

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302267

GILL GRIMES, EMPLOYEE	CLAIMANT
APPLE TREE SERVICE, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., CARRIER	RESPONDENT

OPINION FILED MAY 26, 2004

Hearing before Administrative Law Judge J. Mark White on April 15, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. R. Theodor Stricker, Attorney at Law, Jonesboro, Arkansas.

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

STATEMENT OF THE CASE

On April 15, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on November 10, 2003, and a Prehearing Order was entered that same day. A copy of the November 10, 2003, 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 February 19, 2003; that on February 19, 2003, the claimant sustained an injury to his right shoulder, right arm, brain, ribs and spine; and that the claimant earned an average weekly wage of \$459, entitling him to a compensation rate of \$306 per week for temporary disability benefits and \$230 per week for permanent partial disability benefits.

The parties agreed that the issues to be presented were compensability of the claimant's February 19, 2003, injury; the claimant's entitlement to associated medical and indemnity benefits; and controversion and attorney's fees.

The claimant contends that the injury subject of this claim is compensable; that he is entitled to temporary total disability benefits from February 19, 2003, to a date yet to be determined; that he is entitled to additional medical benefits; and that he is entitled to attorney's fees.

Respondents contend that a post-accident drug test performed on the day of the injury was positive for marijuana, and that the claimant therefore did not suffer a compensable injury; that the medical evidence does not support entitlement to temporary total disability benefits; and in the alternative, that if the claimant is entitled to temporary total disability benefits, his entitlement would cease on October 30, 2003, when the claimant applied for unemployment benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include depositions, 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 his 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 illegal drugs.
5. The claimant has failed to rebut by a preponderance of the evidence the statutory presumption that his injury was substantially occasioned by the use of illegal drugs.

6. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant sustained serious injuries from an accident while cutting down trees near power lines on behalf of Entergy. On the day of his accident, February 19, 2003, the claimant and his brother, George Grimes, were working together as a crew, with George as the supervisor. Between 1 and 2 p.m., they were attempting to bring down a 140-foot tall dead tree near Parkers Chapel in Union County. They tied the dead tree to a live tree with rope to create leverage, and the claimant then cut a notch in the tree. George Grimes was standing some fifty to sixty yards away from the dead tree, pushing down on the rope to pull the dead tree down. He was unable to do so, and the claimant went to George's location to help. As the tree began to fall, George Grimes ran away to escape it. After the tree hit the ground, he turned around and saw the claimant lying on the ground with part of a tree on top of him. George Grimes and John Burson, an employee of Entergy, testified that it appeared that as the dead tree fell it side-swiped a third tree, causing that smaller tree to break at the roots and fall, striking the claimant. Bill Campaign, the operations manager for the respondent-employer, agreed with this assessment.

The claimant was transported by ambulance to the Medical Center of South Arkansas and treated. A urine sample was taken the next day, which eventually tested positive for cannabinoids. George Grimes testified that he did not see his brother smoking marijuana that day and that his brother did not appear to be impaired. He testified that there was no way for the claimant to have avoided the accident. Burson, however, testified that if the claimant had been impaired by marijuana at the time of the accident, "it could have impacted where he chose to stand or chose not to run." He later added, "you might not have run as fast or as far as you would have if you were not impaired."

Camplaign testified that when he visited the location after the accident, he saw "a lot of logs and stuff still on the ground. You could- Where they were laying, where I was told Gill was laying, there were cross logs, dead pine trees laying in that area." He testified that the claimant didn't "have a very good escape route to begin with." He later added, "The cross logs from the pine trees hadn't been removed. They were still laying there. So you could have easily tripped on those trying to escape from the site." Camplaign testified that he knew where the claimant was hit because the claimant's hard hat and safety glasses were still there. Burson visited the site at the same time, and he too testified that some of the claimant's personal articles were still there. In his deposition, the claimant testified that he

remembered trying to get out of the way, but little else. He speculated that he might have tripped, but he denied any specific memory of what happened.

The respondents offered evidence showing that several months prior to the accident, the claimant had been demoted and placed on probation because he had failed a drug test. The respondents also offered evidence showing that the claimant admits to having smoked marijuana in the past. Evidence of character, crimes, wrongs or other acts may not be admitted or considered “to prove the character of a person in order to show that he acted in conformity therewith.” Ark. R. Evid. 404. While the rules of evidence do not apply to these proceedings, they do still possess persuasive authority. This evidence regarding the claimant’s past conduct was offered and admitted for the limited purpose of attacking the claimant’s credibility, as allowed under Rules 404 and 608. Because I reach my decision below on grounds independent of the claimant’s credibility, I decline to consider these prior acts in reaching my decision.

II. Adjudication

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 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.*

The record contains the results of four drug tests performed on the claimant's urine, two of which tested positive for cannabinoids – the metabolic by-products of THC, which is the primary psychoactive ingredient of marijuana. The first test, performed at the Medical Center of South Arkansas from a sample taken the day after the accident, revealed the presence of opiates but not THC. The opiates were most likely due to the pain medication administered to the claimant while he was in the hospital. Nonetheless, because the test produced a positive result for opiates, the sample was sent to the Laboratory Corporation of American (LabCorp) for another test. Both the initial LabCorp test and a confirmation test revealed the presence of cannabinoids in the claimant's urine. The respondents' expert witness, Dr. Henry F. Simmons, testified that the first test done by the hospital may have utilized a different cutoff standard for triggering a positive response, which would explain why the first test was not positive for THC. The fourth and final test was from a sample taken by the claimant on March 7 and submitted on his own, some two weeks after his accident. Though the test proved negative for cannabinoids, the report notes that the sample tested was diluted. Dr. Simmons testified the dilution rendered the test results suspect, and there was no way to know why or how the

sample was diluted.

Act 796 of 1993 requires the Commission and the courts to strictly construe the provisions of the Workers' Compensation Act. ARK. CODE ANN. § 11-9-704(c)(3). The intoxication statute does not say that every drug test administered must test positive before the rebuttable presumption is created, nor does it say that a certain amount of intoxicant must be present. It says only that the mere "presence" of an intoxicant is sufficient to create the presumption. ARK. CODE ANN. § 11-9-102(4)(B)(iv)(a). An intoxicant is present whenever any amount of the intoxicant is revealed, no matter how small. *Flowers v. Norman Oaks Construction Co., supra*. Given the evidence outlined above, 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. The question, then, is whether the claimant has successfully rebutted that presumption.

A running theme of the testimony was that the claimant had a responsibility to plan and clear an escape route before he helped pull the tree down. John Burson agreed that workers would normally ensure they have a clear path of retreat before pulling down a tree. George Grimes testified that one should "make sure they ain't no vines or nothing can catch you when you are running away from the free [sic]

because you can trip and fall and get caught up in the tree. Clear you a pathway.”

Bill Camplaign testified that an escape route was needed “to prevent yourself from getting injured from the falling tree.”

George Grimes testified that he planned an escape route, and he successfully evaded the falling tree. At no point in the hearing, nor in his deposition, did the claimant ever testify that he planned and cleared an escape route. Likewise, no other witness specifically testified that the claimant did so. George Grimes testified initially that “we” – presumably meaning he and the claimant both – had planned an escape route. But he later admitted he did not know if the claimant followed that escape route or even if the claimant had actually cleared it of any bushes or trees that might have been in the way. He admitted that he did not see the claimant running, nor did he see the claimant fall. Significantly, he testified that the claimant had managed to run only ten or fifteen feet from the rope before being struck down by the tree. Camplaign testified that there were “cross logs” laying on the ground near the claimant’s position that could have tripped up the claimant and should have been removed by the claimant before the tree came down.

George Grimes testified that he did not see the claimant smoke marijuana the day of the accident. Dr. Simmons testified that the claimant was exposed to marijuana at least one hour before the test, and possibly as long as several weeks

before. He testified that the impairing effects of marijuana could last as long as 24 hours. Given Dr. Simmons' testimony, it is plausible that the claimant could have smoked marijuana the night before, or even that morning before starting work, and still been impaired at the time of the accident. Dr. Simmons testified that the lab results utterly contradicted the claimant's testimony that he had last smoked marijuana several months before. If the claimant was impaired, it is certainly possible that his response time would have been delayed, making the accident more likely. It is also possible that impairment caused his failure to scout out and clear an escape route.

The Supreme Court has held that substantial evidence exists to deny compensability where the facts demonstrate that the accident could have happened because of the use of illegal drugs. *Woodall v. Hunnicutt Construction*, 340 Ark. 377, 12 S.W.3d 630 (2000). Such is the case here. I recognize that George Grimes testified that this tree fall was abnormal, in that the green tree that fell and struck the claimant broke at the roots instead of at the top. I also recognize that the dead tree's striking the smaller green tree and knocking it down might not have been foreseeable. Nonetheless, the fact that the claimant managed to escape only ten or fifteen feet from the rope – even though he was some fifty or sixty yards from the original tree – suggests that he either tripped or failed to react quickly enough.

Either of these failures can be directly, causally linked to impairment by marijuana.

The claimant has offered no convincing evidence to prove that he was not impaired at the time of the accident. The claimant has offered no convincing evidence to prove that this accident would have occurred regardless of the safety precautions taken and judgment calls made. The claimant has offered no evidence to show that he planned and cleared an escape route so that he could successfully evade the falling tree. This failure of judgment by the claimant was the direct cause of his accident, and it is a failure that could have been caused by marijuana impairment. 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 illegal drugs.

In making this finding, I find instructive a comparison to the facts of *Ramsey v. Arkansas Electric Cooperatives, Inc.*, AWCC F106065 (Sept. 23, 2003). There, the claimant was working from a bucket truck some thirty feet in the air removing the top of a tree. The tree fell on the bucket and pushed it down, knocking the claimant out of the bucket. The claimant had evidently failed to attach the lanyard of his safety harness to the bucket. Nonetheless, the Commission found that the claimant had rebutted the presumption. The Commission reasoned that the accident would have happened regardless of whether the claimant had hooked the lanyard to the bucket. His failure exacerbated, but did not solely cause, his accident. Therefore, the

Commission reasoned, the accident was not substantially occasioned by marijuana.

The instant case is quite different. Here, the accident might never have happened but for the claimant's failure of judgment, a failure that could have been attributable to impairment by marijuana. The claimant has failed to prove that he was not impaired. Therefore, because there is a direct causal link between the claimant's possible impairment by marijuana, his failure of judgment, and the occurrence of the accident, I cannot find that this accident was not substantially occasioned by illegal drugs.

AWARD

The claimant has failed to prove by a preponderance of the evidence that his injury was not substantially occasioned by the use of illegal drugs. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge