safety measures may have prevented this fatality, Dr. Hiatt's opinion constitutes substantial evidence that Mr. Detmer's intoxication was "a" proximate cause of his demise.

The Estate also claims that the appeals officer improperly denied the claim for failure to provide expert testimony to rebut the presumption. In this, the appeals officer stated:

> Unlike the case of Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 877 P.2d 1032 (1994), claimant did not present scientific or expert

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[11]Chalue, 119 Nev. at 352, 74 P.3d at 597; see also NRS 616C.230(1)(d). The Estate relies upon case authority from New Jersey and Illinois that intoxication that only partially contributes to an injury also caused by dangerous working conditions may not be a ground for denying compensation. See Warner v. Vanco Mfg., Inc., 690 A.2d 1126 (N.J. Super. App. Div. 1997); Lakeside Arch. Metals v. Industrial Comm'n, 642 N.W.2d 796 (Ill. App. Ct. 1994). These cases do not apply because under Chalue, the intoxication need only serve as "a" proximate cause of the injury.

testimony to rebut the presumption of NRS 616C.230(1)(d).

There are two possible interpretations of this statement. The statement is either (1) a simple comment upon the evidence, e.g., that unlike other cases, such as Tighe,[12] the Estate chose not to present expert testimony, or (2) constitutes a ruling that expert testimony was necessary to rebut the presumption. If the former, there is no error because the statement merely comments upon the state of the evidence. If the latter, the appeals officer's requirement was erroneous because, under Chalue, a workers' compensation claimant need not present expert testimony to rebut the presumption. We conclude, however, that any error in this regard is harmless. In addition to the fact that the Estate failed to present expert or scientific evidence rebutting the presumption that Detmer's intoxication was a proximate cause of his fall and ultimate demise, the Estate likewise failed to present lay testimony to that effect. Thus, Detmer's Estate failed to present substantial evidence to rebut the presumption that the injury was non-compensable.[13]

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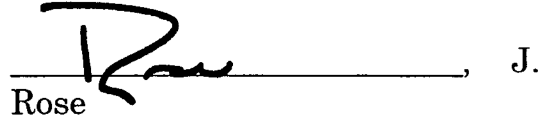
[12]In Tighe, the claimant presented the testimony of two experts who opined that the claimant was not intoxicated at the time of the accident. Tighe, 110 Nev. at 637, 877 P.2d at 1036.

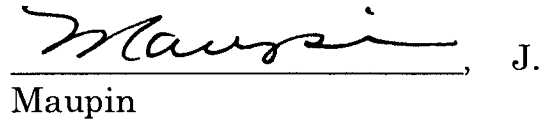
[13]We have considered the Estate's other assignments of error and find them to be without merit.

Because we reject the Estate's assignments of error in this matter, we hereby

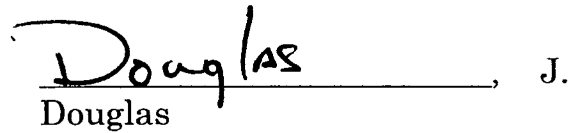
ORDER the judgment of the district court AFFIRMED.



Rose, J.



Maupin, J.



Douglas, J.

cc: Hon. Lee A. Gates, District Judge
Craig P. Kenny & Associates
Beckett & Yott, Ltd./Las Vegas
Clark County Clerk