

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F500939

JEREMY WALDRIP, Employee	CLAIMANT
GRACO CORPORATION, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JANUARY 26, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 14, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 6, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on January 25, 2005 and at all relevant times.
3. The claimant was earning an average weekly wage of \$283.50 which would entitle him to compensation at the weekly rates of \$255.00 for total disability benefits and \$192.00 for permanent partial disability benefits.
4. The respondents have controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's left hand on January 25, 2005.
2. Related medical.

3. Temporary total disability benefits.
4. Attorney fee.

The claimant's contentions are set forth in his pre-hearing questionnaire which is attached to the pre-hearing order as Exhibit Number 1.

The respondents contend the claimant had a left hand injury on January 25, 2005. The claimant underwent a drug screen which indicated over 500 ngs. of THC in his system. The respondents contend that claimant's injury was substantially occasioned by the use of illegal drugs which bars recovery.

From a review of 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 made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 6, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that marijuana did not substantially occasion his injury. Therefore, he has failed to prove that he suffered a compensable injury.

FACTUAL BACKGROUND

This claim involves a tragic injury which resulted in the amputation of several fingers and a portion of the claimant's left hand on January 25, 2005. The claimant is a high school graduate who has performed several jobs including working construction, a Wal-Mart warehouse, a chicken farm, and a wastewater plant. The claimant had previously

worked for the respondent for a two-year period of time before leaving to pursue other employment for one year. Claimant last returned to work for respondent on Thursday, January 20, 2005, only six days prior to his injury. Claimant worked for the respondent on Thursday and Friday, was off for the weekend, and worked Monday before the accident occurred on Tuesday.

The respondent manufactures gun magazines. The manufacture of those magazines requires that magazine parts be stamped out of metal by the use of a press. Testimony from several witnesses at the hearing indicates that three people are required to operate the press. One person works on the end of one machine feeding the material into the machine. A second person operates the press by pressing two buttons simultaneously. The third person is located on the opposite end of the machine from the person feeding in the material and that person catches the finished product after it is stamped out by the machine. The machine in question and the process involved is depicted on a video submitted into evidence as Joint Exhibit Number 1.

The claimant normally worked in the respondent's buffing department, but on January 25, 2005 he was asked to help operate the press around 11:00 a.m. Claimant was to perform the job of catching the finished product after it was stamped out by the press. Craig Westrick demonstrated this job to the claimant by performing it and then allowing claimant to perform the job with Westrick observing.

Claimant along with Ron Shuck and James Mollett operated this machine for approximately one hour before taking a 30-minute lunch break from 12:00 to 12:30. According to claimant's testimony they resumed operation of the machine at approximately 1:00 and continued to perform the job until the accident occurred at approximately 1:30. Testimony was presented indicating that at some point the material which was being put into the machine was too wide and became snagged. As a result, it was necessary to remove the material and cut off the excess material. After this situation was corrected the

machine was again restarted and sometime during the first, second, or third cycle of the press before a piece was stamped out the injury occurred wherein claimant's left hand was in the press when it cycled, resulting in the amputation of a portion of claimant's left hand.

After the claimant's accident he was taken to the Gravette Medical Center before being airlifted first to the hospital in Springdale and subsequently to the hospital in Joplin, Missouri where claimant underwent surgery. Claimant testified that he was hospitalized in Joplin for four days following the accident. Approximately 25 hours after the accident occurred while claimant was hospitalized in Joplin a urine sample was taken which returned positive for marijuana metabolites.

Claimant has filed this claim contending that he suffered a compensable injury to his left hand while employed by the respondent on January 25, 2005. He seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee. Respondent contends that the presence of marijuana metabolites bars claimant's entitlement to compensation benefits because claimant cannot overcome the presumption that the injury was substantially occasioned by the use of illegal drugs.

ADJUDICATION

_____ Under Arkansas law the definition of a compensable injury excludes any injury which was "substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." A.C.A. §11-9-102(4)(B)(iv)(a). The presence of an illegal drug creates a "rebuttable presumption that the injury or accident was substantially occasioned by" their use. A.C.A. §11-9-102(4)(B)(iv)(b). Thus, the employee has the burden of proving by a preponderance of the evidence that the illegal drug did not substantially occasion the injury or accident. A.C.A. §11-9-102(4)(B)(iv)(d).

In this particular case, a urine sample taken by the claimant on January 26, 2005, the day after his injury, was positive for marijuana metabolites. In fact, the test results

indicate that the level was greater than 500 nanograms. Given this positive test revealing the presence of marijuana metabolites, claimant has the burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of marijuana.

In support of his contention claimant relies upon several factors. First, claimant correctly points out that January 25, 2005 was the first time he had worked on the press machine; therefore, he was inexperienced. In addition, claimant also relies upon the testimony of Craig Westrick, the individual who trained him on the machine, who testified that he did not smell marijuana on the claimant and that claimant did not seem impaired in any way. Claimant also relies upon the testimony of Ron Shuck and James Mollett, the two individuals who were also working on the press machine. Both of those individuals testified that they did not observe any signs of impairment prior to the accident.

Claimant also relies upon the testimony of John Thompson. Thompson is the owner of a company which provides drug and alcohol screening programs for businesses. Thompson is trained in medical technology and has been involved with toxicology and laboratory work since 1979. Thompson testified that while the urine test does indicate that the marijuana metabolite was present, it does not indicate when claimant used the marijuana and does not indicate whether claimant was impaired at the time of the accident. It was Thompson's opinion that urine tests do not indicate impairment; instead, this would be more accurately done by a blood test which was not performed. Finally, claimant testified that he had not used marijuana for six days prior to the accident. In fact, it was claimant's testimony that on January 20, 2005, the date he was rehired by the respondent, he decided to stop smoking marijuana which he had admittedly done for five years on a frequent basis of some two to four marijuana cigarettes per day.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the

evidence that the marijuana did not substantially occasion the injury or accident. In other words, claimant has not met his burden of rebutting the statutory presumption.

In making this finding I have relied in large part upon the opinion of Dr. Kim Light, an expert called by the respondent. I find his opinion credible and entitled to great weight. Dr. Light's credentials are impressive to say the least. Dr. Light obtained a bachelor of science degree in biology and chemistry in 1973. Dr. Light obtained a master's degree in pharmacology in 1975 and obtained his Ph.D in pharmacology in 1977. Dr. Light became an associate professor of pharmacology at the College of Pharmacy at the University of Arkansas for Medical Sciences and is currently a professor of pharmacology at that school. Dr. Light also holds an endowed professorship on alcohol and drug abuse in the College of Pharmacy and is the current Director of Research and Graduate Studies and Pharmaceutical Sciences. Additional credentials of Dr. Light are contained in his curriculum vitae which is part of the transcript.

Dr. Light testified that he did not agree with Thompson's opinion that one cannot determine impairment with a urine sample. According to Light's testimony the cut-off levels in the testing procedures are not the limits of detection but rather are set to infer particular types of behavior - such as passive inhalation or whether or not it is likely that an individual is impaired from a particular drug proximate to collection time. According to Dr. Light's testimony there are studies indicating that certain levels of metabolites in the urine demonstrate a certain likelihood of a particular blood level. According to Dr. Light a report of more than 100 nanograms per mil of metabolite in the urine demonstrates an 83 percent likelihood that the blood level of the THC active compound are above one nanogram per million in the blood. According to Dr. Light a number of studies show that one nanogram per mil in the blood is an impairing concentration.

Dr. Light went on to testify that it was his opinion that given the level of greater than 500 nanograms there would be more than a 95-percent chance that claimant had an

impairing concentration in his blood at the time of the accident.

Q. Now, there was mention about using a blood test versus urine. If you have a urine test, have there been any studies of quantification between that and what a blood sample would show?

A. That's been a point of a lot of the drug testing with marijuana. Some of the articles that I cited was to identify if we have a urine level what does that teach us or tell us or infer to us about a particular blood level, and there are studies that have been done that demonstrate or report that above 100 nanograms per mil of this metabolite in the urine there is an 83-percent likelihood that the blood levels of THC active compound are above one nanogram per mil.

Q. Is one nanogram of the active significant?

A. In a number of studies one nanogram per mil in the blood is reported as an impairing concentration.

Q. In this case where he has more than 500 nanograms, where would that place him?

A. Well, that would make you much more certain than 83-percent likelihood. You can extrapolate to greater than 95 percent.

Dr. Light went on to indicate that in his opinion it was more likely than not that claimant was impaired at the time of his accident.

Q. In Mr. Waldrip's case with at least 495 to 505 nanograms on the confirmation test, what does that tell you as far as his impairment?

A. Well, it's greater than - it's not at least, it's greater than - and the bottom line is, in my opinion, it's extremely likely that he was impaired by tetrahydrocannabinol at the time of the accident.

Q. And would those impairments include all the things that you have told us about?

A. Judgment, reaction time, perception, cognitive function, motor control.

As previously noted, the claimant testified that he had not used marijuana for approximately six days prior to this incident and three individuals testified that they did not notice any impairment on the day of the injury. However, claimant's testimony with regard to his last use of marijuana is not credible. First, claimant admitted that in the past he had used marijuana on a frequent basis - "possibly every day." Claimant admitted to smoking anywhere from two to four marijuana cigarettes per day. Claimant also testified that he had been smoking marijuana for about five years before the accident. Despite this history claimant testified that on the day he became re-employed by the respondent he decided to straighten up his life and quit smoking marijuana. Therefore, it is claimant's testimony that he did not smoke marijuana for at least six days prior to the accident in question.

Even John Thompson, the claimant's own expert, did not believe claimant's testimony regarding his last usage of marijuana.

Q. The question is, is his testimony that he stopped smoking six days prior, being a chronic user, consistent with this laboratory finding?

A. It is high value with a normal creatnin. I would - - It seems like in my opinion it is - - probably not six days out is my opinion. It's probably closer to - - probably closer to three to four days, but not six. I have a hard time believing that.

Thompson went on to admit that if he knew of someone that had 500 nanograms of marijuana metabolites present in their system he would not recommend that they work around a press. Thompson also stated that claimant's statement that he stuck his hand into the machine contrary to Westrick's instructions would be consistent with someone impaired by a short-term memory loss caused by marijuana.

Although Westrick, Shuck, and Mollett testified that they did not notice the claimant acting impaired on January 25, 2005, I note that the majority of their observations occurred before lunch since the injury occurred shortly after they began operating the machine after

lunch. This is significant because according to Dr. Light it is his opinion that based on the finding of more than 500 nanograms of metabolites 25 hours after the incident that claimant had used marijuana over his lunch period. While it is not necessary for the respondent to prove that claimant actually used marijuana over his lunch period, the fact that Dr. Light has this opinion based upon the evidence presented is evidence which may be considered and given its appropriate weight in determining whether the claimant has overcome the rebuttable presumption.

Finally, I find it significant to note that claimant acknowledged that he had been informed by Westrick that under no circumstances was he to put his hand in the machine.

Q. Had you been told under no circumstances were you to put your hand in the machine?

A. Yes.

Q. So he had instructed you not to?

A. Yes.

Q. And he clearly told you, "Never put your hand in the machine"?

A. Yes.

Claimant went on to testify that he did not know exactly what he was thinking when he placed his left hand in the press machine.

Q. All I asked was, did it ever cross your mind while you stuck your left hand in that machine that "This is not what Mr. Westrick taught me to do"?

A. I don't recall. It was pretty quick. I mean, it happened very fast. I don't recall what was going through my mind.

Q. Were you thinking at all?

A. I don't - - I couldn't tell you. I know I was because I was awake, but I couldn't tell you what I was thinking because

it was so quick and the trauma that occurred afterwards has kind of made me block out that - - I mean, it's not something I - - I've been trying to forget it.

In summary, a urine sample taken from the claimant the day after his accident revealed the presence of marijuana metabolites in excess of 500 nanograms. The presence of marijuana raises a rebuttable statutory presumption that his injury was substantially occasioned by the use of an illegal drug. Claimant has the burden of proving that the illegal drug did not substantially occasion his injury. In this particular case, even though witnesses testified that claimant did not appear to be impaired and John Thompson testified that in his opinion impairment could not be determined by a urine sample, I nevertheless find that claimant has failed to meet his burden of proof based upon the remaining evidence. First, Dr. Light, an expert in the field of pharmacology and toxicology, testified that studies have been performed indicating that a level of more than 100 nanograms in urine demonstrates an 83-percent likelihood that the blood level is above one nanogram which is considered an impairing concentration. According to Dr. Light, in claimant's particular case there was a greater than 95-percent chance that claimant had an impairing concentration of marijuana metabolites in his blood level at the time of the accident. It was Dr. Light's opinion that claimant was impaired at the time of the accident and that this impairment could include judgment, reaction time, perception, cognitive function, and motor control. Clearly, the placing of one's hand into a press such as the one claimant was operating on January 25, 2005 involves the use of judgment, reaction time, perception, cognitive function, and motor control. According to the witnesses the machine had jammed but this jam had been corrected and the machine was in the process of cycling to produce additional parts. The machine had not yet produced a part; therefore, there was no part for claimant to remove at the time his hand was in the machine. Furthermore, according to claimant's own testimony, he does not know what he was thinking at the time of the accident. Given all of this evidence, I simply find that

claimant has failed to overcome the rebuttable presumption that the injury was substantially occasioned by his use of illegal drugs. Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury.

ORDER

_____ Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE