BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402303

KENNETH MCCOY, EMPLOYEE	**CLAIMANT**
WILBERT BURIAL VAULT, INC., EMPLOYER	**RESPONDENT**
TRANSPORTATION INSURANCE CO., INSURANCE CARRIER	**RESPONDENT**

OPINION FILED MARCH 28, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 3, 2005, in Little Rock, Pulaski County, Arkansas.

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

Respondents represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

A hearing was held on March 3, 2005, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer-carrier relationship on February 6, 2004. It was further stipulated that claimant was earning sufficient wages to entitle him to weekly indemnity benefits of $437.00 for temporary total disability and $328.00 for permanent partial disability benefits.

Claimant contends that he sustained compensable right leg and ankle injuries arising out of and during the course and scope of his employment on February 6,

2004. His claim is for medical benefits, temporary total disability indemnity benefits, and attorney's fees.

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

STATEMENT OF THE CASE

Claimant testified that he had worked for respondent-employer in Little Rock for about four and one-half years and, at the time of his injury on February 6, 2004, he was an assistant manager. Claimant testified that one of his job duties was to deliver caskets and vaults to grave sites. He testified that he would not normally be the person who would load the caskets and/or vaults onto the trucks, but he would check to make sure the load was accurate according to the invoice and that the load was secure.

Claimant testified that February 5, 2004, the day before his injury, was his day off. When he returned to work at about 8:00 a.m. on February 6th, his truck was already loaded with two vaults for two services at two different cemeteries in Pine Bluff that day. One vault was concrete, and one was steel. He stated that his first service was with the concrete vault and that it was on a machine called a Hil-joy, which is used to take the vault off the truck and get it to the grave site.

Claimant testified that everything went fine with the first delivery at the first service. However, the second vault, which was covered with cardboard was the incorrect vault for the second service; therefore, claimant had to wait for another man to drop off another vault. Claimant testified that when he had strapped it down before he left Little Rock that morning, he was unable to tell that it was the wrong steel vault because of the cardboard cover on it. He testified that the vaults are normally marked but that he did not notice it marked on that cardboard at that time, so he assumed it was the correct vault. When asked how he determined it was not the right vault, claimant testified as follows:

> A I was called out at the cemetery by my district manager, and he –
> Q Who is that?
> A That's Steve Yates.
> Q Okay.
> A And he asked me if I had a certain kind of vault on there, and I told him: This is the one that says on the ticket. And he says: Well, it's the wrong one.
> Q So you didn't even know it was the wrong one until he called and told you?
> A Exactly.

Claimant testified that when the other driver came with the correct vault, he had an additional concrete vault on *his* truck for a service *he* was delivering to, and that vault was on a Hil-joy. Claimant testified that because the vaults were so close together on the truck, there was no way to get the machine between them; further, if they had taken the concrete vault on the other driver's truck off his truck with the Hil-

joy, they might not have been able to get it back onto the truck with the Hil-joy. Therefore, they had to get claimant's correct vault off the other driver's truck and onto claimant's without the use of a Hil-joy. Claimant testified that the only way to do it was to "push it off."

Claimant testified that the vault they had to unload was a seven gauge, one of the heaviest steel vaults. Claimant testified that he was on one side pulling, while the other driver was pushing from the other side. Claimant testified that he was holding the bottom of the vault with his left hand and the steel band with his right hand. Claimant testified that whenever they began to push and pull, the steel band broke, causing claimant to lose his balance and slip in the mud, injuring his right leg and ankle. Claimant testified that it had rained on February 5th, and the ground was very muddy.

Claimant was then taken by ambulance to Jefferson Regional Medial Center and was found to have a fracture of the right tibia and fibula. He was given pain medication and, at some point, a urine drug screen was apparently performed, although claimant testified that he never got up to use the bathroom; rather, he was given a handicap-urinal to use whenever he had to void. Claimant testified that no one from the hospital ever brought in a cup with a number on it or anything that would indicate a sample was being taken. Respondents submitted results of a drug screen that showed claimant tested positive for cannibinoids, or marijuana. Claimant

objected to the drug screen in that it indicated no metabolic levels, and no testimony was offered to support the document's authenticity or chain of custody of the screen.

Claimant admitted on cross-examination that he had smoked marijuana about three weeks before the incident. Claimant denied smoking marijuana at any other time prior to the incident. Claimant testified that he had smoked marijuana as a teenager, but had "straightened up" when he got married and had kids. However, about three weeks prior to the accident, he had gotten together with some friends he had not seen since junior high or highschool and drove around with them, smoking marijuana. Claimant could not, however, remember the friends' names. Claimant is now forty-two years old.

Claimant contends that although his urine may have tested positive for marijuana, he simply had not used drugs other than three weeks prior to the accident, and he was not impaired at the time of the accident. Claimant testified that he knew that it was possible that the marijuana would show up on a drug screen, because "I know that it's – it stays in your blood system for a long time." Claimant testified that he had learned this whenever he was younger from talking with older people about it.

Claimant testified that he filed for unemployment benefits some time around May of 2004, but that it was denied because there was a waiting period. He testified that he was ready to go back to work when he filed but that he would not have been

able to do the same type of work; he would have had to do some type of lighter work at that time. Claimant testified that he believes he would have been ready to return to full-duty work about eight months after the accident. No testimony or evidence was offered regarding what date, if ever, claimant actually returned to work or when he was released by his treating physician.

FINDINGS OF FACT

1. The stipulations agreed to herein are accepted as fact;

2. Claimant has proven by a preponderance of the evidence that illegal drugs did not substantially occasion the accident on February 6, 2004;

3. Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his right leg and ankle on February 6, 2004;

4. Claimant is entitled to medical benefits and temporary total disability indemnity benefits from the date of injury through a date yet to be determined;

5. Respondents have controverted the claim in its entirety.

DISCUSSION

In this case, respondents do not dispute the facts proving that claimant sustained injuries to his right leg and ankle on February 6, 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. Claimant asked to submit a post-hearing brief on the issue, and said request was granted. 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.

Without a reliable drug test, the only evidence that claimant used illegal drugs was his own admission that he had smoked marijuana with friends approximately three weeks prior to the accident of February 6, 2004. Further, his work activities on the date of injury were 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.

In this examiner's opinion, claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his right leg and ankle on February 6, 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 February 6, 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