Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 23, 2021

CLAIM NO. 201986394

ESTATE OF DYLAN GRAVES PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

CUT IN TIME LAWN CARE/
SHANE SHULTZ
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. The Estate of Dylan Graves ("The Estate") seeks review of the June 3, 2021, Opinion and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") dismissing the Estate's claim for death benefits against Cut In Time Lawn Care ("Cut In Time") arising out of the death of Dylan Graves ("Graves"). The ALJ determined the Estate had not "overcome the presumption created by KRS

342.610(4)." As such the claim was barred by the statute. The Estate also appeals from the July 3, 2021, Order overruling its Petition for Reconsideration.

On appeal, the Estate argues the ALJ erroneously denied death benefits since the evidence confirms Graves was not intoxicated at the time of his death and any rebuttable presumption created by the statute was overcome by its evidence. The Estate also argues that on remand the death benefits must be increased by 30% pursuant to KRS 342.165(1).

BACKGROUND

The Form 101 alleges that on April 2, 2019, Graves was killed "due to blunt impact injuries of the head and neck caused when decedent was operating a riding lawnmower on a hill while working for defendant/employer and the lawnmower rolled on top of him." The Estate indicated a Form SVE would be filed seeking enhanced benefits pursuant to KRS 342.165.[1]

Cut In Time filed a Special Answer denying the claim pursuant to KRS 342.610(4) alleging voluntary intoxication. It also asserted that if the Estate is awarded benefits the compensation should be decreased by fifteen percent pursuant to KRS 342.165(1). Both parties filed the necessary SVE forms.

The April 14, 2021, Benefit Review Conference Order and Memorandum reveals the parties stipulated Graves sustained a work-related injury and died on April 2, 2019, and due and timely notice was given. The contested issues

[1] The Administratrix of the Estate was not named as a party during the proceedings before the ALJ nor on appeal. However, since the Respondent has not raised the issue of the Petitioner's failure to name the Administratrix as a party in the claim and on appeal, we will not address it.

were work-relatedness/causation. Under "Other," is KRS 342.610(4), KRS 342.165(1), and KRS 342.680.

The Estate filed the citations issued by the Kentucky Labor Cabinet, Office of Occupational Safety and Health ("OSHA"), citing Cut In Time for violating the following: KRS 338.031(1)(a), 29 CFR 1910.1200(e)(1), and 29 CFR 1910.132(d)(2).

On April 2, 2019, Graves had traveled with two other employees to a worksite at which Cut In Time was to perform certain lawn care services. The location was referred to as Patrick Way, in Bowling Green, Kentucky. The supervisor, Kendrick Brandt ("Brandt"), testified at the April 14, 2021, Hearing that the initial plan was for him to mow the hill or slope at Patrick Way with Graves and Anthony Joiner ("Joiner"), another employee, to start at the larger side of the properties. Brandt described the tasks each was to perform at the Patrick Way property.

> A: I suggested that Anthony and Dylan start on the larger side of the properties and that I would go down to the end of the properties where the hill is located. I would mow that and then continue to meet up with them as we gradually all mowed closer together.

The accident occurred on the hill upon which Brandt intended to mow. He changed that plan based on the following:

> A: Dylan Graves insisted that he go down to that property the year prior. I worked very little with Shane Shultz/Cut In Time, and there was another supervisor, Chris Glass who had trained him, and Dylan said he had mowed it before, and he was comfortable mowing it.
>
> Q: By "it," are you referring to the hill?

A: Correct.

Brandt relented and allowed Graves to mow the hill. However, he suggested as follows:

> Q: Upon hearing Dylan state that he was comfortable mowing that hill, did you give him any direction or further instruction?
>
> A: I suggested that if there was any out of – uncomfort (sic), that he should either, one, not mow it, or two, put up the rollbar and possibly wear the seat belt as well.

Graves indicated he would implement both safety measures if needed. Brandt acknowledged he did not tell Graves to activate the rollbar or use the seat belts while mowing on the hill. He did not see Graves smoke marijuana on the morning of his death. Graves did not appear to him to be impaired on the morning of the accident. He had no knowledge of whether Graves used marijuana on April 2, 2019.

Joiner testified Brandt had relented and allowed Graves to mow the hill. Graves informed Brandt he had mowed the end of the property where the slope or hill was located during the prior season. On the day of the accident and the day before the accident, Joiner had not seen Graves use marijuana. As to whether Graves appeared intoxicated, he testified as follows:

> Q: On the morning of April 2nd, 2019, did Dylan appear impaired in any way, either through intoxication of alcohol or marijuana in your opinion?
>
> A: No, sir. I mean, Dylan was always – I mean, at work, he was always pretty awake and aware. I mean, he was more of a morning person, especially more than I am. I mean, on that day, he seemed to be operating at a hundred percent, you know, he seemed awake and aware. I would say he was more awake than I was.

> Q: Okay. But he did not appear to you to be impaired or high or that he had used marijuana?
>
> A: No, not at all.

Christopher Shane Shultz ("Shultz"), the owner and operator of Cut In Time, also testified at the Hearing. He described the hill and the manner in which it would be mowed as follows:

> Q: Can you give us an approximation of the height of this hill?
>
> A: Honestly, I haven't been there since that day. I gave that property up immediately just because I didn't want to be there. But I would guess if you were standing at the bottom of the hill, your eyes are about level with the parking lot above you over the – you know, I guess you could say if it were a roof line, I would say, you know, 15:6, if you will, pitch. So I would say that hill goes, you know, roughly five-and-a-half feet to six feet high, roughly, from the bottom to the top. And that length is about 15 to 20 feet that it takes to rise that height.
>
> Q: Earlier as you testified about stripes, you referenced three to four stripes, and I want to know if the three to four stripes were required to mow this five and a half to six foot high hill?
>
> A: Yes, that would be correct. You would mow it – you know, you would mow it with the hill, so to speak, so it's not an up-and-down motion on a hill. It's going side – you know, sideways on the hill, you turn around and do it again until you go to the bottom.

When Shultz arrived at the scene, he could tell none of the grass on the hill had been cut.

The May 15, 2019, report of Dr. Darius Arabadjief, the Kentucky Medical Examiner, lists the cause of death as follows: "The death of this 21-year-old man, Dylan Thomas Graves, is due to blunt impact injuries of the head and neck.

The decedent was operating a riding lawnmower on a hill at work and the lawnmower rolled on top of him." It also noted:

> Postmortem toxicology of abdominal inferior vena cava blood:
>
> Tetrahydrocannabinol – 6.4 ng/mL
>
> Carboxyl tetrahydrocannabinol – 177 ng/mL
>
> Postmortem toxicology of urine is negative for tested drugs of abuse.

The Warren County Coroner's Investigation Report of April 2, 2019, filed with the Form 101 reflects that while mowing Graves "did not have the Roll Bar up or his lap Belt on." Graves was mowing on a small hillside and the mower went over backwards and he ended up under the mower. The report of The Medical Center EMS reflects Graves was dead at the scene.

The Estate submitted the August 19, 2020, report of Dr. David H. Eagerton, Ph.D., F-ABFT, a board-certified forensic toxicologist. His report contains, in relevant part, the following opinions:

> …Blood was collected from the inferior vena cava along with urine and ocular fluid and was sent to AXIS Forensic Toxicology for analysis. That analysis yielded a result of 6.4 ng/mL of tetrahydrocannabinol (THC) and 177 ng/mL of carboxyl tetrahydrocannabinol (THC-COOH). The urine was found to be negative for drugs of abuse.
>
> The active ingredient in marijuana is delta-9-tetrahydrocannabinol (THC). THC is a psychoactive substance that causes both behavioral and physiological effects such as euphoria, relaxation, and impairment of time perception, concentration, learning and memory. Additionally, reaction time, attention, and motor coordination are degraded by the use of marijuana. These effects are typically present for no more than 4-6 hours after exposure to marijuana.

THC and its metabolites remain in the body for a relatively short period after exposure. The levels of THC in the blood peak within approximately 10 minutes after smoking and typically decline to undetectable levels within approximately 12 hours after a single, low dose administration. THC levels can be detected in blood for up to approximately 24 hours following a single high dose or multiple lower doses. In contrast, the levels of 11-Nor-90carboxy-tetrahydrocannabinol (THC-COOH), the primary metabolite of THC, can be detected in the blood for approximately 2 days in blood and 3 days in the urine following a single low dose administration or up to 7 days to several weeks following high or multiple doses.

The levels of THC and COOH-THC reported are not consistent with a negative urine drug screen. If Mr. Graves had used marijuana within the three days prior to his death, his urine should have been positive for THC metabolites. THC and COOH-THC levels are difficult to interpret in postmortem cases due to a phenomenon known as postmortem redistribution (PMR). PMR occurs when compounds which are present in tissues diffuse into the blood after death. Therefore, the levels found in blood may not accurately represent the levels that were present prior to death. THC is highly lipophilic (fat-soluble) and is highly distributed to fatty tissue where it remains for some time. Any THC that is in fat or any other tissue, except brain, is not present in the blood and not associated with impairment. Trauma has been documented to exacerbate this issue and interpretation of THC levels in traumatic deaths is even more complicated due to increase release of drugs from tissues and into the blood.

There is no documentation of any cognitive impairment or any physiological affect of THC on Mr. Graves at the time of the accident. Therefore, the toxicology results for Mr. Graves indicate the [sic] he was a user of marijuana, but determination of levels prior to death and subsequent impairment cannot be determined solely from the information given.

It is my opinion that, within a reasonable degree of scientific certainty, the results of these tests do not indicate any impairment, at the time of the accident.

> The negative urine drug screen indicates that Mr. Graves was not exposed to Marijuana within the 3 days prior to his death. The levels of THC and COOH-THC are not consistent and are likely the result of PMR and trauma. It is further my opinion that impairment from marijuana was not the proximate cause of the accident.

Cut In Time countered with the October 9, 2020, report of Dr. George R. Nichols, II, a licensed physician certified in clinical pathology and forensic pathology. After reviewing the records from the Kentucky Department of Workers' Claims, Coroner's Investigation Report, The Medical Center EMS records, Certificate of Death, Autopsy Report, records of the Kentucky Labor Cabinet, Dr. Eagerton's report, and Dr. Arabadjief's report, Dr. Nichols expressed the following opinions:

> As above blood, urine and vitreous fluids were securely transported to AXIS Laboratory for alcohol and drug testing. No drugs were detected in the urine sample. Reported in blood were the marijuana active drug Δ-9-tetrahydrocannibinoid (concentration 6.4 ng/mL) and a non-psychoactive marijuana metabolite, carboxyl tetrahydrocannabinol (concentration 177 ng/mL).
>
> Multiple studies have shown that there is a time lag of 2 to 4 hours from inhalation of smoked marijuana and the presence of the marijuana metabolite at employed levels of the urinary metabolite at 50 ng/mL.
>
> Other references conclude that psychoactive blood levels of smoked marijuana occur within 15 – 20 minutes. The levels considered to be psychoactive begin at 3 ng/mL.
>
> The state of Colorado has passed a law which determines that unsafe driving occurs at 5 ng/mL in blood. This level is per se proof of Driving While Intoxicated.
>
> From the above I conclude, with reasonable medical certainty, the following:
>
> • fatal head injury due to motorized implement rollover

• no conscious pain and suffering
• acute marijuana intoxication
• interval of smoking too short for urine metabolite detectability
• accidental manner of death

In rebuttal, the Estate introduced Dr. Eagerton's November 18, 2020, report in which he opined as follows:

> According to Dr. Nichol's cited reference, *Blood Cannabinoids. II. Models for the prediction of Time of Marijuana Exposure from Plasma Concentrations of delta 9-Tetrahydrocannabinol (THC) and 11-nor-9-carboxy-delta 9-tetrahydrocannabinol (THCCOOH)*, the ratio of THC to THCCOOH indicates that marijuana was used within 1.7 to 11.88 hours. This is inconsistent with his stated opinion of 2 to 4 hours. Also, as is stated in this and other references, recent use of marijuana also produces another metabolite, 11-hydroxy-delta 9-tetrahydro-cannabinol (11-OH-THC) which is present in the blood within minutes of exposure to marijuana and can be detected for at least 4 hours after exposure. Additionally, these references indicate that THC can be excreted from deep tissue storage compartments for an extended period of time. There was no 11-OHTHC identified in the postmortem blood from Mr. Graves.
>
> The level of THCCOOH that was identified in the postmortem blood from Mr. Graves was 177 ng/mL while the concentration of THC itself was only 6.4 ng/mL. This would indicate that some time has passed since the beginning of exposure to marijuana, because the THCCOOH comes from the THC. It is my opinion that a blood level of 177 ng/mL of THCCOOH is a significant level and would likely result in THCCOOH being eliminated in the urine at a sufficient level to yield a positive result. In fact, according to the references cited by Dr. Nichols, THCCOOH was measurable in urine within minutes of exposure to marijuana. Again, this is inconsistent with his opinion.
>
> As I stated in my original report, THC is a psychoactive substance that causes both behavioral and physiological effects such as euphoria, relaxation, and impairment of time perception, concentration, learning and memory.

Additionally, reaction time, attention, and motor coordination are degraded by the use of marijuana. These effects are typically present for no more than 4-6 hours after exposure to marijuana. I agree that THC is an impairing substance, and that levels greater than 5 ng/mL are associated with impairment. However, based on the reasons identified in this and my previous report, the levels of THC and THCCOOH identified in the postmortem blood from Mr. Graves are not consistent with a negative urine drug screen. If Mr. Graves had used marijuana within the three days prior to his death, his urine should have been positive for THC metabolites. THC and THCCOOH levels are difficult to interpret in postmortem cases due to postmortem redistribution (PMR), which can be intensified by severe trauma. PMR occurs when compounds which are present in tissues diffuse into the blood after death. Therefore, the levels found in blood may not accurately represent the levels that were present prior to death. THC is highly lipophilic (fat-soluble) and is highly distributed to fatty tissue where is [sic] remains for some time. Any THC that is in fat or any other tissue, except brain, is not present in the blood and not associated with impairment. Trauma has been documented to exacerbate this issue and interpretation of THC levels in traumatic deaths is even more complicated due to increased release of drugs from tissues and into the blood.

I still have seen no documentation of any cognitive impairment or any physiological affect of THC on Mr. Graves at the time of the accident. Therefore, the toxicology results for Mr. Graves indicate he was a user of marijuana, but determination of levels prior to death and subsequent impairment cannot be determined solely from the information given.

It is my opinion that, within a reasonable degree of scientific certainty, the toxicology results from Mr. Graves cannot solely be used to determine impairment at the time of the accident. The negative urine drug screen and the absence of 11-OH-THC is not consistent with recent use. The levels of THC and COOH-THC are not consistent and are likely the result of PMR and trauma. It is further my opinion that the opinions of Dr.

> Nichols are not supported by the literature, including that cited and provided by Dr. Nichols.
>
> Cut In Time offered in sur-rebuttal, Dr. Nichols' October 29, 2020, report in which he expressed the following opinions:
>
> It is my opinion, based upon reasonable medical probability, that Dylan Graves had consumed marijuana by smoking in a 2 to 4 hour window preceding his death on April 2, 2019.
>
> I disagree, based upon reasonable medical certainty, with Dr. Eagerton's opinion that the results of blood and urine tests 'do not indicate any impairment, and cannot be used to determine impairment at the time of the accident.' Indeed state legislators have codified that impairment exists at levels of 5 ng/ml and lesser concentrations.
>
> It is my opinion, based upon reasonable medical probability, that acute marijuana intoxication produced 'disturbance of mental or physical capacities,' and that this was the cause of motorized implement rollover with resulting fatal head injury.
>
> In finding the claim is barred by KRS 342.610(4), the ALJ provided the following findings of fact and conclusions of law:
>
> **I. KRS 342.610(4) and KRS 342.680**
>
> It is clear that these two statutory sections cannot be considered separately or in a vacuum. They are both directly applicable to this fact situation and clearly in conflict and cannot be reconciled to the extent both are applied in the same claim.
>
> KRS 342.610(4) provides:
>
> "If an employee voluntarily introduced an illegal, nonprescribed substance . . . into his or her body, detected in the blood, as measured by a scientifically reliable test, that could cause a disturbance of mental or physical capacities, it shall be presumed that [said substance] caused the injury, occupational disease or death of the

> employee and liability for compensation shall not apply . . . "

However, KRS 342.680 states:

> "In any claim for compensation, where the employee has been killed . . . and where there is unrebutted prima facie evidence that indicates the injury was work-related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work-related . . . and that the injury or death was not proximately caused by the employee's intoxication . . . "

The first section, .610(4) does not set forth any minimal level of illegal substances detected in the blood in order to find that the presumption applies. Therefore, while the presumption can be overcome by evidence regarding whether or not the detectable levels of THC could cause intoxication THC being detected in the blood, regardless of levels, triggers the presumption.

At the same time, I reject the Defendant's argument that the statute creates an "irrebuttable presumption." I need not write at length on the legal and practical differences between a rebuttable and irrebuttable presumption but I will say if the General Assembly had intended to create an irrebuttable presumption they would have said so, certainly that is the correct rule of statutory construction.

Both KRS 342.610(4) and KRS 342.680 cannot apply or be harmonized. I note, with respect to the parties arguments, that none of the case law they cite was created since the relevant revisions to KRS 342.610(4), in 2018. Frankly, the case I am going to rely on was decided before 2018 but I believe it still applicable.

Williams v The Commonwealth of Kentucky, 829 S.W.2d 942 (Ky. App. 1992) set forth various standards and rules for statutory construction when statutes are in conflict. Neither statute in this claim is absurd within the legal and practical meaning of the word. Both simply create a presumption of work-relatedness or non-work-relatedness in cases of the voluntarily ingestion of illegal substances. It is not possible to harmonize and apply

both statutory sections. The only applicable rule discussed is that when two statutes clearly conflict that the later enacted statute applies over the older statute.

The Kentucky Supreme Court denied rehearing in *Williams*. Since then there has been no reversal or overturning of that standard and the only negative treatment of it, in *Adams v. The Commonwealth of Kentucky,* 46 S.W.3d 572 (Ky. App. 2000), concerned the correct interpretation of KRS 533.060(2), not the applicable rule of statutory construction.

KRS 342.610(4) as it is now written was effective as of July 14, 2018. KRS 342.680 as it is now written was most recently effective as of December 12, 1996. Under the above analysis and the rules of statutory construction I am bound to determine and find that KRS 342.610(4) is the correct statutory section and that there is a rebuttable presumption in this matter that the levels of THC found in Mr. Graves' blood was the cause of his accident and his accident is therefore non-compensable unless the rebuttable presumption is overcome.

II. Work-relatedness (and if the rebuttable presumption has been overcome)

I have already found that KRS 342.610(4) applies in this claim and it clearly states that if any THC is found in the blood by a reliable scientific test, it creates a rebuttable presumption of voluntary intoxication and that the accident and death is not work-related. It does not provide for any certain level of THC to create the presumption. That being said it might still be possible to overcome the presumption.

While this is not a case involving a University Evaluator appointed pursuant to KRS 342.315 the Kentucky Supreme Court has defined a rebuttable presumption in Kentucky Workers' Compensation as placing the burden of overcoming the presumption on the party adversely affected by the presumption. *Magic Coal v. Fox*, 19 S.W.3d 88 (Ky. 2000). So if an injured worker's blood showed no illegal or non-prescribed substances a Defendant could still attempt to argue they were voluntarily intoxicated. If, as in this claim, a scientifically reliable blood test showed an illegal

substance in the blood then the Plaintiff must present evidence to overcome the burden for the presumption to not take effect.

It appears undisputed that the level of tetrahydrocannabinol was 6.4 ng/ml and the level of carboxyl tetrahydrocannabinol was 177 ng/ml. The question is: is this level sufficiently low to overcome the presumption that Dylan Graves was voluntarily intoxicated at the time of his accident and death.

The Plaintiff has submitted two reports from Dr. Eagerton to rebut the idea that Mr. Graves was intoxicated at the time of his death and accident. Dr. Eagerton's qualifications are impressive and certainly, this represents an unusual fact situation. Dr. Eagerton has extensively discussed whether the levels of THC was sufficient to cause intoxication. He has also discussed how long it takes to process THC out of the blood or urine once an individual has somehow consumed it. What he does not discuss is three highly relevant facts.

First, he does not discuss if THC would or could metabolize in the blood before it metabolizes in the urine. Second, he does not discuss if the rate of metabolization in the blood would go up shortly in time after consumption of the marijuana, i.e. if in the several minutes or few hours after consuming the marijuana his blood levels would slowly rise before again declining. Third, he does not discuss if it is possible for an individual to consume marijuana, become intoxicated and have it detectable in the blood before it is detectable in the urine. In other words, did Dylan Graves consume marijuana in the minutes or hours before his accident?

I don't know the answers to these questions. I don't need to answer them. My point is that the Plaintiff bears the burden of overcoming the statutory presumption and the evidence genuinely doesn't persuade me. With too many unanswered questions, I cannot find that the Plaintiff has overcome the presumption. I also note, as far as these questions, that they are raised and addressed by the Defendant's medical expert, Dr. Nichols.

It is not necessary for me to conduct a detailed analysis of Dr. Nichols' opinions at this point. The

> Plaintiff must overcome the presumption and they have not done so. That being said Dr. Nichols' opinions not only constitute substantial evidence they are as at least as complete as those of Dr. Eagerton. Even if this was a claim without any presumption to be overcome by either party there is at least a good chance I would rely on Dr. Nichols.
>
> I note the testimony from Mr. Brandt and Mr. Joiner that Mr. Graves did not appear impaired. While probative, it is hardly dispositive. They are not experts on detecting intoxication. There is no proof that they were even looking for the subtle signs of impairment that may escape a 21-year observer old but could be sufficient to cause an accident. There is no proof that they were evaluating Mr. Graves for impairment at the time of his accident.
>
> This claim is not work-related because the Plaintiff has not overcome the presumption created by KRS 342.610(4).

The Estate filed a Petition for Reconsideration arguing there is no authority supporting the ALJ's conclusion KRS 342.610(4) and KRS 342.680 are in conflict and the ALJ erred in relying upon KRS 342.610(4) to dismiss the claim. It contended even though the statutes shift the burden of proof, KRS 342.680 may be applicable. Thus, the ALJ's Order is erroneous pursuant to both statutes because the post-accident toxicology analysis confirmed Graves' urine was negative for drugs and his blood did not contain 11-OH-THC. Thus, Cut In Time could not prove "Graves' death was caused by any intoxication under KRS 342.680" and the presumption contained in KRS 342.610(4) was rebutted.

It also argued the rebuttable presumption contained in KRS 342.610(4) was overcome by the evidence since the toxicology analysis confirmed Graves' urine was negative for any drugs of abuse at the time of the accident even though the

analysis reflected THC and THCCOOH in the blood at the time of testing. The Estate asserted the ALJ's Order was erroneous because there was no evidence Graves' death was caused by intoxication, and the presumption contained in KRS 342.610(4) was overcome by evidence confirming the THC in Graves' blood was only present after his death.

Significantly, it requested the ALJ reconsider his decision and award benefits increased by 30% according to KRS 342.165(1). The Estate did not request any additional findings of fact or for the ALJ to further explain the basis for his decision. It sought reversal requesting the ALJ rely upon the opinions of Dr. Eagerton over those of Dr. Nichols which would result in the presumption contained in KRS 342.610(4) being overcome. The ALJ overruled the Petition for Reconsideration reasoning as follows:

> This matter comes before the undersigned on the Plaintiff's Petition for Reconsideration and the Defendant's Response thereto. I appreciate that this claim concerns novel issues of law, with regards to the specific statutory section I applied, at least as far as Kentucky appellate courts have previously been asked to provide guidance. I nonetheless believe that my analysis of which statutory section applies to this claim is supported by not only the most reasonable application of existing case law, but the most likely application of existing case law. As such there is a rebuttable presumption that Dylan Graves' illegal drug use was the proximate cause of his death and the Estate's claim is therefore barred. As a factual matter I do not think the Plaintiff's evidence even remotely overcomes the presumption. It is merely contradictory evidence to the Defendant's evidence. As such the Petition is OVERRULED.

On appeal, the Estate contends there is no authority supporting the ALJ's conclusion KRS 342.610(4) and KRS 342.680 are in conflict. It argues that

even though those statutes shift the burden of proof, the ALJ was not prevented from finding KRS 342.680 applicable. The Estate maintains the dismissal of its claim is arbitrary, capricious and erroneous under both statutes because the only reliable, probative, and material evidence, i.e. the post-accident AXIS Forensic Toxicology Analysis, confirms Graves' urine was negative for any drugs, and his blood did not contain 11-OH-THC. Thus, Cut In Time did not prove Graves' death was caused by intoxication and any presumption created by KRS 342.610(4) that Graves' death was caused by marijuana use was rebutted. In the Estate's view, the ALJ erroneously ignored the portion of the forensic toxicology analysis revealing Graves had no drugs in his urine and also ignored the detailed opinion of Dr. Eagerton explaining why Graves was not intoxicated at the time of his death.

The Estate also argues Dr. Nichols' report fails to prove Graves' death was primarily caused by intoxication or that he was intoxicated at the time of the accident. The Estate cites extensively to Dr. Eagerton's report in support of its argument. It contends the post-mortem blood test does not prove drug use at the time of the incident. Since the urine drug screen confirms no drug use at the time of the incident, the Estate maintains the only reliable, probative, and material evidence confirms Graves was not intoxicated at the time of the incident. Consequently, the ALJ erred in denying its claim.

In a companion argument, the Estate argues any rebuttable presumption created by KRS 342.610(4) that THC was found in Graves' blood was overcome by the forensic toxicology analysis and Dr. Eagerton's opinions. It maintains the questions posed by the ALJ in his opinion were answered by Dr.

Eagerton's report and the lack of 11-OH-THC in Graves' blood after his death confirms he was not intoxicated at the time of the accident. The Estate also relies upon the testimony of Graves' co-workers that he did not appear intoxicated at the time of the accident.

Finally, the Estate argues that upon remand it is entitled to enhancement of the benefits by 30% pursuant to KRS 342.165(1) as the Kentucky Labor Cabinet's OSHA citations establish Graves' death was caused by the employer's failure to comply with KRS 338.031(1)(a). It notes the citations reflect Graves' death was due to Cut In Time's failure to furnish Graves with a place of employment free from recognized hazards because Cut In Time failed to properly train and instruct Graves to wear the seat beat and extend the roll over protection system when mowing the Patrick Way Hill.

ANALYSIS

KRS 342.680 reads as follows:

> In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work related, that sufficient notice of the injury has been given, and that the injury or death was not proximately caused by the employee's intoxication or by his willful intention to injure or kill himself or another.

The above-cited statute directs that in the absence of substantial evidence to the contrary a presumption exists that the injury resulting in death is

work-related and not caused by the employee's intoxication. Thus, the presumption of work-relatedness is present in the absence of substantial evidence to the contrary.

In the case *sub judice*, the report of the Chief Medical Examiner demonstrates marijuana was found in the blood. This is sufficient to rebut the presumption created by KRS 342.680. The opinions of Dr. Nichols also constitute substantial evidence abrogating the presumption created by the statute. In his October 9, 2020, report, Dr. Nichols concluded Graves suffered from acute marijuana intoxication. In a subsequent October 29, 2020, report, Dr. Nichols disagreed with Dr. Eagerton's opinion that the results of the blood and urine tests do not indicate any impairment and cannot be used to determine impairment at the time of the accident. Dr. Nichols noted Colorado had codified that impairment exists at the level of 5 ng/mL. Thus, Dr. Nichols concluded acute marijuana intoxication produced a "disturbance of mental or physical capacities" and caused the lawnmower rollover resulting in a fatal head injury.

KRS 342.610(4) reads as follows:

> If an employee voluntarily introduced an illegal, nonprescribed substance or substances or a prescribed substance or substances in amounts in excess of prescribed amounts into his or her body detected in the blood, as measured by a scientifically reliable test, that could cause a disturbance of mental or physical capacities, it shall be presumed that the illegal, nonprescribed substance or substances or the prescribed substance or substances in amounts in excess of prescribed amounts caused the injury, occupational disease, or death of the employee and liability for compensation shall not apply to the injury, occupational disease, or death to the employee.

In part, the statute directs that when an illegal non-prescribed substance is detected in the blood by a scientifically reliable test and capable of causing a disturbance of mental or physical capacities a presumption is created that the illegal substance caused the death of the employee. Consequently, liability for compensation shall not apply to the injury.

Contrary to the view expressed by the ALJ, we believe KRS 342.680 and KRS 342.610(4) are easily harmonized. Because Graves was killed at work, upon the filing of the claim the presumption of work-relatedness in KRS 342.680 applied. At that point, the employer had the burden to rebut the presumption of work-relatedness. Cut In Time rebutted the presumption utilizing the affirmative defense of voluntary intoxication, supported by evidence of marijuana metabolites in Graves' blood. The work-related presumption was obviated by both the forensic toxicology report and Dr. Nichols' opinions. Thus, the presumption created in KRS 342.680 vanished. The Estate then had the burden of producing evidence of the non-existence of the presumed fact which it attempted to do through Dr. Eagerton's opinions.

In AK Steel v. Adkins, 253 S.W.3d 59, 63-64 (Ky. 2008), the Kentucky Supreme Court explained the significance of rebuttable presumptions by providing the following:

> *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 95 (Ky. 2000), explains that rebuttable presumptions are governed by KRE 301. A rebuttable presumption shifts to the party against whom it is directed the burden of going forward with evidence to rebut or meet it but does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom the burden was originally cast. If the presumption is not rebutted, the party with

> the burden of proof prevails on that issue by virtue of the presumption. If the presumption is rebutted, it is reduced to a permissible inference. The ALJ must then weigh the conflicting evidence and decide which is most persuasive. The court applied these principles recently in *Jefferson County Public Schools v. Stephens,* 208 S.W.3d 862 (Ky. 2006), a case involving an unexplained workplace fall.
>
> The claimant had the burden to prove every element of her claim, including causation. The reason for her workplace fall was not apparent. The employer offered evidence that she had been treated previously for dizziness and balance problems. It asserted that the fall and torn rotator cuff were due to a personal (idiopathic) cause and, therefore, not work-related.
>
> KRS 342.285 designates the ALJ as the finder of fact. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985), explains that the fact-finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986), explains that a finding that favors the party with the burden of proof may not be disturbed if it is supported by substantial evidence and, therefore, is reasonable.
>
> Assuming that the employer's evidence rebutted the presumption of causation and reduced it to no more than a permissible inference, other substantial evidence indicated that the torn rotator cuff was work-related. Thus, the finding of causation was reasonable. Under the circumstances, it is unnecessary to address an ALJ's authority to apply a non-statutory presumption of causation.

KRS 342.610(4) delineates a fact pattern, when established, constituting substantial evidence sufficient to obviate the presumption contained in KRS 342.680. Specifically, a scientifically reliable test revealing an illegal substance in the blood stream rebuts the presumption contained in KRS 342.680. As found by the ALJ, Dr. Nichols' report also constituted substantial evidence rebutting the presumption contained in KRS 342.680. The ALJ found KRS 342.610(4) applicable

since the forensic toxicology report found THC was present. Thus, a rebuttable presumption of voluntary intoxication arose that the accident and death are not work-related. As noted by the ALJ, the statute does not specify the level of THC which must be present in the blood in order to create the presumption.

The ALJ noted the level of tetrahydrocannabinol was 6.4 ng/mL and the level of carboxyl tetrahydrocannabinol was 177 ng/ML. He concluded the question is whether this level is sufficiently low to overcome the presumption that Graves was voluntarily intoxicated at the time of his accident and death. After reviewing Dr. Eagerton's report, the ALJ concluded his opinions were not sufficient to overcome the presumption created by KRS 342.610(4). The ALJ set forth his impressions of Dr. Eagerton's report.

The ALJ noted the Estate bore the burden of overcoming the statutory presumption and concluded the evidence was not persuasive enough to overcome the statutory presumption. Too many unanswered questions prevented him from finding the presumption was overcome. On the other hand, he noted Dr. Nichols had addressed his questions. Although he chose not to engage in a detailed analysis of Dr. Nichols' opinions, the ALJ found Dr. Nichols' opinions constitute substantial evidence and were at least as complete as those of Dr. Eagerton. Although unnecessary, the ALJ stated that even if a presumption was not present, there was at least a good chance he would rely on Dr. Nichols.

The ALJ addressed the testimony of Brandt and Joiner and found their testimony was not dispositive as they were not experts in detecting intoxication.

Further, there was no proof either was looking for subtle signs of impairment or that they were even evaluating whether Graves was impaired at the time of the accident.

On appellate review, this Board must determine whether substantial evidence of probative value supports the ALJ's findings. Whittaker v. Rowland, 998 S.W.2d 479, 481-82 (Ky. 1999). Substantial evidence is evidence of "substance and relevant consequence" having fitness to induce conviction in the minds of reasonable people. Miller v. Tema Isenmann, Inc., 542 S.W.3d 265, 270 (Ky. 2018).

The ALJ, as fact-finder, has "the sole authority to judge the weight, credibility and inferences to be drawn from the record." Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997). However, there must be substantial evidence supporting the decision. We conclude the ALJ correctly applied KRS 342.610(4) by determining the facts in this case gave rise to the rebuttable presumption created by the statute. Consistent with the law pertaining to rebuttable presumptions, the ALJ then determined the rebuttable presumption was not overcome by Dr. Eagerton's opinions. Although KRS 342.610(4) does not expressly state a rebuttable presumption is created, we believe it unequivocally creates a rebuttable presumption regarding causation.

Professor Lawson, in his treatise on Kentucky evidence law, reviews the evolution of the law on presumptions in Kentucky. *See*, Lawson, The Kentucky Evidence Law Handbook, Section 10.05. Professor Lawson states with regard to rebuttable presumptions as follows:

> The approach to presumptions that has prevailed in Kentucky – the Thayer-Wigmore view – postulates that a presumption vanishes upon the production of evidence pertinent to the nonexistence of the presumed fact.

> Once the presumption vanishes, the burden of going forward with evidence comes into play (not as a unique part of presumption law but as an ordinary part of burden of proof law) and sufficiency issues are determined as if no presumptions ever existed. The high court of Kentucky, in most of its recent opinions, has adopted a position on the rebuttal of presumptions that is consistent with this aspect of the Thayer-Wigmore view.

Professors Underwood and Weisenberger, in their courtroom manual on Kentucky evidence, explain overcoming the presumption as follows:

> KRE 301 adopts the Thayer-Wigmore or 'bursting bubble' approach to presumptions. Under KRE 301, a presumption is a procedural device that operates to shift the evidentiary burden of producing evidence, i.e., the burden of going forward, to the party against whom the presumption is directed. The burden of producing evidence operates generally to expose a party to an adverse result on a directed verdict where the evidence on the issue has not been advanced. But once the opponent introduces enough evidence for the submission of the issue to the jury, the presumption disappears. The burden of proof, i.e., the risk of nonpersuasion is not affected under KRE 301 and it remains on the party on whom it was originally cast by the law and the pleadings. Indeed, KRE 301 provides that the burden of proof, i.e., the risk of nonpersuasion may not be shifted from one party to another during the course of an action. Of course, KRE 301 creates no presumption. It merely governs the operations and effect of presumptions.

Underwood and Weisenberger, Kentucky Evidence, Chapter 301.

At the time of Graves' death, the presumption pursuant to KRS 342.680 attached. However, KRS 342.610(4) directs the forensic toxicology report constituted the requisite substantial evidence required by KRS 342.680 to rebut the presumption of work-relatedness. The report demonstrates a scientifically reliable test detected an illegal substance in the blood capable of causing a disturbance of mental

or physical capacities. We emphasize that both Drs. Eagerton and Nichols agree marijuana, as contemplated by the statute, is capable of causing a disturbance of mental and physical capacities. In his November 18, 2020, report, Dr. Eagerton acknowledged THC is a psychoactive substance which "causes both behavioral and physiological effects such as euphoria, relaxation, and impairment of time perception, concentration, learning, and memory. Additionally, reaction time, attention, and motor coordination are degraded by the use of marijuana." He noted the effects are typically present for no more than 4-6 hours after exposure to marijuana, but agreed THC is an impairing substance at levels greater than 5 ng/mL. Similarly, in his October 9, 2020, report, Dr. Nichols noted "other references conclude that psychoactive levels of smoked marijuana occur within 15 to 20 minutes," and "the levels considered to be psychoactive begin at 3 ng/mL." He also noted further support is found in the Colorado statutes which direct unsafe driving occurs at 5 ng/mL in the blood. Consequently, that level is *per se* proof of driving while intoxicated. In his October 29, 2020, report, Dr. Nichols opined acute marijuana intoxication produced a disturbance of mental and physical capacities which was the cause of the motorized rollover resulting in the fatal head injury. We note the level of marijuana in Graves' blood exceeded the above-discussed levels.

That being the case, the toxicology report created a presumption that the ingestion of marijuana caused the injury resulting in death. The report is buttressed by Dr. Nichols' report in which he concluded the marijuana intoxication produced a disturbance of mental and physical capacities causing the accident resulting in Graves' death. Cut In Time presented evidence of voluntary intoxication

placing the burden on the Estate of producing the non-existence of a presumed fact. Thus, the ALJ was tasked with determining whether the Estate had rebutted the presumption contained in KRS 342.610(4). Within his discretion, the ALJ concluded it had not. Unlike Dr. Eagerton's opinions, the ALJ concluded Dr. Nichols' opinions constituted substantial evidence. Our review of Dr. Nichols' report leads us to conclude that his opinions constitute substantial evidence supporting the ALJ's determination that the rollover accident resulting in Graves' death was caused by marijuana intoxication. Consequently, the Estate is not entitled to workers' compensation benefits. Dr. Nichols opined the acute marijuana intoxication producing a disturbance of mental or physical capacities was the cause of the rollover resulting in the fatality. That opinion constitutes substantial evidence supporting the ALJ's finding Graves' death is not work-related.

Assuming, *arguendo*, the statutes cannot be reconciled, the ALJ correctly applied KRS 342.610(4) as it was the more specific statute. In Light v. City of Louisville, 248 S.W.3d 559, 563 (Ky. 2008), the Supreme Court explained:

> Since we have two statutes whose provisions are in conflict, the conflict must be resolved under the doctrine of *in paria materia. Economy Optical Co. v. Kentucky Board of Optometric Examiners,* 310 S.W.2d 783 (Ky. 1958). It is incumbent upon courts to resolve the conflict between the two statutes so as to give effect to both. *Id.* In harmonizing the conflict between two statutes that relate to the same subject, Kentucky follows the rule of statutory construction that the more specific statute controls over the more general statute. *Withers v. University of Kentucky,* 939 S.W.2d 340 (Ky. 1997); *City of Bowling Green v. Board of Education of Bowling Green Independent School District,* 443 S.W.2d 243 (Ky. 1969).

KRS 342.610(4) is specifically applicable to the facts of this case rather than the general statute contained in KRS 342.680. KRS 342680 is a general workers' compensation statute and KRS 342.610(4) specifically and unambiguously refers to claims barred by illegal substances found in the claimant's blood as revealed by a scientifically reliable test. The Supreme Court in Boyd v. C & H Transp., 902 S.W.2d 823, 824 (Ky. 1995) stated:

> A specific statute of limitation preempts a general statute of limitation where there is a conflict. *Land v. Newsome,* Ky., 614 S.W.2d 948 (1981). KRS 342.185 is the general workers' compensation statute of limitation; KRS 342.670(2) specifically and unambiguously refers to filing deadlines for compensated extraterritorial claims. Therefore, KRS 342.670(2) applies in this situation.

Moreover, as noted in Williams v. Com., 829 S.W.2d 942, 944-45 (Ky. App. 1992), the later enacted statue is controlling. The Court of Appeals explained:

> Several principles of statutory construction come in for consideration in resolving this problem. Where a conflict exists between two statutes, the later statute enacted is generally controlling. *Commonwealth v. Hunt,* Ky. App., 619 S.W.2d 733 (1981). This principle standing alone would favor KRS 500.095, which was enacted in 1990. KRS 533.060(1) was enacted in 1976. We also note, however, that where there is conflict between statutes or sections thereof, it is the duty of the court to attempt to harmonize the interpretation so as to give effect to both sections or statutes, if possible. *Ledford v. Faulkner,* Ky., 661 S.W.2d 475 (1983). The court must not interpret a statute so as to bring about an absurd or unreasonable result. *George v. Alcoholic Beverage Control Board,* Ky., 421 S.W.2d 569 (1967). If we agreed with Williams and concluded that KRS 500.095 were controlling, we could make a nullity of KRS 533.060(1).
>
> Another rule of statutory construction is that specific provisions of a statute take precedence over general provisions. *Kentucky Trust Co. v. Department of Revenue*, Ky., 421 S.W.2d 854 (1967). The language

> in KRS 500.095(1) is very specific when it directs that *in every case* the judge *shall consider* alternatives to prison, but we also note that KRS 533.060(1) is very specific when it directs that anyone convicted of using a firearm in the commission of a Class A, B, or C felony must be sentenced to a term in prison. A similar conflict arose between the provisions of KRS 532.110 (1) and (2) and KRS 533.060 in *Commonwealth v. Martin,* Ky. App., 777 S.W.2d 236 (1989). In *Martin,* it was held that the provisions of KRS 533.060(3), requiring consecutive sentencing for an offense occurring while one was awaiting trial for another crime, were more "specific" and "tailored" to the facts, and that those provisions should override the more general provisions of KRS 532.110, which allowed some concurrent or consecutive sentences for convictions of multiple offenses.

Based upon the above, KRS 342.610(4) controls in the event of a statutory conflict.

Finally, we point out the Estate did not request additional findings of fact seeking further explanation or a more explicit ruling regarding the basis of the ALJ's decision in its Petition for Reconsideration, as required by KRS 342.281 and KRS 342.285. As such, the issue was not properly preserved for review by this Board. *See* Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007) (failure to make statutorily-required findings of fact is a patent error which must be requested in a Petition for Reconsideration in order to preserve further judicial review).

In its Petition for Reconsideration the Estate asserted its disagreement with the decision and pointed out reasons why the ALJ should change his decision. However, it did not seek additional findings of fact or a further explanation. Thus, our task is to determine whether substantial evidence supports the ALJ's decision. We conclude it does as the forensic toxicology report and the opinions of Dr. Nichols comprise the requisite substantial evidence supporting the ALJ's decision.

Due to our ruling on the Estate's first argument, the Estate's argument pertaining to the applicability of KRS 342.165(1) is moot.

Accordingly, the June 3, 2021, Opinion and Order and the July 3, 2021, Order ruling on the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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