

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407327

JOHN A. SKORUPSKI, EMPLOYEE	CLAIMANT
AFFILIATED FOODS, EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INS. CO., TPA	RESPONDENT

OPINION FILED NOVEMBER 14, 2005

Hearing before Administrative Law Judge J. Mark White on October 11, 2005, in Little Rock, Pulaski County, Arkansas.

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

Respondents represented by Mr. Guy Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 11, 2005, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on August 29, 2005, and a Prehearing Order was entered that same day. A copy of the August 29, 2005, 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 July 5, 2004; that on July 5, 2004, the claimant was hit by a forklift, breaking his wrist; and that the respondents now controvert this claim in its entirety. At the hearing, the parties further stipulated that the claimant earned an average weekly wage of \$361, entitling him to a compensation rate of \$240 for total disability benefits and \$180 for permanent partial disability benefits; that medical records indicate the claimant reached the end of his healing period on September 1, 2004; and that the claimant has been assigned a permanent anatomical impairment rating of six percent (6%) to the body as a whole.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury to his wrist; whether the claimant is entitled to medical treatment; whether the claimant is entitled to temporary total disability benefits; whether the claimant is entitled to permanent partial disability benefits; and attorneys' fees.

The claimant contends that he sustained a compensable injury and is entitled to the requested benefits.

The respondents contend that the claimant did not sustain a compensable injury within the course and scope of his employment; and that the claimant tested positive on a drug screen shortly after the alleged injury.

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 and/or prescription drugs used in contravention of physician's orders in the claimant's body at the time of his accident.
4. The claimant has failed to prove by a preponderance of the evidence that his accident was not substantially occasioned by the use of illegal drugs and/or prescription drugs used in contravention of physician's orders.
5. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a “module stacker,” moving food pallets in a warehouse. The claimant testified that he regularly used a forklift in the course of his job duties, while his supervisor testified that the claimant did not use a forklift and was not certified to use one. The supervisor testified that the claimant had been transferred to his crew specifically because he could not permissibly operate a forklift.

The parties have stipulated that the claimant sustained an injury to his forearm and wrist on July 5, 2004, when he was hit by a forklift. The claimant testified that sometime before lunch the battery to his forklift was unplugged by another employee as a prank. He testified that he reached over with his right arm to plug the battery back in when a forklift driven by another employee crashed into the claimant’s forklift, trapping his arm and crushing his wrist. The claimant testified that he is blind in his right eye, the direction from which the other forklift came, and that the forklifts operate quietly, meaning he could not hear its approach. The claimant’s supervisor testified that the claimant came to him “hysterical” saying that his arm had been injured. The supervisor quoted the claimant as saying “that he was plugging his battery in and one of the Latinos on my crew ran into it.”

The claimant was taken to the hospital and treated for an ulnar styloid avulsion fracture. While in the hospital the claimant was administered a drug test, and his urine tested positive for amphetamines. The claimant testified that he suffers from bronchitis and that at the time of the accident he regularly took Albuterol and “two-ways,” tablets containing ephedrine. He blames the positive drug test on the “two-ways.” Since his accident, the claimant has switched from the “two-ways” to tablets containing pseudoephedrine. He testified that he uses no other medications.

The respondents called as an expert witness Dr. Kim Edward Light, a Professor in the College of Pharmacy at UAMS. Dr. Light testified that neither the Albuterol nor the ephedrine tablets would have caused a positive result for amphetamines. He further testified that outside of a prescription, the amphetamines could have come only from an illegal source. There is no evidence the claimant possessed any legitimate prescription for amphetamines.

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).

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). Therefore, if a claimant is found to have illegal 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 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 ... illegal drugs” is that there must be a direct causal link between the use of illegal drugs and the injury for the injury to be noncompensable. *Id.*

The respondents have introduced into evidence a drug testing report purporting to show the presence of amphetamines in the claimant’s body. The claimant has introduced no evidence to challenge the validity of the report, and in his testimony the claimant acknowledged providing a urine sample for the test. A

pharmacist called by the respondents testified that the positive test result could not have resulted from the legitimate medications taken by the claimant at the time of his injury. I find that the respondents have proven by a preponderance of the evidence the presence of illegal drugs and/or prescription drugs used in contravention of physician's orders in the claimant's body at the time of his accident, giving rise to the rebuttable presumption. To prove his injury compensable, the claimant must therefore prove that his injury was not substantially occasioned by the use of amphetamines. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

Even if I take the claimant's account of the accident as true, I can only guess as to whether the amphetamines in his body contributed to the accident or not. Dr. Light testified that the amphetamines in the claimant's system could have impaired his judgment, increased the likelihood of impulsive acts, decreased or increased the level of vigilance, and decreased his awareness of other tasks. Given the details of the accident as testified to by the claimant, it is plain that impairment by amphetamines could have made an accident such as this more likely.

The claimant denied using any illegal drugs, but given the substantial conflicts between the claimant's testimony and that of his supervisor, I cannot find the claimant to be a credible witness. Since there is little corroborating evidence

outside of his own testimony, I cannot find that the claimant has met his burden of proof – and under the statute it is the claimant’s burden to prove that his accident was not substantially occasioned by the use or misuse of amphetamines. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that his accident was not substantially occasioned by the use of amphetamines.

I note that in his prehearing filings, the claimant objected to the admissibility of any drug tests introduced by the respondents, though the claimant identified no specific grounds for his objection. The Prehearing Order filed herein provided that any decision as to admissibility would be made at the hearing. The claimant did raise an objection at the *end* of the hearing, arguing that for the drug test to be admissible, the respondents were required to produce a witness personally familiar with the collection and handling of the test specimen. But at the *beginning* of the hearing, the claimant offered no objection when the drug test report was introduced and admitted into the record “without objection.” By not raising any specific objection until the last moments of the hearing, and by not objecting when the report was first admitted at the beginning of the hearing, I find that the claimant waived any objection to the admissibility of the test report. Even if the objection were not waived, I am unable to identify any requirement in the statute or case law requiring such witness testimony. Therefore, the claimant’s objection is overruled.

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.

HON. J. MARK WHITE
Administrative Law Judge