

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F404635**

<b>JACKY GARRETT, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>JACK YATES DRYWALL, EMPLOYER</b>	<b>RESPONDENT</b>
<b>AMERICAN INTERSTATE INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED DECEMBER 10, 2004**

Hearing before Administrative Law Judge J. Mark White on November 4, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On November 4, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on August 16, 2004, and a Prehearing Order was entered that same day. A copy of the August 16, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including May 13, 2004; and that the claimant earned wages sufficient to entitle him to a compensation rate of \$320 for total disability benefits and \$240 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant's injury was substantially occasioned by the use of illegal drugs; whether the claimant is entitled to temporary total disability benefits; whether the medical treatment received by the claimant has been reasonably necessary in connection with a compensable injury; and controversion and attorney's fees.

The claimant contends that he sustained compensable injuries on May 13, 2004; that the drug test given him should be ruled invalid because the claimant was given narcotic medications for pain before the urine sample was taken; in the alternative, that even if the rebuttable presumption is raised, his accident was not substantially occasioned by the use of illegal drugs; that he is entitled to temporary total disability benefits from May 13, 2004, to a date yet to be determined; that the medical treatment he has received to date has been reasonable and necessary and related to his compensable injuries; and that he is entitled to attorney's fees as permitted by law.

Respondents contend that the claimant tested positive for illegal drugs on the

date of the accident; that the drugs and the claimant's impaired ability substantially caused the accident; and that the claimant tested positive for both opiates and cannabinoids.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The respondents have proven by a preponderance of the evidence the presence of illegal drugs in the claimant's body at the time of his injury, thereby creating a rebuttable presumption that the claimant's injury was substantially occasioned by the use of illegal drugs.
4. The claimant has failed to prove by a preponderance of the evidence that his

injury was not substantially occasioned by the use of marijuana.

5. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.
6. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant worked for the respondent-employer as a sheetrock finisher. On May 13, 2004, shortly after lunch, he was climbing down a scaffold to retrieve some expansion joints for the wall he had been working on at the top of the scaffold. As he climbed down, he grabbed hold of an X-shaped cross-brace that had been wired, not welded, to the scaffold as a temporary safety measure. The cross-brace gave way and the claimant fell some twenty to twenty-five feet to the ground. He hit the concrete floor with his feet, injuring his feet and his left wrist.

He was transported by ambulance to the hospital; a drug test administered several hours after his admission – and several hours after he was given pain medication – revealed the presence of marijuana in his system. His doctors were unable to immediately treat his feet because of swelling, but he eventually underwent a surgery to install screws in his right foot and to reconstruct his left heel

and ankle. Shortly before the hearing he had a second surgery to remove the screws.

The claimant admitted that before this accident he regularly smoked marijuana. He denied having smoked marijuana the day of the accident, but he admitted to smoking marijuana the weekend prior. He testified that he would sometimes go to lunch with co-workers who would smoke marijuana on their lunch break, but he denied ever smoking marijuana himself while on a lunch break.

## **II. Adjudication**

### **A. Intoxication**

The definition of a compensable injury under the Workers' Compensation Act excludes any injury "substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." ARK. CODE ANN. § 11-9-102(4)(B)(iv)(a). The presence of any such intoxicant creates a "rebuttable presumption that the injury or accident was substantially occasioned by" their use. ARK. CODE ANN. § 11-9-102(4)(B)(iv)(b). The statutory presumption set forth does not quantify the term "presence"; therefore, an intoxicant is present whenever any amount of the intoxicant is revealed, no matter how small. *Flowers v. Norman Oaks Construction Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000). Testing positive for marijuana metabolites – that is, cannabinoids – is sufficient to raise the statutory

presumption. *Wood v. West Tree Service*, 70 Ark. App. 29, 14 S.W.3d 883 (2000); *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

A drug test administered the day of the claimant's accident revealed the presence of cannabinoids. The claimant admitted in his testimony that prior to the accident he regularly smoked marijuana, but he denied having done so the day of the accident. Given the results of the drug test, I find that the respondents have proven by a preponderance of the evidence the presence of illegal drugs in the claimant's body at the time of his injury, thereby creating a rebuttable presumption that the claimant's injury was substantially occasioned by the use of illegal drugs.

In making this finding, I am mindful of the claimant's reliance on *Padgett v. Epoxyn Products*, A.W.C.C. F002716 (Dec. 10, 2002), *aff'd Epoxyn Products, Inc., v. Padgett*, 84 Ark. App. 147, 138 S.W.3d 118 (2003). The claimant rightly points out that the drug test in *Padgett* was found invalid and that his own drug test was administered under similar conditions. Nonetheless, I note from the Full Commission's opinion that the validity of the *Padgett* drug test was called into question by expert testimony – specifically, the medical officer of the drug testing company testified that he could not within a reasonable degree of medical certainty vouch for the accuracy of the drug test results. *Id.* There is no such expert testimony in the instant claim, nor any other evidence to call into question the validity of this

claimant's drug test. Indeed, the claimant's admission that he smoked marijuana a few days before his injury at least partially validates the accuracy of the drug test.

Moreover, I am unwilling to accept a finding of fact from a wholly unrelated case as binding precedent on all other claims. To cite a case for a particular holding of law is one thing; but what the claimant herein seeks to do is cite a case for a particular finding of fact – that a drug test given under similar conditions was invalid and as such insufficient to raise the statutory presumption. Given this, and given the fact that the respondents herein have not had the opportunity to cross-examine the witnesses whose testimony was the determinative factor in the *Padgett* decision, I decline to take *Padgett* as on-point authority.

I find that the statutory presumption has been raised. The question, then, is whether the claimant has successfully rebutted that presumption. A statutory presumption is a rule of law by which the finding of a basic fact gives rise to the existence of a presumed fact, unless sufficient evidence to the contrary is presented to rebut the presumption. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). If evidence that is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. *Id.* Therefore, if a claimant is found to have alcohol or drugs in his body after an injury, he must prove by a preponderance of the evidence that his

injury was not substantially occasioned by the alcohol or drugs. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). The plain and ordinary meaning of the statutory phrase "substantially occasioned by the use of alcohol" is that there must be a direct causal link between the use of alcohol or illegal drugs and the injury for the injury to be noncompensable. *Id.* I find there was such a direct causal link in the instant claim.

Before his injury, the claimant had been on top of a scaffold. The testimony establishes that this scaffold had several different levels, with a board at each level where a worker could walk back and forth. The claimant was climbing down from the top level and fell from one of the lower levels. He testified that he fell because a cross-brace gave way when he grabbed it.

This cross-brace, a piece of metal in the shape of an "X" and five to six feet wide, is of a type that is usually on the end of a scaffold to provide support and stability. On the side of the scaffold, perpendicular to where a cross-brace would typically be, metal rungs are welded every 18 inches, providing what is in effect a ladder for workers to use climbing up and down the scaffold. At the level from which the claimant fell, a cross-brace had been wired to the scaffold as a safety precaution, to keep a worker from walking off the level and falling. The cross-brace was wired to the same side of the scaffold as the climbing rungs, and was wired so

that the brace was in front of the rungs. The claimant testified that he was aware of the presence of the cross-brace, but that he “really wasn’t paying attention to it.” Yet, his co-workers testified that this cross-brace was in an unusual location – suggesting that they ordinarily would not have expected to see a cross-brace in that location. One worker said that using a cross-brace to block workers from walking off a level, as this cross-brace was arranged, was “not normal.” The claimant agreed in his testimony that the cross-brace which caused his fall was in front of him, in front of the rungs, but that he would ordinarily expect such a cross-brace to be off to the side, away from the rungs – that is, on the side of the scaffold perpendicular to the rungs.

Because the cross-brace was in an obviously unusual position, it would seem that a worker would pay particular attention to it and exercise greater caution in climbing down over it. Yet the claimant testified he “really wasn’t paying attention.” The fact that he fell after grabbing a cross-brace that he knew should not have been there, suggests that his fall was caused by poor judgment, a slowed reaction time, or both. Both are side effects of marijuana use.

The claimant’s co-workers testified that he did not appear impaired and that they did not see him smoke marijuana that day. But it is plausible to think that the claimant could have smoked when none of them were around, and impaired

judgment and reaction time may not necessarily manifest themselves in signs visible to others. The claimant denied using marijuana that day but admitted using it several days before.

Because the claimant's injury was at least partly attributable to his own poor judgment or slow response, and because the claimant has offered little other than his own testimony to rebut the presumption, I find that the claimant has failed to prove by a preponderance of the evidence that his injury was not substantially occasioned by the use of marijuana. Therefore, I conclude that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

#### **AWARD**

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge