

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F406402

**MARCUS TENNER (DECEASED),
EMPLOYEE**

CLAIMANT

**AEROCARE HOLDINGS, INC.,
EMPLOYER**

RESPONDENT NO. 1

**HARTFORD UNDERWRITERS
INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT NO. 1

**DEATH AND PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 2

OPINION FILED DECEMBER 13, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on August 15, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Morris W. Thompson, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Gene Williams, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, the Death and Permanent Total Disability Trust Fund, waived appearance at the hearing, as its issues were not ripe for consideration.

A hearing was held on August 15, 2005, to determine the compensability of the claim filed herein. At the hearing in this matter, the parties simply argued their respective positions and offered exhibits, as well as testimony from witnesses by way

of deposition. No live testimony was offered from any witness. The parties further agreed to submit the case on post-hearing briefs and exhibits.

The parties stipulated to the existence of the employee-employer-carrier relationship on June 3, 2004, when the claimant was involved in an automobile accident while working for respondent-employer. Claimant died on June 4, 2004, as a result of the accident. It was further stipulated that claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$121.00 for temporary total disability and permanent partial disability benefits, based on an average weekly wage of \$181.00. The parties additionally stipulated that respondents No. 1 paid some medical bills before controverting the claim.

Claimant contends that his death was the result of a compensable injury and his surviving spouse and children are entitled to workers' compensation benefits as a result. Claimant contends that the accident resulting in claimant's injury and resultant death was not substantially occasioned by the use of illegal drugs, in contravention of Ark. Code Ann. § 11-9-102(4)(B)(iv)(a). Claimant contends that respondents have not met their burden of proving reasonable and responsible testing by properly trained medical personnel for the presence of illegal drugs in the claimant's body at the time of the accident, in order to invoke the statutory presumption of Ark. Code Ann. § 11-9-102. Claimant contends that a urinalysis,

which can only detect the presence of non-psychoactive metabolites of cocaine, is insufficient to invoke the statutory presumption.

Claimant further contends that Ark. Code Ann. § 11-9-102(4)(B), as applied, violated the claimant's right to due process, by creating a rebuttable presumption and by shifting to the claimant the burden of proving that the illegal drug did not substantially occasion the injury or accident. Claimant contends that the statute's creation of a classification between injured workers who are detected to have non-psychoactive metabolites in their urine and those who do not, violates the claimant's right to equal protection.

Respondents No. 1, the employer and insurance carrier, contend that claimant tested positive for the presence of cocaine metabolites at the time of the accident and that the claim is therefore not compensable, because his death was substantially occasioned by the use of illegal drugs, in violation of Ark. Code Ann. 11-9-102(4)(B).

_____ Respondent No. 2, the Death and Permanent Total Disability Trust Fund, acknowledges that claimant died with a spouse and three children, those all being dependents of the claimant, but the Trust Fund takes no position with regard to compensability. Respondent No. 2 waived appearance at the hearing and for the briefing schedule, in that its issues were not ripe for consideration at the time.

STATEMENT OF THE CASE

The facts are essentially undisputed in this case. Marcus Tenner, the deceased claimant in this case, was injured in an automobile accident on June 3, 2004, on Highway 425 near Monticello, Arkansas, while driving a van for respondent-employer, and subsequently died on June 4, 2004. According to the motor vehicle accident report filed by the State Police, Tenner's vehicle crossed the center line of the highway and struck a trailer being towed by a pickup truck. The accident occurred in daylight on a clear, dry day. There were no roadway defects or construction at the site of the accident. The investigation police officer noted no contributing factors to the accident. Four witnesses were listed on the report, and each witness gave a statement to the officer indicating that Tenner's vehicle had crossed the center line, causing the accident. One witness, A.C. Simpson, Jr., even noted that it was "as if he [Tenner] fell asleep."

According to medical records introduced and sworn to by affidavit by the custodian of the records of Drew Memorial Hospital, Mr. Tenner was taken to Drew Memorial Hospital Emergency Room, where he was treated for fractures. While he was in the E.R., a urine screen test was done, the results of which were positive for cocaine metabolites. Mr. Tenner died as he was being transported from Drew Memorial Hospital to Jefferson Regional Medical Center.

Jeff Turner's deposition of August 5, 2005, was introduced by respondents No. 1 as Exhibit No. 2, as well as claimant as claimant's Exhibit No. 2. Mr. Turner

testified that he is the laboratory supervisor for Drew Memorial Hospital and that orders for drug testing are entered into a hospital-wide computer system, which typically generates a pre-printed label for specimen containers. He testified that occasionally, in the interest of time in an emergency situation, a container will be hand-labeled. He testified, as did Dr. Henry Simmons, Jr., expert witness offered on behalf of claimant, that physicians routinely order and rely on drug screening tests in order to make medical care decisions.

Mr. Turner testified as to the regular, routine manner in which the urine specimen is collected. He testified that it is collected by a nurse into a sterile, single-use container that is then immediately labeled, placed into a bio-hazard bag, and carried to the lab, which is approximately fifty yards from the E.R. At the lab, the specimen is placed in a labeled specimen container. The lab technician visually inspects the specimen and removes a small amount of the specimen for testing, placing it into a computer-operated testing machine. He testified that, on average, less than fifteen minutes lapses before testing.

Mr. Turner testified that the machine used for testing in this case was an AxSYM system, manufactured by Abbott Laboratories. Both Mr. Turner and claimant's witness, Dr. Simmons, testified that this is a standard model machine used in hospitals. Mr. Turner testified that the machine adds a reagent to the specimen, runs a fluorescent polarization immunoassay, measures the degree of fluorescence,

and generates a result. The results are then reviewed by the lab technicians for errors, and the machine then generates an electronic report into the hospital-wide lab information system, as well as a printed report.

Mr. Turner testified that the machine is calibrated with every lot number change. He further testified that the validity of a test result is checked by review of two controls run within twenty-four hours of the test, and that blind testing of specimens by a third party lab is done quarterly to assure accuracy. He additionally testified that preventive maintenance is performed by a factory technician twice per year and that the State health department conducts a biannual quality control review of the machine and documentation.

Mr. Turner testified that the machine is factory-set to detect cocaine metabolites in urine at a level of 300 nanograms per milliliter. Dr. Simmons testified that this level “is a metabolite concentration that is very frequently used in drug testing,” and, as stated previously, Dr. Simmons agreed that physicians routinely rely on drug screening tests to make medical care decisions.

The deposition of Dr. Henry Simmons, Jr., taken on September 1, 2005, was offered in support of claimant’s case as claimant’s Exhibit No. 1. Dr. Simmons testified that he is a physician and toxicologist and practices and teaches toxicology and emergency medicine in central Arkansas. Dr. Simmons testified about the difference between a “screening” drug test and a “confirmation” test and offered his

opinion that a confirmation test would be required in order to avoid a “false positive” that sometimes occurs when only a screening test is involved. He opined that a simple screening test would be unreliable in that it may indicate that a metabolite for a particular drug is present – or that the drug is present in the urine – but that it would be falsely positive, in that the actual drug may no longer be in the person’s system, but has been metabolized and is being excreted through the urine. In his opinion, from a medical and scientific standpoint, a confirmation test, rather than a simple “screening” would be the “gold standard,” and would be required in order to know for certain what drugs, if any, were present in a person’s system.

Dr. Simmons opined that the test performed in this case, although admittedly performed routinely and in a regular manner, using standard equipment, is simply unreliable to know whether illegal drugs were present in claimant’s system at the time of claimant’s accident because it offers no quantitative results. He testified that, without a *confirming* test, he cannot say within a reasonable degree of medical certainty that there was cocaine metabolite in claimant’s urine.

There was no other testimony, deposition, or evidence offered on claimant’s behalf, other than the depositions of Dr. Simmons and Mr. Turner. Following the hearing, counsel for claimant wrote the Commission requesting that the record be kept open, so that claimant might be allowed to offer additional evidence into the record either by deposition or live testimony. However, respondents objected, and claimant’s

request was denied by this examiner by letter of September 20, 2005, pursuant to Ark. Code Ann. § 11-9-705.

FINDINGS OF FACT

1. The stipulations agreed to herein are accepted as fact;
2. Claimant has failed to rebut, by a preponderance of the evidence, the presumption contained in Ark. Code Ann. § 11-9-102(4)(B)(iv) that illegal drugs substantially occasioned the accident in which he was injured on June 3, 2004, and which resulted in his death on June 4, 2004.

DISCUSSION

In this case, respondents do not dispute the facts proving that claimant sustained injuries in a motor vehicle accident on June 3, 2004, which resulted in his death on June 4, 2004, while in the course and scope of his employment with respondent-employer. Respondents simply assert the defense that claimant tested positive for cocaine metabolites on the date of injury, thereby triggering the mandatory presumption that claimant's injury was substantially occasioned by the use of illegal drugs, and that claimant has failed to rebut that presumption by a preponderance of the evidence.

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.]

First, claimant contends that the above statute is unconstitutional in that it violates due process and equal protection. Claimant argues that a urine test which can only detect the presence of non-psychoactive metabolites of cocaine in the urine and nothing more, thereby invoking the statutory presumption that the accident or injury was substantially occasioned by the use of an illegal drug, violates a claimant's right to due process because there is no correlation between the presence of non-psychoactive byproducts in the urine with the presence of an illegal drug in one's system, or body. As such, to the extent that such test results, and nothing more, can

provide the basis to deny an injured worker benefits, the statute is unconstitutional as applied. Further, claimant argues that the statute's creation of a classification between injured workers who are detected to have non-psychoactive metabolites in their urine and those who do not, violates claimant's right to equal protection.

The constitutionality of this statute was made to the Arkansas Supreme Court in the case of *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998), and was rejected. The Court therein held that "all statutes are presumed constitutional and we resolve all doubts in favor of constitutionality," citing *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998); *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997); *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997).

The Court further held as follows:

The party challenging a statute's constitutionality has the burden of proving that the act lacks a rational relationship to a legitimate objective of the legislature under any reasonably conceivable set of facts. *Arkansas Hosp. Ass'n v. Arkansas St. Bd. Of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). See also *Smith v. Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995); *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990). It is not our role to discover the actual basis for the legislation. *Arkansas Hosp. Ass'n, supra*; *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). We merely consider whether there is any rational basis which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of arbitrary and capricious government purposes. If we determine that

any rational basis exists, the statute will withstand constitutional challenge. *See Arkansas Hosp. Ass'n., supra.*

In this case, a rational basis does exist for the legislation. The Commission pointed out that the rebuttable presumption is rationally related to the legitimate government objective of placing the burden of production on the party with the greatest access to relevant evidence. We agree. Obviously the claimant for benefits will have more information about the presence of drugs in his system than the employer. Additionally, the presumption is rationally related to promoting a safer workplace. The presumption encourages employees to remain drug-free and thereby promotes the state's legitimate objective - safety in the workplace.

With respect to claimant's argument that the presence of cocaine metabolites bears no relationship to the presence of cocaine in his body at any particular time, claimant did offer the testimony of Dr. Henry Simmons to support his argument, unlike Mr. Ester in *Ester v. National Home Ctrs., Inc., supra*, who offered no evidence in support of that argument. However, as the Supreme Court pointed out in *Ester*, the claimant's drug screen showed a positive indication for cocaine metabolites, and the statute states that the "presence" of an illegal drug in the claimant's system triggers the mandatory rebuttable presumption. Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *See Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). Further, the Commission is not bound to

accept the testimony of any witness, even if uncontradicted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

While Ark. Code Ann. § 11-9-102 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).

In addition to his constitutional arguments, claimant objected to the introduction of the drug screen in this case as it was neither properly authenticated nor testified to regarding chain of custody. However, respondents No. 1 offered the deposition testimony of Jeff Turner, laboratory supervisor for Drew Memorial Hospital, in support of their contention that the testing was performed in a reasonable and responsible manner. Mr. Turner testified regarding how a specimen is collected and the regular, routine procedures followed for performing tests on the specimen using the Axsym system machine, manufactured by Abbott Laboratories.

Both Mr. Turner and Dr. Henry Simmons, expert witness for claimant, testified in their depositions that the machine used to test claimant's specimen in this case is a standard model used in hospitals. Mr. Turner further testified about the calibration of the machine, quality control, preventive maintenance, and the validity of tests results. Counsel for claimant participated in that deposition, thereby being afforded the ability to cross-examine that witness regarding the manner of the test.

In addition to his other arguments, claimant contends there was no testimony or other evidence introduced that claimant had used illegal drugs prior to the accident of June 3, 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, indicating that claimant was not properly doing his job at the time of injury. This is true; however, there was *no* evidence or testimony offered by claimant, or anyone, that he had *not* used illegal drugs prior to the accident of June 3, 2004, to support claimant overcoming the rebuttable presumption triggered once the presence of an illegal drug was found in the claimant's system. Once the statutory presumption is invoked, the burden shifts to the claimant to show the death or injury did not occur as a result of illegal drug use. The claimant in this case has offered no such evidence.

Moreover, the police indicated in their accident report that the weather was clear and dry on the date of the accident; and, each of the witnesses to the accident

testified that claimant's vehicle had crossed the center line, thereby striking another vehicle to cause the accident. One witness even stated that it was as if claimant "fell asleep" while driving. The fact that there were no adverse weather conditions and that there is no other explanation for the accident except that claimant crossed the center line, coupled with claimant's positive test for the presence of an illegal drug, indicates to this examiner that the cause of the accident was consistent with impairment due to illegal drugs.

In this examiner's opinion, claimant has failed to rebut, by a preponderance of the evidence, the presumption contained in Ark. Code Ann. § 11-9-102(4)(B)(iv) that illegal drugs substantially occasioned the accident in which he was injured on June 3, 2004, and which resulted in his death on June 4, 2004. As such, his claim herein is denied.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge