

TEMPORARY AWARD ALLOWING COMPENSATION
(Reversing the Award and Decision of Administrative Law Judge)

Injury No.: 08-060525

Employee: Frank Roscom

Employer: Woodstone Builders, LLC

Insurer: American Home Assurance Company/AIG

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and briefs, and considered the whole record, the Commission finds that the final award and decision of the administrative law judge is not supported by competent and substantial evidence and was not made in accordance with the Missouri Workers' Compensation Act. Pursuant to § 286.090 RSMo¹, the Commission reverses the final award and decision of the Administrative Law Judge Robert H. House dated May 21, 2009, and issues a temporary or partial award. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

Employee sustained serious injury as a result of a work accident on July 17, 2008. Employee, then age 23, was raising a wall with co-workers when the wall fell on employee. As a result of his injuries, employee is paralyzed from the waist down. The administrative law judge heard this matter on employee's request for a temporary award of temporary total disability and medical treatment. The administrative law judge denied compensation on the ground that employee forfeited his right to compensation under § 287.120.6(3) RSMo (2007). Employee appealed to the Commission.

Issues Presented

The primary issue to be decided was stated succinctly by employer in its brief. "At issue in this case is not whether [employee] sustained a work-related injury and whether it was the prevailing factor in causing his injuries, but instead, the issue upon which all benefits rise or fall is whether [employee] forfeited his benefits under the Missouri Workers' compensation statute by refusal to submit to a drug test requested by the employer following his injury."

If the Commission decides the primary issue in the affirmative, the following issues must be decided:

- Whether and in what amount employee is entitled to past medical expenses.
- Whether and for what period employee is entitled to temporary total disability.
- Whether employee is entitled to additional medical care.

¹ All statutory references are to the 2007 Revised Statutes of Missouri unless otherwise indicated.

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Findings of Fact

As to the threshold issue of whether employee forfeited benefits under § 287.120.6(3) RSMo, we adopt the findings of the administrative law judge except as specifically modified or rejected herein.

As to the issues of temporary total disability and additional medical care, we find as follows:

Employee testified that he has constant pain in his mid-back. Employee is unable to drive or perform most other activities due to his paraplegia. Employee is depressed and short-tempered. Employee testified that employer has offered no treatment or therapy to employee since he left the hospital.

Dr. Bennoch testified that although employee's condition of paraplegia will not improve, employee is not at maximum medical improvement regarding his ongoing pain symptoms and his depression. Dr. Bennoch believes that employee has been temporarily totally disabled since the work accident. Dr. Bennoch testified that employee needs additional medical care including pain medications, psychological evaluation and treatment, and physical therapy. We find credible Dr. Bennoch's opinion.

Law

Employer/insurer bears the burden of proving that employee forfeited his benefits. "The burden of establishing any affirmative defense is on the employer...In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." § 287.808 RSMo.

Section 287.030.2 RSMo provides, "Any reference to the employer shall also include his or her insurer or group self-insurer."

Section 287.120.6(3) RSMo provides:

The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

We must construe the above provision strictly. See § 287.800.1 RSMo.

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Conclusions of Law

Forfeiture

Request

The administrative law judge correctly found that no one on behalf of employer directly requested employee to undergo a drug test. Notwithstanding, the administrative law judge concluded that employee's conversation with Nurses Norton and Cass met the statutory requirements of § 287.120.6(3) RSMo. We disagree.

Neither Nurse Norton nor Nurse Cass was acting on behalf of the employer or the insurer at any time. Both testified that they visited employee to inform him that the insurance company wanted him to submit to a drug test, to inform him that he could consent or refuse to submit to a drug test, and to inform him that refusal to do so may jeopardize his workers' compensation claim. Nurse Norton advised employee he may wish to check with the human resources department of employer or consult with an attorney regarding his rights. We find that the information conveyed to employee by Nurses Norton and Cass did not constitute a request by employer that employee submit to a drug test as contemplated by § 287.120.6(3). Consequently, employee never refused an employer request to submit to a drug test.

Policy

Employer argues that its workplace drug policy "clearly authorizes post-injury drug testing" even though employer has a written drug policy identifying types of permitted testing and post-injury testing is not included in the written drug policy. We need not determine whether employer's policy clearly authorizes post-injury drug testing because our determination that employer did not request that employee submit to a drug test is dispositive of the forfeiture issue. To be clear, we specifically do not adopt the administrative law judge's findings and conclusions regarding whether employer's drug policy clearly authorizes post-injury drug testing.

We conclude that the forfeiture set forth in § 287.120.6(3) RSMo was not triggered in this case because employer never requested that employee submit to a drug test. Employee is entitled to compensation for his injury that arose out of and in the course of his employment.

Capacity

Employee argued he did not have the capacity to refuse or consent to a drug test. Relying upon an implied consent case, the administrative law judge determined that employee had capacity to refuse. We disagree with the administrative law judge's analysis and specifically reject his application of implied consent cases to the facts of this case. The rationale is inapplicable in the workers' compensation arena where there is no statutory implied consent.

Past Medical Expenses

In his brief, employee asserts that the parties stipulated that there are outstanding past medical expenses in the amount of \$165,523.46, in the event the claim is found compensable. The record does not support employee's assertion in that there is no stipulation that outstanding medical bills total \$165,523.46. Employee offered no testimony regarding his medical treatment or medical bills to enable us to issue an

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award on expenses due to date. The issue of past medical expenses may be resolved upon final hearing of this claim.

Temporary Total Disability

Based upon the foregoing, we conclude that employee has been temporarily and totally disabled since July 18, 2008. Employee is entitled to temporary total disability benefits at the stipulated weekly rate of \$300.00 from July 18, 2008, until such time as employee reaches maximum medical improvement. Naturally, employer/insurer is entitled to credit for temporary total disability amounts already paid.

Additional Medical Care

Employee has requested additional medical care. Employee is entitled to all medical treatment necessary to cure and relieve him from the effects of his injury including, but not limited to, pain medications/management, psychological evaluation and treatment, and physical therapy.

Award

We reverse the award of the administrative law judge. Employer/insurer has failed to prove that employee forfeited his benefits under § 287.120.6(3) RSMo. We direct employer/insurer to pay temporary total disability benefits as directed. We direct employer/insurer to provide medical treatment necessary to cure and relieve employee of the effects of his injury.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Randy C. Alberhasky, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 12th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Frank Roscom

Injury No. 08-060525

Dependents: N/A

Employer: Woodstone Builders, LLC

Additional Party: N/A

Insurer: American Home Assurance Company / AIG

Hearing Date: March 17, 2009

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: JULY 17, 2008
5. State location where accident occurred or occupational disease was contracted: TANEY COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
SETTING A WALL INTO PLACE
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$4,444.00
16. Value necessary medical aid paid to date by employer/insurer? 53,510.59
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$450.00

19. Weekly compensation rate: \$320.00 AND \$268.00

20. Method wages computation: AGREED

COMPENSATION PAYABLE

21. Amount of compensation payable: -0-

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

22. Second Injury Fund liability: NO

TOTAL: -0-

23. Future requirements awarded: NONE

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Frank Roscom

Injury No. 08-060525

Dependents: N/A

Employer: Woodstone Builders, LLC

Additional Party: N/A

Insurer: American Home Assurance Company / AIG

Hearing Date: March 17, 2009

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by:

AWARD ON HEARING

The parties presented evidence at the hearing on March 17, 2009. The parties agreed that the following are the only issues to be considered:

1. Whether claimant is entitled to benefits because of his alleged refusal to take a drug test pursuant to §287.1201.6(3), RSMo.
2. The liability of employer/insurer for temporary total disability benefits to claimant from November 2008 onward. The parties agree that there was an underpayment of temporary total disability benefits in the amount of \$360.00 which employer/insurer agree to pay to claimant should this matter be resolved in his favor pursuant to issue No. 1.
3. The liability of employer/insurer for past medical care.
4. The liability of employer/insurer for future medical care.
5. Whether this matter should be resolved on a final or a temporary basis.
6. The parties agree that all issues rise or fall with a determination of whether claimant refused to take a drug test requested by his employer which would result in forfeiture of

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benefits pursuant to §287.120.6(3). There is no dispute as to the need for past medical care, future medical care (except as to the specifics thereof), and temporary total disability benefits other than the issue of compensability pursuant to §287.120.6(3). Should claimant succeed in his claim, claimant's attorney, Randy Alberhasky, requests an attorney's fee of 25 percent upon any temporary total disability benefits and past medical benefits ordered to be paid.

The parties agree that medical benefits have been paid in the amount of \$53,510.59. The parties further agree that temporary total disability benefits have been paid in the amount of \$4,444.00, with three weeks being paid at the rate of \$320.00 and thirteen weeks at the rate of \$268.00. The parties agree that the workers' compensation rate for claimant is \$300.00 per week. The parties further agree that claimant's average weekly wage was \$450.00 per week.

Claimant appeared in person and with his attorney, Randy Alberhasky. Employer/insurer appeared through their attorney, Karen Johnson. The record was left open for 30 days following the hearing for the parties to submit an agreed upon exhibit of St. John's medical records so that those medical records would not be duplicated in the evidence presented in this case.

Claimant was 23 years old at the date of the hearing. He was an employee of Woodstone Builders, LLC, on July 17, 2008. On that date claimant was working as a framer for employer. Working along with other employees, claimant was attempting to raise a completed wall from the ground to be fixed to the foundation. Claimant's employer, Shannon McMurdo, described the wall as follows: "It's an exterior wall, an end wall, had windows in it fully framed we call it a balloon framing is what the term is called. It's where you build a wall on the ground – on the floor deck, you sheet it, you get everything ready to go, and then you stand it up in place." As the employee with coworkers attempted to lift the wall in place, the wall fell backwards upon claimant and another worker injuring them. As a result of those injuries, claimant is now a paraplegic from the waist downward. He has required significant past medical treatment and will require extensive future medical care. It is clear that claimant is unable to work and is temporarily and totally disabled. There is no evidence to the contrary regarding claimant's need for past and future medical care and the need for temporary total disability benefits. Indeed, as

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stated by employer/insurer in its brief, “At issue in this case is not whether claimant sustained a work-related injury and whether it was the prevailing factor in causing his injures, but instead, the issue upon which all benefits rise or fall is whether claimant forfeited his benefits under the Missouri Workers’ compensation statute by refusal to submit to a drug test requested by the employer following his injury.”

The portion of Missouri workers' compensation law at issue in this case is §287.120.6(3), reads as follows: “An employee’s refusal to take a test for alcohol or a non-prescribed controlled substance as defined by §195.010, RSMo., at the request of the employer shall result in the forfeiture of benefits under this Chapter if the employer had sufficient cause to suspect the use of alcohol or a non-prescribed controlled substance by the claimant or if the employer’s policy clearly authorizes post-injury testing.”

Claimant asserts five reasons why claimant’s benefits should not be forfeited under §287.120.6(3):

1. The employer specifically told Frank Roscom he did not have to submit to a drug test.
2. The employer never requested a drug test.
3. The St. John’s risk management nurses were not employers under RSMo. §287.120.6(3), were not representatives of the employer and never asked the employee to submit to a drug test.
4. Roscom was legally incapable of consenting or refusing to consent to a drug test.
5. Under RSMo. §287.120.6(3), the employer did not have “sufficient cause” to request a drug test on July 21, 2009, at 10:40 a.m. nor did their policy “clearly” give them the right to post accident drug testing.

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Addressing Point 5 of claimant's argument that there was not "sufficient cause" to request a drug test and that there was no employer policy that "clearly" authorizes post-injury testing, I find that employer had the right to request post-injury testing because employer had a policy that clearly authorized post-injury testing. Under §287.120.6(3), an employee's benefits under the Workers' Compensation Act shall be forfeited if an employee refuses to take a test for alcohol or a non-prescribed controlled substance at the request of the employer if the employer has sufficient cause to suspect the use of alcohol or non-prescribed controlled substance or if the employer's policy clearly authorizes post-injury testing. Claimant has asserted that the employer did not have sufficient cause to request a drug test on July 21, 2008. From the testimony of Shannon McMurdo, the owner of Woodstone Builders, LLC, claimant's employer, and the project manager for employer, Rex Winslow, employer had no reason to believe that claimant was using drugs. Consequently, one of the alternatives for drug testing under §287.120.6(3) "sufficient cause," has not been met. The other alternative of the statute allowing drug testing concerns whether "employer's policy clearly authorizes post-injury testing." The written policy of employer regarding drug testing is contained in an employee handbook dated October 1, 2007. The provisions of the employee handbook regarding the use of drugs and drug testing are as follows:

Woodstone Builders does not tolerate the presence of illegal drugs or the illegal use of legal drugs in our workplace. The use, possession, distribution, or sale of controlled substances such as drugs or alcohol, or being under the influence of such controlled substances is strictly prohibited while on duty, while on Woodstone Builders' premises or worksites, or while operating Woodstone Builders' equipment or vehicles. The use of illegal drugs as well as the illegal use of legal drugs is a threat to us all because it promotes problems with safety, customer service, productivity, and our ability to survive and prosper as a business. If you need to take a prescription drug that affects your ability to perform your job duties, you are required to discuss possible accommodations with your supervisor. Violation of this policy will result in disciplinary action, up to and including termination.

This policy has the following implications:

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1. All employees are prohibited from unlawfully manufacturing, distributing, dispensing, possessing, or using controlled substances in the workplace. Controlled substances include (but are not limited to):

Narcotics (e.g., heroin or morphine)
Cannabis (e.g. marijuana)
Stimulants (e.g., cocaine)
Depressants (e.g., tranquilizers)
Hallucinogens (e.g., PCP or LSD)

2. Any employee who violates this policy will be subject to disciplinary action, up to and including termination.

3. Your receipt of this policy statement and signature on the handbook acknowledgment form signify your agreement to comply with this policy.

4. Any employee convicted of violating criminal drug statutes in this workplace must notify an appropriate officer or senior official of Woodstone Builders of that conviction within five days of the conviction. Failure to do so may lead to disciplinary action. Employees convicted of violating criminal drug laws may be given the option of participating in an approved rehabilitation program.

5. Employees may be selected at random for a drug test.

The handbook was admitted into evidence and contains the signature of claimant. The handbook's policy prohibits the use of illegal drugs or alcohol at the workplace and prohibits employees being under the influence of such substances while at work. The written policy also indicates that employees may be subjected to random drug tests. The written policy does not require post-injury testing. However, Rex Winslow testified by deposition that all employees, including claimant, would be subjected to a drug test if they were injured at work. Mr. Winslow testified that he informed claimant of that policy. Claimant in his deposition, and ultimately at hearing, admitted to having been informed of that policy by Mr. Winslow after claimant had been hired.

It may have been better procedure for employer to provide a written policy regarding post-accident drug testing; however, it is clear from the testimony of Mr. Winslow and claimant that employer had a clear policy requiring drug testing after there was an injury at work and that

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claimant was aware of that policy. There is nothing in §287.120.6 that requires employer's policy be in writing. I find that employer's oral policy requiring testing whenever any employee was injured at work as relayed to claimant by Rex Winslow "clearly authorizes post-injury testing" as required under the statute.

Addressing Point 2 of claimant's argument, that the employer never requested claimant have a drug test, and Point 3 that the St. John's nurses were not the employer or representatives of the employer and did not ask claimant to submit to a drug test, I find that employer did request a drug test and that claimant refused to take such a test. I further find that the St. John's nurses were acting upon the request of the employer to obtain a drug test and that their actions were to gain consent of claimant to allow or disallow his physicians to order such a test as required by St. John's before a drug test could be performed.

Neither Shannon McMurdo nor anyone on behalf of employer directly requested claimant to undergo a drug test. Nevertheless, Shannon McMurdo through representatives in the insurance company followed procedures to have claimant undergo a drug test. Pursuant to §287.030, "[a]ny reference to employer shall also include his or her insurer or group self-insurer." A nurse case manager, Debbie Morin, was hired by employer's insurer to obtain a drug test from claimant. As such, she had the authority as an equivalent of the employer under §287.030 to request that a drug test be performed on claimant. Debbie Morin testified that she did not directly ask claimant to consent to or undergo a drug test, but she requested that a drug test be performed by St. John's Hospital. Debbie Morin followed the procedure established by St. John's for a drug test to be performed. In order for St. John's employees to take a drug test sample from claimant at employer's request, the employee first had to consent to have his physicians order a drug test. It is clear from the testimony of Debbie Morin and the testimony of the St. John's nurses that claimant's physicians would not perform a drug test without claimant's consent. Nurses Norton and Cass were assigned the task of seeking consent or refusal from claimant to have his physicians order a drug test. Claimant does not recall visiting with anyone concerning his lack of consent to a drug test. However, from the record it is clear that after a conversation with Nurses Norton and Cass, claimant declined to have his physicians order such a test.

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The ultimate issue regarding whether employer requested claimant undergo a drug test is whether claimant's conversation with nurses Angie Norton and Sonja Cass, informing claimant that employer desired a drug test, met the statutory requirements of §287.120(3) for requesting a drug test for which a refusal by claimant would result in forfeiture of benefits. Nurses Norton and Cass were employees of St. John's hospital and the department of patient safety and risk management. They were aware of the request for a drug test by claimant's employer and insurer through the direct request of Debbie Morin. As noted by Nurse Norton, risk manager for St. John's Hospital, she visited with claimant in the hospital along with Nurse Sonja Cass about the request for a drug test. As set out in Nurse Norton's deposition:

Q. And if you would, just for clarity, your writing is very clear there, but just so there's no misunderstanding, if you would just read verbatim what you have written in that note, I would appreciate it.

A. It says late entry, 7/21/08 at 10:50, discussed with patient that Workers' Comp is requesting a drug screen be drawn. Patient was advised of his right to either consent or decline the request. Advised the patient that by declining he may be -- may jeopardize his Work Comp payments, and we recommend that the patient contact wither the HR Department with his company and/or a Workers' Comp attorney to look out for his interests. The patient voices understanding of all discussed, and at this time patient declines to have drug screen drawn. Debbie Morin -- Morin with Coventry Insurance will e notified of patient's decision, Angie Norton, RN, Department of Patient Safety.

Q. All right. And the late entry, did you -- did you make it, though, on July 21?

A. Yes.

The testimony of Nurses Norton and Cass was to the effect that they were not requesting claimant to perform a drug test at the time of the conversation with him on July 21, 2008, but as Nurse Cass testified, "We were informing him that he -- the request had been made by his work comp insurance for him to undergo a drug test, and that he could either accept that request or decline it, and he said he didn't think he wanted to at this time." She also testified that her "[c]apacity was to inform him that a request had been made for a drug test, and that he had the -- the option of consenting or declining it, and that he needed to be aware of his -- his rights to

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either to consent or decline to a drug test. And that if he wished to have a drug test, he needed to inform the physician, the physician would then order it. If he declined it, then it would possibly affect his – his work comp.” She further stated that she was not there to have claimant submit at that moment to drug testing. As shown in her deposition:

Q. Well, you weren't actually there to – to have him submit to drug testing; correct?

A. No (Sic).

Q. So he really – there was nothing to decline, was there?

A. Well, no, there really wasn't anything to decline at that time, we asked him what you know . . .

Q. Sort of a hypothetical what would –

A. Right, do you wish to, you know, have drug testing at this time, and he indicated that he did not.

Q. You didn't give him any sort of written thing –

A. No.

Q. -- to sign?

A. No.

Nurse Norton also testified concerning her conversation with claimant as follows:

A. We went to the bedside, and I remember that there was a nurse or an aide in the room at the time, when we actually entered the room there were some friends or family members standing outside the door. When we went in, we went – went to the bedside, introduced ourselves, told him that we were there – the reason that we were there was because we had been requested for a drug screen to be drawn on him. And we just wanted to – needed to let him know that he had the right to either agree to that or to decline it, whichever was his choice. We did also want him to know that most Work Comp companies, when a drug screen is declined, it will somehow affect the outcome of your payout. We wanted him to be aware of that before he made the decision. And that if he wanted to speak with someone about that, that he should do so. He voiced understanding of what we were saying to him. And then he was asked whether he wanted to consent or decline to do it, and he declined at the time.

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In summary, the nurses testified that they were not there to give claimant a drug test at that time but merely to explain to claimant that a drug test had been requested and that his workers' compensation rights could be affected if he did not consent to a drug test. Nurse Norton testified, as did Nurse Cass, that only physicians could order a drug test be performed. At that time the nurses were seeking from claimant consent or refusal for such an order by claimant's physicians. He refused to give consent to his physicians to order a drug test.

The procedures set out in the statute do not require that an employee's declining to consent to a drug test be in writing. Claimant's refusal of a drug test in this case occurred orally after his conversation with Nurses Norton and Cass. That refusal occurred after claimant was informed that his employer was requesting that a drug test be performed. Neither the employer nor any representative of the employer or the insurer directly asked claimant to consent to or decline to take a drug test. Yet Claimant clearly declined to consent to a physician's order for a drug screen when informed of the request of his employer on July 21, 2008, by Nurses Cass and Norton. The conversation with Nurses Norton and Cass informed claimant of his right (1) to consent or decline a drug test, (2) that his workers' compensation benefits could be affected by his declining a drug test and, (3) that he could visit with his employer or a workers' compensation attorney regarding the request. He declined to consent. Was that a sufficient refusal of a drug test "at the request of the employer?" I find that it was. Even though Nurses Norton and Cass were not asking claimant to take a drug test immediately. The only way that the drug test could be performed was for claimant to consent to have his physicians issue an order for that test. He declined to allow such an order. I find that claimant's declining to consent to that order is a refusal to take a drug test pursuant to §287.120.6(3). Claimant was never asked again to consent to a drug test by the employer, by the insurer, or by the nurses at St. John's. However, the statute does not require multiple requests. As a result, I find that the employer requested a drug test, that claimant was informed of that request, and that he declined to give consent to a drug test being performed.

Claimant's attorney argues that after claimant had declined to consent to a drug test, claimant telephoned Mr. McMurdo, his employer, and that that call was an attempt to discuss

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with Mr. McMurdo the drug test, as was recommended by the St. John's nurses. According to Mr. McMurdo, claimant called Mr. McMurdo's cell phone at 11:20 a.m., a half an hour after his discussion with the nurses at 10:40 a.m. on July 21, 2008. Claimant does not recall making that telephone call. The recorded message was not retained by Mr. McMurdo, but Mr. McMurdo made a notation of claimant's message that claimant "Will not pass drug test." Mr. McMurdo did not return claimant's call or communicate with him after that date. Nevertheless, it is apparent from the evidence in this case that claimant had already declined to consent to a drug test at the time of his telephone call to Mr. McMurdo. Nothing in the statute would require the employer to request a drug test after claimant had already declined to consent to a drug test.

In addressing Point 1 of claimant's argument, that employer told claimant he did not have to submit to a drug test, I find that assertion is incorrect. Claimant's attorney argues that the employer through Rex Winslow, claimant's supervisor, specifically told claimant that he did not have to submit to a drug test. Claimant's attorney bases that assertion upon the testimony of Rex Winslow. Rex Winslow in his deposition testified as follows:

Q. Did you ever discuss with him any sort of drug usage, the possibility of him being on drugs or anything like that t the time of the accident?

A. There at the hospital – it was an early visit. I don't know which one it was, but he – one of the first things he said when I walked in the room – I could not understand what he was saying, because he was so quiet about it, and he was crying heavily, and he just said, "I won't pass." I said, "What? I didn't hear exactly what you said." And he said, "I won't pass the test." And I said, "Frank, that's not a concern right now at all. I don't even want to talk about it." His family and everyone was in the room.

Q. Would this have been the 21st of July, or do you know?

A. I don't know what date it was sir. . . .

Q. And you told him right now it wasn't a concern?

A. I said – I can't remember exactly what I told him, but basically I said that's not what we need to be worrying about.

Q. Did you have any other conversations with him about drugs or drug testing?

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A. No. After that, that was – that was it.

I find that that testimony is insufficient to prove that the employer specifically told claimant that he did not have to submit to a drug test. Mr. Winslow is not the employer, nor was he an agent of the employer for the purposes of requesting or waiving a drug test. The testimony of the owner of Woodstone Builders, LLC, Shannon McMurdo, clearly was that Mr. Winslow did not have the authority to request a drug test. Moreover, there is nothing in the record to demonstrate that Mr. Winslow had the authority to waive a drug test. As a result, I find that Mr. Winslow did not have the authority to request or waive a drug test from claimant, and I further find that Mr. Winslow did not specifically instruct claimant that he did not have to submit to a drug test.

In addressing Point 4 of claimant's argument, that claimant was incapable of consenting or refusing to take a drug test, I find that claimant had the capacity to consent or refuse to take a drug test. Claimant argues that he was legally incapable of consenting or refusing to consent to a drug test based up claimant's prescription drug usage in the hospital, (specifically narcotic medications), physical pain and psychological stress from claimant's injury. Dr. Bennoch testified on behalf of claimant that morphine and other mediations claimant was taking are mind-altering drugs that could alter perception and judgment. Dr. Bennoch opined that, although variable from person to person, morphine could affect a person's ability to understand what's going around him and the ability to interact with others. He also testified that claimants extreme pain could interfere with his mental processes. Dr. Lennard, based upon his review of the medical records and the depositions of the St. John's nurses, testified on behalf of employer/insurer that claimant had the mental capacity to give or refuse his consent He opined, as had Dr. Bennoch, that people react to narcotic medications differently. He stated that it was important to consider the objective signs and behaviors of those on narcotics as observed by medical professionals in this case. Both Nurses Norton and Cass stated that claimant was coherent, not disoriented, and showed no signs that he was not able to give consent other than being very tearful.

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I have not found nor did the parties provide me any case which dealt with capacity to refuse or consent to a drug test as it relates to workers' compensation law. However, I find analogous cases provided by the employer/insurer aid in a determination of whether claimant had the capacity to consent. It is clear from the holding in *Berry v. Director of Revenue*, 885 SW2d 326 (Mo. Banc 1994) that it makes no difference whether a claimant's injuries are such that he could not physically be able to refuse a chemical test and did not remember taking the test. Moreover, as in *Corum v. McNeill*, 716 SW2d 915 (Mo.App. E.D. 1986). the Court rejected an argument that a person would be considered incapable of validly refusing a breathalyzer test because of intoxication. As stated by the Court, "to allow an intoxicated person to avoid the consequences of her refusal to take a breathalyzer test based on her inability to comprehend it because she was intoxicated is violative of the statute's intent." *Corum*, 716 SW2d at 917. Moreover, as stated by the Court in *State v. Hindman*, 543 SW2d 278, 285-286 (Mo.Ct.App.Spgd. 1976):

Another segment of this point with which we do not agree is defendant's argument that because he had ingested prescription drugs and consumed whisky the day and evening prior to the events in question he was rendered in such a dazed and clouded state as to make his actions and statements involuntary due to lack of capacity. It is generally agreed among authorities that drug influence or intoxication at the time of making a statement or confession does not require exclusion because not voluntarily, knowingly and intelligently made unless the intoxication or drug influence amounts to mania. The fact of drug influence and intoxication, absent mania, only goes to the credibility and weight of the statement. Before exclusion is required, it should appear that defendant was so intoxicated or influenced that he was unable to appreciate the consequences and nature of his statements. *State v. Heather*, 498 S.W.2d 300, 304(5) (Mo.App. 1973), and authorities there cited. The witnesses testified defendant appeared coherent and lucid at the times he made the reported statements – at least there was no testimony, save the defendant's which would indicate mania. Neither the trial court nor the jury was bound to accept defendant's testimony as to his condition and could properly find the statements were voluntarily, knowingly and intelligently made. For the reasons aforesaid, this point is ruled against defendant.

In this case, Nurses Norton and Cass testified that claimant was coherent and understood the nature of the conversation and his actions. Claimant does not remember the conversation. Claimant's mother testified that claimant at times was incoherent, was hallucinating and was in

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extreme pain during his stay in the hospital. I find her testimony concerning claimant's mental capacity to be less persuasive than the testimony of Nurses Norton and Cass. Moreover, I find Dr. Lennard to be more persuasive as to claimant's mental capacity than Dr. Bennoch in light of the testimony of Nurses Norton and Cass. Consequently, I find that claimant had the mental capacity to consent or refuse to take a drug test.

As a result of the foregoing, I find that claimant refused his employer's request to take a drug test and thereby has forfeited workers' compensation benefits pursuant to §287.120.6(3). I deny the claim.

Date: May 21, 2009

Made by: /s/ Robert H. House
Robert H. House
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation