

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308075

SIMON DAVIS, EMPLOYEE

CLAIMANT

CAMACO, INC., EMPLOYER

RESPONDENT

**HARTFORD INSURANCE COMPANY/
SPECIALTY RISK SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 22, 2004

Submitted on the record before Administrative Law Judge Cynthia Estes Rogers.

Claimant represented by Mr. Carter Dooley, Attorney at Law, Wynne, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

A hearing was held on April 2, 2004, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer-carrier relationship on January 24, 2003. It was further stipulated that, based on an average weekly wage of \$540.39, the claimant would be entitled to weekly indemnity benefits of \$360.00 for temporary total disability and \$270.00 for permanent partial disability benefits.

Claimant contends that he sustained a compensable injury arising out of and during the course and scope of his employment on January 24, 2003. His claim is for medical benefits and attorney's fees.

Respondents controvert this claim in its entirety, contending that the claimant tested positive on a drug screen, which would bar benefits.

STATEMENT OF THE CASE

The claimant is employed as a C and C bender operator for respondent employer, running a pipe bender used to bend pipe into seat frames to make car seats. He has been employed with respondent employer for twenty-one years and has worked as a bender

operator for approximately two years. Claimant was injured on Friday, January 24, 2003, at approximately 10:30 or 11:00 p.m., while working the second shift, which was from 3:00 p.m. or 3:30 p.m. until 11:00 p.m. or midnight.¹

Claimant testified that his bender machine had stopped working at a particular step in the process; therefore, he went inside the “caged” or fenced area containing the machine, in order to clean it so that it would resume proper working order. He testified that that is not an uncommon occurrence and that he does periodically have to get inside the caged area in order to clean the machine. He testified that, rather than entering the fenced-in area through the gate, which would make the machine automatically shut off, he either went over or under the fence; therefore, the machine would not automatically shut off.

He testified that although he knew he should have put the machine in “manual” before entering the fenced or “caged” area, he had left the machine in “step,” or automatic, so that he would be able to tell when he had properly cleaned it, as it would then begin running again. Because he had left the machine in “step,” as he cleaned the electronic eye that previously would not turn in order to lock around the pipe, it locked once it was clean; then, it rotated and snatched his glove and middle finger, cutting off the end of that finger.

He was taken to the hospital at that point, but did not lose any days of work as a result of the accident. Respondents denied benefits because claimant testified positive for cocaine in a urine drug test, administered while he was at the hospital being treated for his finger injury.

Claimant admitted on direct examination that he had smoked crack cocaine a few days before the incident, on Wednesday morning, after he had gone off his Tuesday night shift. Claimant denied using cocaine at any other time during that week but did admit that

¹According to testimony, the second shift had, at some point in time, changed from a 3:00 p.m. until 11:00 p.m. shift to a 3:30 p.m. until 12:00 a.m. shift. Claimant could not recall if his injury occurred before the change in shift times had taken effect, or after.

he uses drugs “every now and then” and has since the 1970's. Claimant contends that although his urine tested positive for cocaine, he had neither used drugs on the night of the accident, nor was he impaired at the time of the accident.

Co-workers, Jimmy Palmer and Kenneth Rachel, who have each known the claimant for at least twenty years, both testified that claimant did not appear to be under the influence of anything on the date of the accident. Each witness testified that he had not done drugs with the claimant. Although Jimmy Palmer did speak to claimant on the date of his injury, as he does each day, he did not observe claimant operating the bender machine.

Kenneth Rachel, however, testified that he did observe claimant operating the machine and that he appeared to be operating it “just fine. Same as usual.” He testified that he has seen him operating it on previous occasions and that he was operating it the same on January 24, 2003, as he had previously. Mr. Rachel admitted that he does not have specialized training for individuals who are using or under the influence of drugs or alcohol and that he does not have any knowledge as to whether claimant was, in fact, under the influence of drugs at the time of his accident.

Mr. Rachel testified that he was involved in a safety meeting following the accident, with regard to the accident itself, and that the safety committee came up with a list of different things that could have prevented the accident from happening, such as making sure that the machine is in manual and entering the area through the gate instead of around or under the fenced area. Mr. Rachel admitted that claimant was not where he should have been at the time of the accident. Mr. Rachel further testified that, although the safety committee had concluded that claimant should not have been in the area he was in at the time of the accident, other employees of respondent are still gaining access to the fenced area in the same way as claimant – by going underneath the fence – and that supervisors see this.

FINDING OF FACT

1. Claimant has failed to rebut the presumption that the injury or accident was substantially caused by the use of illegal drugs, thereby failing to prove by a preponderance of the evidence that the illegal drugs for which he tested positive did not substantially occasion the injury or accident.

DISCUSSION

Arkansas Code Annotated § 11-9-102 states, in pertinent part:

(B) “Compensable injury” does *not* include:

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders *shall create a rebuttable presumption* that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall *not be* entitled to compensation *unless* it is proved by a *preponderance of the evidence* that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders *did not* substantially occasion the injury or accident.

[Emphasis added.]

Claimant admitted both in his direct testimony and to the human resources manager, Jimmy Williams, shortly after the accident, according to Mr. Williams’ testimony, that he should have handled the equipment failure differently by using more safety precautions. Other witnesses testified at the hearing that claimant did not appear to be impaired on the night of the accident. Further, other witnesses testified that claimant’s actions were consistent with his usual work and that other employees handle the equipment failures in the

same way, with supervisors present. Moreover, claimant's testimony concerning the drugs found in his body was forthright and not in contradiction with the medical evidence.

All of the above certainly goes a long way toward rebutting the presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. However, without further evidence, it cannot be said that claimant has overcome the statutory presumption and proved entitlement to benefits without impermissibly giving him the benefit of the doubt that he did not use drugs on the specific date of injury or resorting to conjecture and speculation on his behalf.

Claimant testified that although he was not sure his drug test would come back positive, he "had an idea" that it would. Further, according to Jimmy Williams' testimony, claimant told him after the accident that he had been "doing some cocaine," but that Mr. Williams did not ask him how much, how often, or anything to that effect. Claimant offered no evidence regarding what the metabolic level of cocaine found in his urine would bear in relation to the level of impairment, if anything. In addition, there was no evidence offered regarding the urine test that can conclusively be linked by itself to impairment at any particular time or any evidence of how long cocaine would stay in a person's system in order to show up on a urine test. Claimant could have offered such evidence in support of his rebuttal of the statutory presumption.

The mere testimony that he was not impaired from fellow co-workers who simply spoke to him in passing that evening or the testimony that he was performing his work "as usual," when he admittedly uses drugs every "now and then" and has since the 1970's, simply fails to prove by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did *not* substantially occasion the injury or accident on January 24, 2003.

Claimant admittedly used poor judgment in unsafely attempting to repair or clean his bender machine on the night of the accident. Further, claimant may make a practice of unsafely repairing his machine when it malfunctions. However, given that his urine tested positive for cocaine on that same night as his injury, the presumption is that claimant's injury was substantially occasioned from illegal drug use, and claimant has failed to prove otherwise by a preponderance of the evidence.

The above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge