

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301504

BARRY WARD

CLAIMANT

HICKORY SPRINGS MANUFACTURING COMPANY

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED August 30, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 7, 2005, in Fort Smith, Arkansas. The deposition of Pat Meek was taken on December 8, 2004, and has been admitted as Respondents' Exhibit No. 5. The deposition of Dr. Henry F. Simmons was taken on December 16, 2004, and has been admitted as Respondents' Exhibit No. 4. The deposition of Kim Light was taken on May 18, 2005, and has been admitted as Claimant's Exhibit No. 4.

A pre-hearing order was entered in this case on September 16, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1.

The following stipulations were offered by the parties and are hereby accepted:

1. On February 4, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$298.00 for total disability and \$223.00 for permanent partial disability.
3. On February 4, 2003, the claimant sustained an injury to his penis and groin area.
4. Some benefits in the form of medical expenses have been provided by the respondents.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the injuries to the claimant's penis and groin area on February 4, 2003, represent compensable injuries.
2. whether the claimant also sustained compensable injuries to his spine and gastrointestinal system on February 4, 2003.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from February 5, 2003 through a date yet to be determined, and an appropriate attorney's fee.

In regard to these issues, the claimant contends:

"The claimant suffered an accidental injury in the course of his employment on February 4, 2003. The injury consisted of a degloving of the groin area; spinal and gastrointestinal injuries. As a result of the injuries the claimant is entitled to the award of medical benefits; temporary total disability from the date of the injury through a date yet to be determined; and attorney's fees."

In regard to these issues, the respondents contend:

“The respondents will contend that the claimant did not sustain a compensable injury in the accident of February 4, 2003. Without waiving other defenses, and the respondents will contend that the claimant’s accident was substantially occasioned by the use of illicit drugs.”

DISCUSSION

_____ There is no doubt that the claimant was involved in a specific incident on February 4, 2003. All parties acknowledged that he sustained injuries to his penis and groin area in this incident. This specific incident occurred on the respondent’s premises, at the claimant’s regularly assigned work station, during the claimant’s regular working hours, and while he was performing his assigned employment duties. The claimant alleges that he also sustained injuries to his back and gastrointestinal system in this same specific incident.

The threshold issue in this case is whether the claimant’s admitted physical injuries to his penis and groin and the alleged physical injuries to his back and gastrointestinal system are expressly excluded from the category of “compensable injuries” by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv). The applicable provisions of this subsection state:

“(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 physicians orders.

. . .

(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."

The initial burden rests upon the respondent to prove that, at the time of the claimant's injuries, the claimant had present in his system alcohol, illegal drugs, or prescription medication used in contravention of the prescribing physician's orders. If the respondent meets this burden, then the presumption arises that the claimant's accident and resulting injuries were substantially occasioned by these substances and the burden then shifts to the claimant to prove by the greater weight of the credible evidence that these substances were not a substantial cause of his accident and resulting injury.

The record shows that immediately following the February 4, 2003 accident, the claimant was transported and admitted to Sparks Regional Medical Center for appropriate treatment of the injuries to his genitalia. The claimant remained hospitalized at this facility until February 7, 2003. Before the claimant's discharge, on February 7, 2003, a urine sample was taken from the claimant by

Pat Meek, an employee of Sparks Regional Medical Center. This sample was submitted to Keystone Laboratories for drug screening. The results of testing purportedly performed upon this sample showed positive for the presence of opiates and cannabinoids.

The medical evidence indicates that, during the claimant's hospitalization, large doses of opiate based narcotics (specifically morphine) were medically prescribed for the obviously extremely painful "degloving of his genitalia." However, there is no indication that any medication was prescribed that would result in the presence of cannabinoids (the metabolic by-products of the body's processing of the drug THC found in cannabis or marijuana).

In his testimony, the claimant acknowledged that he had, in fact, used the illegal drug marijuana, prior to his accident. However, he stated that he had last used this drug approximately 10 days before the accident.

After consideration of all the evidence presented, it is my opinion that the respondents have proven by the greater weight of the credible evidence that, at the time of the claimant's accident and injury, the claimant had the illegal drug marijuana present in his system. The presence of marijuana metabolites (cannabinoids) is legally sufficient to establish the presence of the drug itself.

In reaching this decision, I have considered the reports and deposition of Kim Light, the claimant's expert. I have also considered the deposition of Pat Meek and the deposition of Dr. Henry Simmons, the respondents' medical expert. I have also considered all other evidence in the record concerning this issue,

including the testimony of the claimant and other witnesses and the other medical records and reports.

The majority of the points raised by Mr. Light concern the accuracy of the specific level of cannabinoids found by Keystone Laboratories (i.e. the actual nanograms per milliliter). However, the only accuracy of the test relevant for the purpose of §11-9-102(4)(B)(iv)(b) is qualitative, not quantitative. The provisions of this subsection do not require any certain level of illegal drugs for the presumption to arise. Quantitatively, it is only necessary that the drugs exist at a sufficient level to exceed the cut off or threshold level necessary to assure the accuracy of the qualitative testing, itself. I find that the greater weight of the evidence proves that this has occurred in the present claim.

Mr. Light also raises the point that the mere fact that the drug screen may be positive in this case is not sufficient to show the presence of illegal drugs in the claimant's system at the actual time of his accident and injury. Clearly, there is no evidence that the claimant used or consumed marijuana after his injury and prior to testing or even that anyone used it in his presence (so as to expose him to second hand smoke). Clearly, the presence of cannabinoids in the claimant's urine, 72 hours after his accident and injury, would reasonably lead to the conclusion that these substances would have been present in his system at the time of his accident and injury. Even assuming that the level of these substances could fluctuate, after usage, there is no indication that they can appear, disappear, and reappear. In fact,

based on the evidence presented, in all reasonable likelihood, the level of these cannabinoids would have been higher at the time of the claimant's accident and injury, than at the time of his testing.

The arguments advanced by Mr. Light concerning the actual validity of the positive outcome of the testing, focuses on the reliability of the collection of the sample tested (i.e. whether the sample had been contaminated or was even actually the claimant's urine). One of these points, involves Mr. Light's conclusion that a urine sample taken from a catheter tube could not be collected in a sufficient quantity rapidly enough so that the temperature of the collected sample was within a temperature range of 90 to 100 degrees. While Mr. Light may be a highly competent pharmacologist, he obviously has little or no experience with catheters. From my own personal experience, I am aware that urine can be passed through a catheter almost as rapidly as it can be without the catheter. It must also be noted that any question concerning the temperature of the urine would only go to the credibility of the person collecting the urine (Pat Meek), rather than the validity of the test results, itself.

Mr. Light also points to the fact that certain notations made by Ms. Meek on the original and carbon copies of the required forwarding documents do not exactly "line up." This relatively minor and insignificant discrepancy is adequately explained by the fact that these documents were to some degree separated at the time the original marks were made.

After consideration of the testimony of Ms. Meek, I find her to be a credible witness and her testimony in accord with the other evidence presented. Her credible testimony is sufficient to provide adequate assurance that the sample of urine she collected and forwarded for testing was collected by way of catheter from the claimant.

I would note, at this point, that while certain consideration must be given by this Commission to the "chain of custody" of blood and urine samples that are used in alcohol and drug testing, the standard for adequacy of showing a proper "chain of custody" in workers' compensation cases is not necessarily as great as that which might be required in criminal actions. So long as the greater weight of the evidence presented is sufficient to reasonably assure that the sample tested was the same as that collected from the claimant and that no adulteration of the sample had occurred, then the requirements of Ark. Code Ann. §11-9-102(4)(B)(iv)(b) have been satisfied. It is not necessary that the evidence be sufficient to totally eliminate any conceivable possibility of error or adulteration or even to eliminate the possibility of error beyond a reasonable doubt.

I find it impossible to believe that Sparks Regional Medical Center would provide the claimant with a catheter, tube, or bag that had previously been used by some other patient. There is absolutely no reason to believe that someone intentionally or even accidentally placed marijuana, THC, or marijuana metabolites into the claimant's catheter, bag, or tube. It is equally implausible to

believe that persons unknown would have added marijuana, THC, or marijuana metabolites to the claimant's urine after its collection. There is no evidence, whatsoever, to even suggest the occurrence of any of these events. There is also no evidence presented that would in any way indicate mislabeling or switching of the claimant's urine sample. In fact, the evidence presented is sufficient to reasonably assure that the urine sample tested by Keystone Laboratories was, in fact, as it was purported to be, the urine sample taken from the claimant on February 7, 2003.

It next becomes necessary to determine if the claimant has presented sufficient evidence to rebut the statutory presumption that the actual and alleged injuries on February 4, 2003, were substantially occasioned by his use of the illegal drug marijuana. As previously noted, the claimant admitted that he had used marijuana, prior to the incident on February 4, 2003. It was also his testimony that he had last used the drug some 10 days before the accident and injury. He stated that although he had previously been a regular user of the drug, he now only used it occasionally. Curiously, when the claimant reported back to work some 3 months after his accident and injury, he was advised that he would not be allowed to continue working unless he took and passed another drug test. The claimant declined to take this test. He stated that his reason for his action was that his attorney had told him that "it wouldn't matter."

Vern Hanna, a co-employee who assisted the claimant immediately after his accident, and Bruce Rowe, the claimant's lead

man, both testified that they never saw the claimant when he appeared to be intoxicated or under the influence of alcohol or drugs. Mr. Rowe specifically mentioned that he never observed the claimant with “red eyes” or “moping around.” Mr. Rowe did acknowledge that the claimant generally left the premises in his truck during the lunch hour. Mark Bryant, the plant manager, testified that he took the claimant to the hospital immediately following the incident and the claimant did not appear to be under the influence of alcohol or drugs. None of the foregoing witnesses could recall any conversations with the claimant or had any recollection of specific observation of the claimant and his demeanor during the hours prior to the incident and injury on February 4, 2003.

The claimant testified that he could not recall what he did at lunch on the date of the incident or injury or whether he left the respondent’s premises. The claimant testified that the incident and injury occurred when he was attempting to adjust a “trailing bar” on the machine that he was operating. Although the respondent’s witnesses testified that this activity should not have been undertaken with the machine running, Mr. Rowe testified that this was often done.

In his testimony, the claimant stated that he was not exactly clear how his clothing became entangled in the machinery or any of the details of what occurred thereafter. He also offered no explanation for his failure to hit the stop or shut off switch that was within reach.

Mr. Hanna testified that he ran over to the claimant as soon as he heard him yell. He stated that the claimant was standing by his machine and that he turned off or stopped the claimant's machine. At that time, the claimant's clothing (both shirt and pants) had been torn entirely off.

Mr. Rowe testified that when he arrived, he saw the claimant and Mr. Hanna standing by the claimant's machine and that the claimant had no clothes on. He also testified that the claimant appeared "unusually calm." Finally he testified that the shaft, which was responsible for tearing off the claimant's clothing, turned at a rate that normally varied between 20 and 30 rpm, but could turn as high as 60 rpm.

Mr. Bryant testified that immediately following the claimant's injury the cut off switch at the claimant's work station was checked. The switch was found to be working properly.

Although the quantitative amount of the illegal drug in the claimant's system (nanograms per milliliter) is not particularly relevant for the purpose of determining whether §11-9-102(4)(B)(iv)(b) has been proven, the actual amount in the claimant's system would certainly be relevant in determining whether the presumption has been rebutted. In the present case, neither expert appears to have expressed an opinion on whether the test results revealed a high or low level of the drug in the claimant's system at either the time of the testing or the time of the injury. Certainly, one would reasonably expect that the level of the drug would be higher at the time of the injury, than at the

time of the testing. I find no particular merit to Mr. Light's arguments to the contrary. It is highly unlikely that the claimant was allowed to become dehydrated during his hospital stay and there is certainly no evidence to indicate this fact. There is also no evidence to indicate that the claimant's injuries or resulting treatment altered his metabolism so as to cause his level of marijuana metabolites to be higher 72 hours after his injury, than they were at the time of his injury.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by a preponderance of the evidence that his use of the illegal drug, marijuana, did not substantially occasion the accident or incident and his resulting injuries, both admitted and alleged. Therefore, these injuries are expressly precluded from representing "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv).

In reaching this decision, I am aware that the claimant's lead man, Mr. Rowe, and a co-employee, Mr. Hanna, testified that they never observed the claimant to be what they would consider as being under the influence of alcohol or drugs. However, neither of the individuals has been shown to have any particular or extensive expertise in identifying individuals under the influence of marijuana. Certainly impairment from the effect of this drug can occur without the user exhibiting "red eyes or moping around." It must also be noted that neither of these individuals, in their testimony, were able to recall any direct observation of or conversation with the claimant on February 4, 2003, prior to the

incident and injury. Although Mr. Bryant testified that the claimant did not appear under the influence of drugs when he took the claimant to the hospital, there is also no indication that Mr. Bryant has any particular expertise in this area.

The claimant's testimony that he had not smoked any marijuana within 10 days prior to the incident and injury is, in the opinion of Dr. Simmons, implausible and extremely unlikely in light of the positive drug screen of urine taken some 72 hours after the injury. I find Dr. Simmons opinion in this regard to be supported by the other evidence presented, credible, and convincing. I also find that the claimant's testimony concerning his usage of marijuana, or lack thereof, is inconsistent with his failure to take the requested drug screen as a condition to his return to employment with the respondent. Clearly, the claimant's failure to stop the machine, prior to adjusting the "trailing bar," showed poor judgement and was unsafe procedure. Even though this practice appears to have been prevalent, this action could still be considered an indication of impaired judgement from the use of marijuana. The claimant's inability to explain how his adjusting of this trailing bar, an operation which he had apparently done repeatedly over a 5 to 6 month period, resulted in him getting both his shirt and pants caught in and wrapped around the rotating shaft could be considered credence of drug induced impairment. The same is true for his inability to recall what he did at lunch. Most importantly is his failure to hit the switch that stopped the machine, even though it was located close at hand.

Clearly, the presence of the illegal drug, marijuana, in the claimant's system, on February 4, 2003, may not have been the sole cause or even the "major cause" of his accident and any resulting injuries he sustained. However, I cannot find from the evidence presented that the greater weight of the evidence establishes that the presence of this illegal drug played no causal role or only an insubstantial causal role in the accident and any resulting injuries.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 4, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On February 4, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$298.00 for total disability and \$223.00 for permanent partial disability, should such benefits have been appropriate.
4. On February 4, 2003, the claimant sustained a physical injury to his penis and groin area.
5. Any injuries sustained by the claimant, as a result of the specific incident or accident on February 4, 2003, are expressly precluded from constituting "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv). Specifically, the greater weight of the credible evidence establishes the presence of the illegal drug, marijuana, in the claimant's body at the time of

the incident on February 4, 2003. Thus, raising the rebuttable presumption that the claimant's accident and resulting injuries were substantially occasioned by his use of this illegal drug. The claimant has failed to prove by the greater weight of the credible evidence that his use of this illegal drug played no causal role or only an insubstantial causal role in occasioning the accident or resulting injuries.

6. The respondents have denied the occurrence of any "compensable injuries" as a result of the specific incident on February 4, 2003. Although the respondents initially paid some benefits, in the form of medical expenses, this claim has now been controverted in its entirety.

ORDER

Based upon my forgoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge