

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F413226

DELTON ADAMS, EMPLOYEE

CLAIMANT

**B & B CONCRETE OF LITTLE ROCK, INC.,
EMPLOYER**

RESPONDENT

**COMMERCE & INDUSTRY INSURANCE CO.
C/O AIG CLAIM SERVICES, TPA,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 16, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on August 18, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

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

A hearing was held on August 18, 2005, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer-carrier relationship on December 16, 2004. It was further stipulated that claimant was earning twelve dollars per hour and that the parties would stipulate to the number of hours the claimant worked per week, in the event the claim is found to be

compensable. The parties further stipulated that claimant was released to return to work, having reached the end of his healing period, on April 25, 2005.

Claimant contends that he was driving a company vehicle on December 16, 2004, when it lost its braking power, thereby forcing him to jump from the moving vehicle, resulting in bodily injuries to him. His claim is for medical benefits, temporary total disability indemnity benefits from the date of injury through April 25, 2004, and attorney's fees.

Respondents controvert this claim in its entirety, contending that the claimant tested positive for marijuana on a post-accident drug screen on the date of injury, which would bar benefits pursuant to Ark. Code Ann. § 11-9-102(4)(B)(iv).

STATEMENT OF THE CASE

Claimant is forty-eight years old and testified that he had been working as a concrete truck driver for respondent-employer for about nine months when he was injured on December 16, 2004. He testified that he had received two raises between the time he was hired and the date of the accident, making \$12.00 per hour at the most, and that he was even named "employee of the month" at one time. He testified that he was never reprimanded, got along well with everyone, and never missed more than perhaps one day's work the entire time he had worked there.

He testified that he generally worked anywhere from eight to ten hours per day. He admitted that he was not guaranteed a forty-hour work week. Claimant also

testified that he had received some unemployment benefits for some weeks that he had worked less than forty hours but denied having been laid off for two weeks just prior to his accident of December 16, 2004.

He testified that on December 16, 2004, he had made two runs to Jacksonville already that day to deliver concrete to construction sites. He was then dispatched to deliver a load to a La Marche construction site in West Little Rock. He testified that he was carrying a full load in his truck when the accident occurred and that it was approximately 1:30 in the afternoon. He testified:

So it wasn't nothing wrong that, you know, that I could tell, it was just a normal work day. And I loaded and I had a full load and I headed out to the construction site. And I was going on level ground the whole time out there from leaving off of 12th Street at the Little Rock plant on the Interstate 630 and on out Chenal to the destination.

And everything was normal, as I remember, it was a bright sunny day. It was kind of cold, cause it was December, and it was kind of cold that day but it was bright and sunny. And I was just driving the truck as normal, you know, stopping normally on level ground, and I was going up hills. If you've ever been out that way, hills and hills. And I got to the last one like on Raylen Drive and I had to go on down and make a right on Country Club and make a left on Marche down to the site.

So I was – I went out there and I'm going up a little hill, a little grade before I get there, and I started down the hill and I was just going to brake a little, you know, to kind of look for the site. I'd never been there before. And I went to apply the brake, and the best that I remember, just like I said in the deposition, it wouldn't

stop. I just applied a little trying to make it stop, then I mashed harder.

So by that time I was going down the grade and had picked up a lot of speed and had got out of control, and I had to go around some curves and I almost turned over. I went around like two curves and the truck just wouldn't stop. I was mashing the brake, you know, and it didn't get hot and spongy, just something with the braking power or something stopped it from working.

And I couldn't, you know, stop it and I didn't know what to do, and I just, you know, most of the time when people have wrecks like that they get killed.

So I was going down that steep grade, it was all pavement, and at the end of it I could see like a wooded area and a little grass and I didn't know what was beyond that. I'm thinking I'm going to go over a cliff and get killed or something like that.

So I couldn't get it to stop, and the only thing I knew to do was to come out of it. So after it got to the end of the pavement of this dead-end street down here, there's a grassy spot in the trees, so I just exited and thought I was going to hit a soft grassy spot and I hit a tree and busted my head and jaw and eye socket, and the truck ran over my leg and broke it.

When I woke up the ambulance was there. I was there about 30 minutes, from what the witnesses say, and that was it.

Claimant admitted that he was not wearing a seatbelt at the time of his accident and that he did not make any effort to "gear down" during the incident. He testified that he has been a truck driver since 1987. He further testified that it is part of his job to complete pre-trip and post-trip inspections on his truck and that he did not notice anything wrong with the brakes on his pre-trip inspection that morning.

William Germer, Vice President of respondent-employer, likewise, testified that he did not have any knowledge of any problems with the brakes on Truck 65, the truck claimant was driving on December 16, 2004.

Virgil Elmore, the head heavy truck mechanic for respondent-employer, testified that he performed a post-accident inspection of the truck and did not find any problems associated with the brakes. However, he did testify that the day before the accident he had had a mechanic put an air line on the brakes, as the air line had developed a hole in it, which would cause the brakes to lock up because of a lack of air. He, however, did not believe this could have caused the accident. When asked if this air line was checked again on the post-accident inspection, he testified that he did not remember specifically checking, but “there was no reason to check it, it was brand new,” he said.

Mr. Elmore testified that one would have to be a real “professional” to even attempt to “gear down” to try to slow down a truck that is carrying a full load, such as the one that claimant was driving on December 16, 2004, because if you do not know what you are doing, you will not be able to get the truck back into gear, and then the brakes will not even work.

Mr. Elmore further testified that he saw the claimant on a regular basis and that on December 16, 2004, claimant did not appear to be impaired but appeared to be acting normal. Mr. Elmore stated, “He seemed the same.”

No testimony whatsoever was offered regarding claimant's alleged illegal drug use or the drug test.

FINDINGS OF FACT

1. The stipulations agreed to herein are accepted as fact;
2. Claimant has rebutted the presumption contained in Ark. Code Ann. § 11-9-102(4)(B)(iv) and has proven by a preponderance of the evidence that illegal drugs did not substantially occasion the accident in which he was injured on December 16, 2004;
3. Claimant has proven by a preponderance of the evidence that he sustained compensable injuries on December 16, 2004;
4. Claimant is entitled to medical benefits and temporary total disability indemnity benefits from the date of injury through April 25, 2005;
5. All issues regarding permanency are reserved;
6. Respondents have controverted the claim in its entirety.

DISCUSSION

In this case, respondents do not dispute the facts proving that claimant sustained injuries on December 16, 2004, while in the course and scope of his employment with respondent-employer. Respondents simply assert the defense that claimant tested positive for marijuana on the date of injury.

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.]

While the above statute does state that a positive drug test creates a presumption that the accident was substantially occasioned by the use of illegal drugs, it also states that the testing must be performed in a “reasonable and responsible manner.” The Arkansas Supreme Court has held that strict compliance with the Department of Health regulations is not necessary for admitting a drug test in workers’ compensation cases; however, the Commission still has discretion to

conduct the hearing in a manner as will best ascertain the rights of the parties, and the right to cross-examination is a basic right of fair play that the claimant must be afforded. *See St. Paul Insurance Co. v. Tonzin*, 267 Ark. 539, 592 S.W.2d 447 (1980).

Claimant herein objected to the introduction of the drug screen in this case as it was neither properly authenticated nor testified to regarding chain of custody and claimant was, therefore, afforded no ability to cross-exam the test. One case claimant relies on in support of his position is the Full Commission decision in the case of *Bledsoe v. Red Arrow Freight Lines*, 1997 AWCC 263, Claim No. E503128, wherein the Full Commission affirmed the Administrative Law Judge's exclusion of a drug test.

In *Bledsoe*, respondents offered not a single witness to discuss how, when, or where the drug screen was taken, how the test was administered, or how the results were arrived at. The respondents did not offer a single witness to discuss the chain of custody of this evidence, and they did not produce a single witness to authenticate the document in question. The respondents also did not offer any other testimony or evidence to support their intoxication defense, relying solely on the drug test, which was found to be inadmissible, as there was no proof that the test was reasonably performed and reliable. The Full Commission agreed with the Administrative Law Judge that because no proof was offered that the urine specimen was sealed, and

because no witnesses were offered by respondents to verify any aspect of the testing, or to allow the claimant his right to cross-examination, there was no proof that the test was reasonably performed and reliable; it was, therefore, properly excluded.

The instant case mirrors *Bledsoe* in that respondents in this case offered not a single witness to discuss how, when, or where the drug screen was taken, how the test was administered, or how the results were arrived at. The respondents did not offer a single witness to discuss the chain of custody of this evidence, and they did not produce a single witness to authenticate the document in question. The respondents also did not offer any other testimony or evidence to support their intoxication defense, relying solely on the drug test. As such, although the drug test was introduced into evidence, it bears no weight, as there is no proof that the test was reasonably performed and reliable.

In addition to the fact that the drug test was unreliable, there was no testimony or other evidence introduced that claimant had used illegal drugs prior to the accident of December 16, 2004. Further, there was no evidence that his work activities on the date of injury were anything other than normal and in no way showed that his faculties were in any way impaired on that date. No evidence was offered by respondents that claimant was not properly doing his job at the time of injury.

Respondents argue that claimant's act of jumping out of a moving vehicle is further proof of his irrational behavior on the date of injury. However, claimant relies

in support of his position on the case of *Systems Contr. Corp. v. Reeves*, 85 Ark. App. 286, 151 S.W.3d 18 (2004), wherein the Court of Appeals held that claimant's decision to jump from a moving vehicle was reasonable and wise under the circumstances. Respondents assert that the facts herein are distinguishable from the *Reeves* case. While I agree that in that case, the moving truck contained dangerous materials and that the situation was distinguishable from the instant case, the similarity remains that the claimant herein believed that under the circumstances the safest thing for him to do was to jump from the moving vehicle; otherwise, he believed he would be dead. Moreover, in this case, there is no evidence to rebut his belief, and there were no witnesses. As such, it is this examiner's opinion that based on claimant's testimony of the facts of the accident, it was not necessarily irrational for him to jump from the moving vehicle to avoid further harm.

In this examiner's opinion, claimant has proven by a preponderance of the evidence that he sustained compensable injuries on December 16, 2004, and that illegal drugs did not substantially occasion the injuries or accident.

AWARD

Respondents are directed to pay the claimant indemnity benefits in accordance with the findings of fact above.

Respondents are directed to pay past and future reasonable, necessary, and related medical expenses the claimant has and may incur as a result of his compensable injuries of December 16, 2004.

Respondents are directed to pay the claimant's attorney, Mr. Philip Wilson, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge