

THOMAS ARCHIBALD, Employee, v. METROPOLITAN MECHANICAL CONTRACTORS/  
MINNESOTA WILD and ST. PAUL COS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 28, 2000

No. [REDACTED SSN]

HEADNOTES

**PRACTICE & PROCEDURE - FIFTH AMENDMENT PRIVILEGE.** The expert testimony supports the arbitrator's conclusion that evidence of marijuana use more than 48 hours prior to the employee's injury would have been of no probative value in proving the employee was intoxicated or that the intoxication, if any, was the proximate cause of the employee's injury. The arbitrator, accordingly, properly denied the employer and insurer's motion to dismiss the employee's claim petition based on the assertion of his right against self-incrimination.

**PRACTICE & PROCEDURE - MARITAL PRIVILEGE.** The arbitrator properly refused to dismissed the employee's claim based on his assertion of the marital privilege on the facts in this case.

**PRACTICE & PROCEDURE - DISCOVERY.** Substantial evidence supports the arbitrator's conclusion that the employer and insurer failed to establish any prejudice as a result of the employee's failure to fully comply with the arbitrator's order to provide medical authorizations for medical records pre-existing the employee's injury, and his refusal to dismiss the employee's claim petition on that basis.

**PRACTICE & PROCEDURE - DISCOVERY.** Although the arbitrator concluded the employee was not truthful when he testified he did not know the whereabouts of his brother-in-law, it does not appear that the lack of the brother-in-law's testimony deprived the employer of any relevant evidence, and the arbitrator did not abuse his discretion in denying the employer and insurer's motion to dismiss the employee's claim on that basis.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Pederson, J.

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the decision of the arbitrator and seek a reversal of the award of benefits based on the employee's assertion of his Fifth Amendment rights, assertion of spousal privilege, violation of the arbitrator's order for discovery and refusal to respond to or participate in discovery. We affirm.

## BACKGROUND

On August 26, 1999, Thomas Archibald, the employee, worked for Metropolitan Mechanical Contractors, the employer, insured by St. Paul Companies. On that date, the employee sustained a personal injury arising out of and in the course of his employment with the employer. The employee performed sheet metal work at the Minnesota Wild hockey arena, then under construction in St. Paul, Minnesota. In connection with this work, the employee was provided with a motorized lift. The lift was comprised of a heavy base, a man-bucket, a motor and a number of arms which lifted the bucket vertically. The lift was moved from level to level at the construction site by means of a skip hoist. The skip hoist was a temporary elevator constructed on the outside of the building for use in transporting materials during the construction phase. On August 26, 1999, the employee caught his head between a steel beam over the entrance to the skip hoist and an arm of the man lift, sustaining a head injury. (T. I, 31-43.)<sup>1</sup>

The employee was taken to United Hospital in St. Paul, Minnesota. A CT scan showed a skull fracture with a subarachnoid hemorrhage. The employee underwent surgery that same day to repair a left temporal depressed skull fracture and a complex scalp and eyelid laceration. (Ee Ex. B.) The general contractor on the project, M.A. Mortonson Company, requires a drug test following any work-related injury. While at United Hospital, the employee provided a urine sample. Analysis of the urine sample showed a concentration of 450 nanograms<sup>2</sup> per milliliter (ng/ml) of a marijuana metabolite. (Er Ex. 3.) Based, in part, on the positive results of this drug test, the employer and insurer denied liability for workers' compensation benefits.

The employee filed an Application for Arbitration pursuant to the rules and regulations of the Union Construction Crafts Workers' Compensation Fund, as authorized by Minn. Stat. § 176.1812, subd. 1. William M. Bradt, Esq., was selected as the arbitrator. By an Order dated November 23, 1999, the employee was ordered to sign certain medical authorizations. (Tab 6.)<sup>3</sup>

Prior to the arbitration hearing, counsel for the employer and insurer deposed the employee. At the deposition, the employee was asked whether he ever used marijuana. In response, the employee asserted his right against self-incrimination under the Fifth Amendment to the Constitution.<sup>4</sup> (Depo. pp. 35-36.) The employee did, however, testify that he had not

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<sup>1</sup> The transcript consists of two volumes, T. I and T. II.

<sup>2</sup> A nanogram is one-billionth of a gram.

<sup>3</sup> By letter dated March 22, 2000, Kevin S. Gregerson, the program facilitator and fund administrator for the Union Construction Crafts Workers' Compensation Fund, filed with the Workers' Compensation Court of Appeals certain documents constituting the pleadings in this matter. The pleadings are referenced as Tab 1 through Tab 15 and are deemed part of the Judgment Roll in this case.

<sup>4</sup> U.S. Const. amend. V; Minn. Const. art. 1, § 7.

consumed marijuana during the 48 hours prior to his injury. (Depo. p. 36; T. I, 51-52.) At about the time the employee started working at the Minnesota Wild project, his brother-in-law, Mike Turner, came to live with him. The employee testified Turner smoked marijuana in the employee's home on a daily basis, and that he was with Turner in the same room while Turner smoked marijuana. (Depo. pp. 39, 43-56.) The employee testified his brother-in-law smoked marijuana the night before the employee was injured. (Depo. p. 57.) The employee asserted his positive drug test was due to passive inhalation of Turner's marijuana smoke. (Depo. pp. 37-38.)<sup>5</sup>

Following the employee's deposition, counsel for the parties discussed a deposition of the employee's spouse. The appellants sought to question Mrs. Archibald concerning the employee's marijuana use. Counsel further discussed the issue of spousal immunity with respect to a deposition of Mrs. Archibald. (T. I, 54-59.) There is no indication in the Judgment Roll or the exhibits the employer and insurer ever attempted to depose Mrs. Archibald.

On December 8, 1999, the employer and insurer filed a Motion to Dismiss the employee's claim. They asserted four grounds for their motion: the employee's assertion of his Fifth Amendment privilege to avoid discovery obligations; the employee's assertion of the spousal privilege to avoid his discovery obligations; the employee's violation of the arbitrator's order to sign medical authorizations; and the refusal of the employee to meaningfully respond or participate in discovery. On December 15, 1999, the employee filed a Memorandum in opposition to the employer's Motion to Dismiss the employee's claim. (Tab 11.)

The case was heard by the arbitrator, William M. Bradt, on December 15, 1999, December 27, 1999, and January 14, 2000. At the outset of the hearing, the parties stipulated the employee's injury on August 26, 1999 arose out of and in the course of his employment. The employer and insurer, however, contended the employee's intoxication was the proximate cause of his injury. Accordingly, the employer and insurer contended they had no liability for benefits under Minn. Stat. § 176.021, subd. 1. The employer and insurer further contended the employee's injury resulted from his performance of a prohibited act.<sup>6</sup> The arbitrator decided to hear expert testimony before ruling on the employer and insurer's Motion to Dismiss. (T. I, 1-10.)

Roger Rutter works for Advanced Toxicology Network (ATN) in Memphis, Tennessee. (Er Ex. 5, p. 4.) ATN is a drug testing laboratory, which evaluated the urine sample taken from the employee on August 26, 1999. The urine test performed by ATN tests for a primary

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<sup>5</sup> The employer and insurer apparently offered the employee's deposition into evidence. The arbitrator did not accept the exhibit. (T. I, 148.) The deposition of the employee is contained in the file delivered to this court.

<sup>6</sup> The arbitrator found the evidence failed to establish the employee committed a prohibited act on August 26, 1999. Although they appealed this finding, the appellants, in their brief, withdrew their appeal of that finding and did not brief the issue. This court does not, therefore, review that issue.

metabolite of marijuana called THC.<sup>7</sup> THC is not an active ingredient of marijuana, but is a metabolite or byproduct produced by the human body and eliminated into the urine. (Er Ex. 4, p. 54.) Mr. Rutter has been involved in the use of urine tests for marijuana since 1977. He defined “detection time” as the time from when the drug is used until it’s last detectable in a urine sample. Mr. Rutter testified marijuana is fat soluble. If someone is an occasional user, it is excreted rather rapidly. If someone is a habitual user, it gets stored in body fat. (Er Ex. 4, p. 13.) For an occasional user, a person who smokes marijuana once a week, for example, marijuana can be detected in a urine sample for three to four days. (Er Ex. 4, p. 15.) Mr. Rutter testified the test result of 450 ng/ml is on the high side. Seventy (70) percent of the positive test samples at ATN are less than that. (Er Ex. 4, p. 51-52.) Mr. Rutter testified the results from urine tests for THC can be used only to determine whether or not a person has ingested marijuana but cannot be used to indicate the presence of effects or impairment from marijuana use. Mr. Rutter was asked whether a test of 100 or 400 nanograms per milliliter speaks at all to the sobriety of the test subject. He conceded “in a urine test, you cannot conclude anything about impairment, that’s correct.” All the test shows, according to Mr. Rutter, is that the subject has ingested an active component of marijuana sometime during the prior three weeks. (Er Ex. 5, p. 65.)

Anne Rummel Manly is a forensic toxicologist employed by Forensic Associates, Inc., and was retained by the employer and insurer as an expert witness. Ms. Manly works in the area of forensic analysis of ethyl alcohol and other drugs in blood, urine and breath and in the interpretation of such analyses. (Er Ex. 2.) Ms. Manly has studied the effects on humans of various drugs, including marijuana, since 1967. (T. I, 35.)<sup>8</sup> She testified marijuana is a mood altering substance and causes euphoria, relaxation, muscular incoordination and slowed reaction time. Physically, a person who has smoked marijuana might demonstrate red eyes, dry mouth, increased appetite, slurred speech or sleepiness. (T. I, 32-37.) Ms. Manly stated the amount of the initial dose of marijuana is a factor in the length of time a person continues to be effected by marijuana. The higher the dose, the longer the effects last. (T. II, 30-31.) Several studies of which Ms. Manly was aware documented effects lasting up to 24 hours after ingestion of marijuana. (T. II, 31-34.) An average dose of marijuana will remain in the human system for from three to seven days. (T. II, 41.) Ms. Manly stated an individual who consumed a very high dosage of marijuana would take longer to eliminate it from the system. (T. II, 52-53.) Ms. Manly was also familiar with studies measuring the effects of passive inhalation of marijuana, that is, inhalation of marijuana smoke from another smoker. Ms. Manly testified passive inhalation of marijuana can result in reportable levels of 50 to 100 ng/ml. She was aware of no studies documenting 450 ng/ml attributable to passive inhalation. (T. II, 44.)

Ms. Manly testified that the employee’s test result of 450 nanograms per milliliter at 9:00 a.m. on August 26, 1999, likely resulted from exposure to marijuana within six hours of the urine test. This opinion was based on her conclusion that 450 ng/ml is an “extremely high

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<sup>7</sup> THC - COOH or carboxy THC. (T. I, 40; T. II, 72.)

<sup>8</sup> The first portion of Ms. Manly’s testimony is contained in Volume I of the transcript, but is separately numbered from pages 1 to 77. The second portion of her testimony is contained in Volume II of the transcript.

level of carboxy THC in a urine specimen.” (T. II, 50-52.) Ms. Manly further testified that knowledge of the employee’s drug use prior to the 48-hour period before the injury was important in interpreting the test results. The witness opined that if the employee was only an occasional user of marijuana, a test of 450 ng/ml “tells me that that exposure was in a relatively short time frame to the collection of the sample which then says intoxication impairment is there, and exists.” Were the employee a chronic user of marijuana, the “time frame could be longer and I would need to know that as to when his last exposure occurred.” (T. II, 63.) Ms. Manly also stated the type of marijuana used by the employee could be relevant, as well as observations about the employee’s behavior after use. (T. II, 64.) However, Ms. Manly further testified that if “the time frame of any use is relatively short, then impairment and intoxication is occurring. If it is 24 hours ago, 48 hours ago, then there is no impairment or intoxication, if that was the last exposure, the time frame of the last exposure.” (T. II, 62.)

On cross-examination, Ms. Manly agreed the results from a urine test for THC can be used only to determine whether or not a person has ingested marijuana and cannot be used to determine whether a person is impaired from use of marijuana. She further agreed based on the results of a urine test alone, nothing can be concluded about impairment. (T. II, 74, 87-89, 93.) Ms. Manly also agreed that if a person smoked marijuana 50 hours prior to an injury, there is no scientific evidence to support a conclusion that the marijuana usage would have any effect on the person at the time of the injury. (T. II, 94-95.) The arbitrator asked Ms. Manly to assume the employee’s testimony that he did not voluntarily ingest marijuana within the 48 hours prior to his accident. Given that assumption, Ms. Manly was asked whether any additional information about the employee’s marijuana use prior to 48 hours before his accident would allow her to form opinions with reasonable certainty about the employee’s level of impairment at the time of his accident and whether that level of intoxication was sufficient to be a contributing factor to the employee’s accident. Ms. Manly testified “then there is nothing that you can say about intoxication or impairment of this urine sample at 450 nanograms per mil, absolutely nothing.” (T. II, 130-131.)

Patrick Gallagher was a sheet metal foreman for the employer and had supervised the employee. (T. I, 74.) On August 26, 1999, Mr. Gallagher saw the employee from 10 to 15 feet away. Mr. Gallagher did not observe anything unusual about the employee and testified he looked normal. He saw no evidence the employee was intoxicated, impaired or under the influence of any drugs. (T. I, 86-87.) Tim Denelius was a general foreman for the employer and was Mr. Gallagher’s supervisor. He testified that at the Minnesota Wild project, the employee reported either to Mr. Gallagher or to him. Mr. Denelius saw the employee the morning he was injured and talked to him for a few minutes about the work the employee was going to be doing that morning. He testified the employee did not appear to be intoxicated, and appeared to be acting normally. (T. II, 9-15.) Janet Frels also worked at the Minnesota Wild project for the employer and ran the skip hoist. She knew the employee from taking him up and down in the skip hoist. (T. II, 97-98.) On August 26, 1999, Ms. Frels talked to the employee before his injury. She noticed nothing that caused her to think he was under the influence, intoxicated or impaired in any manner. Rather, the employee appeared just as he did every other morning. Ms. Frels had no concerns about the employee’s ability to operate the man lift. (T. II, 100-101.)

In a Findings and Order dated January 24, 2000, the arbitrator found the employee exercised his Fifth Amendment privilege against self-incrimination and refused to answer questions of the employer and insurer regarding marijuana use prior to 48 hours before his personal injury. The arbitrator also found the employee refused to waive the spousal privilege set forth at Minn. Stat. § 595.02, subd. 1(a) to allow the employer to question his wife regarding his marijuana use. The arbitrator found the employee, more likely than not, used marijuana within the 48-hour period preceding the personal injury. However, the arbitrator found the employer and insurer failed to prove that on August 26, 1999, the employee was intoxicated within the meaning of Minn. Stat. § 176.021, subd. 1. Finally, the arbitrator denied the employer and insurer's Motion to Dismiss the employee's claim. The employer and insurer appeal.

## STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

## DECISION

### Fifth Amendment Privilege

Minn. Stat. § 176.021, subd. 1 states:

If . . . the intoxication of the employee is the proximate cause of the injury, then the employer is not liable for compensation. The burden of proof of these facts is on the employer.

The employer and insurer have the burden of proving both that the employee was intoxicated and that the intoxication caused the injury. Thake v. Backhauls, Inc., 345 N.W.2d 745, 748, 36 W.C.D. 565, 568 (Minn. 1984.) This burden of proof may be met by any competent evidence, either direct or circumstantial. Id.

The arbitrator concluded the employer and insurer failed to prove the employee was intoxicated within the meaning of Minn. Stat. § 176.021, subd. 1, at the time of his injury on August 26, 1999. The employer and insurer appeal this finding, contending the employee's failure

to respond to discovery prejudiced their ability to defend against the employee's claims. The appellants sought to inquire of the employee about his use of marijuana during the period prior to 48 hours before the injury. The employer and insurer contend that by asserting his Fifth Amendment right against self-incrimination the employee withheld information which might relieve them of liability. Accordingly, under Christenson v. Christenson, 162 N.W.2d 194 (Minn. 1968), the appellants contend the employee's claims must be dismissed. We disagree.

The Christenson case involved an action for a divorce. In the course of discovery, the defendant took the plaintiff's deposition and questioned the plaintiff regarding alleged misconduct during the marriage. The plaintiff refused to answer many of the questions on the grounds that her answers were privileged under the Fifth Amendment of the U.S. Constitution and article 1, section 7, of the Minnesota Constitution. On the same basis, the plaintiff also objected to a request for admissions under Rule 36 of the Rules of Civil Procedure. The defendant then moved the court for an order requiring the plaintiff to respond to the discovery or an order striking or dismissing plaintiff's complaint. The district court denied the defendant's motion. On appeal, the supreme court reviewed the authorities on the issue from other jurisdictions and concluded the issue was not whether the plaintiff should be forced to divulge the requested information. Rather, the question was "whether plaintiff should be permitted to withhold information which might relieve defendant of liability and at the same time be permitted to prosecute her claim."<sup>9</sup> The court concluded the defendant's motion to dismiss plaintiff's divorce action must be granted where the plaintiff refused to answer questions pertinent to the issues involved on the grounds of self-incrimination. In Parker v. Hennepin County District Court, Fourth Judicial District, 285 N.W.2d 81, 83 (Minn. 1979), the court cautioned that the policy underlying assertion of the Fifth Amendment does not permit use of that privilege "to unfairly prejudice an adversary in a civil case."

The basic principle underlying the Christenson case is that a party seeking relief cannot "eat his cake and have it too." Christenson, 281 Minn. at 521, 162 N.W.2d at 203. That is, a party cannot assert the Fifth Amendment in order to "gain an unfair advantage" by withholding important information. Parker, at 83. In this case, the arbitrator reasoned that a dismissal of the employee's claim based on assertion of the Fifth Amendment privilege must relate to information which, if disclosed, would assist the fact-finder in resolving the dispute. The arbitrator concluded that while evidence of the employee's habits might have been of some assistance to the employer's toxicologist, there was no evidence "that information regarding the employee's use [of marijuana] more than 48 hours prior to the accident would have allowed the toxicologist to render opinions regarding level of impairment and proximate cause, with any degree of scientific certainty." (Memo, p. 12.) The testimony of Ms. Manley and Mr. Rutter support this conclusion.

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<sup>9</sup> The court noted that the questions and requested admissions which the plaintiff refused to answer related to the plaintiff's alleged adultery, the frequency and extensiveness of her absenteeism from her home and children, the deceptions practiced upon the defendant, together with the plaintiff's neglect of the family and lack of stability and morals. The defendant contended all of these were factors deeply involved in the issues before the court.

Although Ms. Manly testified that information regarding the employee's drug use prior to 48 hours before his injury would assist her in interpreting the drug test results, she also unequivocally testified the results of a urine test for THC can be used only to determine whether or not that person has ingested marijuana. The test cannot be used to determine whether a person is impaired from the use of marijuana. Mr. Rutter expressed the same opinion and conceded that nothing can be determined about impairment from a urine test for marijuana. Rather, Mr. Rutter testified that all the test shows is that a subject has ingested an active component of marijuana some time during the prior three weeks.

The lay witnesses who testified at the hearing observed nothing unusual about the employee on the morning of his injury. There was no evidence that the employee was in any way intoxicated or impaired. The expert testimony in the case supports the arbitrator's conclusion that marijuana use more than 48 hours prior to the employee's injury would be irrelevant and of no probative value in proving the employee was intoxicated or that the intoxication was the proximate cause of his injury. Accordingly, we find no unfair prejudice to the employer and insurer. We, therefore, affirm the arbitrator's denial of the appellant's motion to dismiss the employee's claim petition based upon the employee's assertion of his right against self-incrimination.

#### Marital Privilege

Minn. Stat. § 595.02, subd. 1(a) provides, in part: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage." "The basic reason for enforcing the marital communications privilege is that the injury that would result to the marital relationship by disclosure of confidential communications outweighs the benefit conveyed by disclosure to the judicial investigation of truth." State v. Clark, 296 N.W.2d 372 (Minn. 1980).

The appellants argue the employee asserted the marital privilege in the same fashion as he asserted the Fifth Amendment, that is, as a sword to avoid his discovery obligation in a civil claim. They contend the employee asserted the privilege to hide relevant information from appellants. Ms. Archibald, they contend, had relevant information about the employee's marijuana use which they should have been permitted to discover. Again, relying on the Christenson doctrine, the employer and insurer assert the arbitrator erred in failing to dismiss the employee's claim. We are not persuaded.

The Christenson case applies solely to a party's assertion of that party's Fifth Amendment privilege against self-incrimination, not to a party's assertion of the doctrine of spousal immunity. The appellants cite no legal authority for their assertion that the Christenson precedent applies to marital privilege. Rather appellants argument is directly contrary to the very purpose of the statute. As the arbitrator noted, this proceeding is precisely the type of case governed by the statute. The appellants contend the employee must either waive his statutory

privilege or suffer dismissal of his claim. Acceptance of this argument would, in effect, abrogate the marital privilege statute. Accordingly, we reject the argument.

### Discovery Order

By an Order dated November 23, 1999, the arbitrator ordered the employee to sign and mail to the employer's attorney certain medical authorizations by November 24, 1999. The appellants contend the employee failed to fully comply with this order. This failure, appellants assert, caused delay in the proceedings and substantial prejudice to the employer in that it was unable to locate all of the employee's medical history. The employer and insurer contend they were unable to fully present their defenses at the hearing because of the employee's intentional violation of the arbitrator's order. Accordingly, they contend the arbitrator should have dismissed the employee's claim petition under Minn. R. 1415.1700, subp. 2, for failure to comply with an order.

The arbitrator acknowledged that the employee did apparently fail to comply with his discovery order. However, the arbitrator stated the employer and insurer presented no information this failure "thwarted the employer's ability to obtain information that it had reason to believe existed." Further, the arbitrator concluded there was "no evidence from any source that medical records might exist that would confirm the likelihood of the employee having used marijuana within 48 hours prior to the accident, the only time period having any significant relevance." (Memo, p. 14.)

On appeal, the appellants assert the employee's intentional violation of the arbitrator's order placed the employer in a situation in which it was unable to present its defenses fully at the arbitration hearing. As the arbitrator noted, however, appellants offer no information to establish any prejudice. We have affirmed the arbitrator's conclusion that evidence of marijuana use more than 48 hours prior to the employee's injury is of no relevance or probative value in this case. Accordingly, we fail to see how medical records pre-existing the employee's injury are relevant on the issue of intoxication and/or proximate cause.<sup>10</sup> The arbitrator's decision is affirmed.

### Information Regarding Mike Turner

The employee's brother-in-law, Mike Turner, lived in the employee's home for a period of time prior to the employee's injury. The employee testified Turner often smoked marijuana in his presence and smoked marijuana the night before his injury. The employee contended the result of his urine test was influenced, at least in part, by passive inhalation of smoke generated by Turner. At his deposition, counsel for the employer and insurer asked the employee questions about Turner's current residence and address.<sup>11</sup> The appellants again argue the employee's failure to truthfully respond to these questions prejudiced its ability to present a

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<sup>10</sup> The employee's medical records after the injury are in evidence. (See Ee Exs. A-F.)

<sup>11</sup> In his deposition, the employee testified Turner lived in Delano, that he had no idea where he was now, and that he last saw him right after he got out of the hospital. (Depo. p. 38.)

defense to the employee's claims. Such failure, they contend, is a ground for dismissal of the employee's claim petition and they appeal the arbitrator's failure to dismiss.

The arbitrator concluded the employee was not truthful when he testified that he did not know his brother-in-law's whereabouts. (Memo, p. 13.) However, the arbitrator rejected the employee's testimony on the marijuana use issue, finding the metabolite present in the employee's urine resulted from active, as opposed to passive, consumption of marijuana. (Findings 26, 27.) Further, the arbitrator specifically found "the employee, more likely than not, used marijuana within the 48 hour period preceding his injury." (Finding 28.) Even if the employer and insurer would have been able to locate and subpoena Turner, we fail to see how the lack of testimony from Turner deprived the employer of any relevant evidence. Contrary to the employee's testimony, the arbitrator found the employee's test results of 450 ng/ml resulted from the employee's active use of marijuana, and that the employee, more likely than not, used marijuana during the 48 hour period prior to his injury. Even assuming Turner would have testified the employee had personally consumed marijuana on the evening before his injury, that fact alone would prove neither intoxication or proximate cause. For these reasons, we conclude the arbitrator properly denied the employer and insurer's motion to dismiss the employee's claim on this basis.

Affirmed.