

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412758

KENNY FLOWERS, EMPLOYEE

CLAIMANT

SOUTHERN WAREHOUSE & GIN LLC, EMPLOYER

RESPONDENT

AGRI GROUP - COMP SI FUND, CARRIER

RESPONDENT

OPINION FILED JUNE 30, 2006

Hearing before Administrative Law Judge J. Mark White on May 11, 2006, in Texarkana, Miller County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Ms. Betty Demory, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 11, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on April 17, 2006, and a Prehearing Order was entered that same day. A copy of the April 17, 2006, 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; and that the employee/employer/carrier

relationship existed at all relevant times, including November 30, 2004. At the hearing, the parties further stipulated that the claimant earned \$6.15 per hour at the time of his injury.

The issues to be presented were defined as follows: whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits and medical treatment; and determination of the claimant's average weekly wage and corresponding compensation rate.

The claimant contends that on November 30, 2004, he was an employee of the respondent-employer; that on that date, he sustained a compensable injury to his right hand; that he is entitled to temporary total disability benefits from November 30, 2004, through a date yet to be determined; that he has not returned to work since the injury; that the medical treatment he has received to date has been reasonably necessary in connection with the compensable injury; and that additional medical treatment remains reasonably necessary in connection with the compensable injury.

The respondents contend that the claimant did not sustain a compensable injury pursuant to Act 796 of 1993; that specifically, the claimant's injury was substantially occasioned by the use of drugs; that the claimant tested positive for cannabinoids immediately following the accident; and that this claim is therefore not compensable pursuant to Ark. Code Ann. § 11-9-102 (b)(iv).

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 that cannabinoids were present in the claimant's body at the time of his work injury, raising a statutory presumption that the claimant's accident was substantially occasioned by the use of illegal drugs.
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.
5. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.
6. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant sustained an injury to his right hand on November 30, 2004, when his hand was caught in a cotton gin. The claimant testified that the gin was “stopping up” and needed to be cleaned; he described this task as a regular duty of his job. He testified that his supervisor shut down the gin and went below it to check something, while the claimant went to the top of the gin to clear out the lint cleaner. The claimant testified he waited until the machine stopped moving before putting his hand inside to clean it out. He said the gin started back up unexpectedly, injuring his right hand. The claimant testified he did not hear the machine moving at the time.

The claimant’s supervisor, Ricky Burton, denied that the claimant was performing an expected job duty when he injured his hand. He testified there was no need for the claimant to stick his hand in the gin to clean it, and no reason for the claimant to be on top of the gin at that time. Burton testified he shut down the gin to remove cotton from the bottom of the gin. He testified that before the gin stopped moving, he saw a “yellow streak go by” - apparently the amputated portion of the claimant’s finger and glove. Finally, he denied that the claimant needed to clear the lint cleaner on top of the gin:

Q Let's suppose that [the claimant] hadn't been injured. He comes to you and tells you that there is lint or trash in it and you shut it down. What has to be done after that to get it running again - to clean it out and get it running again?

A Well, if it was stopped up, like I say, you just shut it down and when everything quits moving, 100 percent stopped, then you just clean it out.

Q When you say clean it out, are you talking about what you were doing down on the bottom or what he was doing up above you?

A Say that again.

Q Is that what you were doing on the bottom?

A Oh. What I was doing on the bottom, it was just cotton, just pure cotton. See, it goes up in the machine and you've got a big revolving screen separator that is up there. Sometimes the cotton won't feed through the machine and it just gets hung up there. Well, you just take the air off and it falls down into the bottom of the pipe and you open up the door and dig it out. There is nothing down there but just a pipe and air, nothing moving.

Q Okay. So what he was doing at the time of the injury, that needed to be done but just not until it stopped moving?

A Not necessarily. I wasn't going to do that.

...

Q So from your point of view, what he was doing up there didn't need to be done?

A Right.

Q And that was not something that you did every time that you stopped the machine to clean it out?

A No, sir. No.

Q Okay.

A I have two men who clean the gin every night when it is shut down and they give it a good general cleaning. I'm not saying that it hurt to be done but it wasn't something that I was going to do. It wasn't necessary to start back ginning.

A drug test taken the day of the accident revealed the presence of cannabinoids in the claimant's bloodstream. The claimant acknowledged in his testimony that he had smoked marijuana at a party in Little Rock three days prior to the accident.

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). Testing positive for marijuana metabolites – that is, cannabinoids – is sufficient to raise the statutory presumption. *Wood v. West Tree Service*, 70 Ark. App. 29, 14 S.W.3d 883 (2000); *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

The medical record reflects that cannabinoids were detected in the claimant’s body on the day of the injury, and he acknowledged smoking marijuana several days prior to the injury. I find that the respondents have proven by a preponderance of the evidence that cannabinoids were present in the claimant’s body at the time of his work injury, and I thus conclude that the statutory presumption has been raised.

The question, then, is whether the claimant has successfully rebutted that presumption. 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). If evidence that is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. *Id.* Therefore, if a claimant is found to have alcohol or 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 alcohol or 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” is that there must be a direct causal link between the use of alcohol or illegal drugs and the injury for the injury to be noncompensable. *Id.* I find there was such a direct causal link in the instant claim.

The claimant’s testimony as to what he was doing at the time of his injury and why he was doing it directly conflicts with the testimony of his supervisor, Burton. The claimant testified he was doing his job by clearing the lint cleaner, while Burton testified the claimant had no reason to do so. The claimant testified the gin had stopped moving before he put his hand in it, while Burton testified the gin was still moving when he saw part of the claimant’s fingers fly by. There is no other evidence in the record to resolve these conflicts, and as noted above the claimant bears the burden of proving his injury was not substantially occasioned by the use of marijuana.

I find it more likely than not that the gin had not stopped moving before the claimant put his hand in it, leading me to conclude that this accident was caused by a combination of poor judgment and slowed reaction time by the claimant - factors that could certainly be caused by marijuana impairment. The only evidence serving

to rebut the presumption is the claimant's self-serving testimony that three days passed between his smoking marijuana and the accident. On balance, I find this evidence insufficient to overcome the statutory presumption.

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 illegal drugs. I conclude that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

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