

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613567

TIFFINEY M. SALLEY, EMPLOYEE

CLAIMANT

ARBY'S, EMPLOYER

RESPONDENT

**XL SPECIALTY INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 14, 2007

Hearing conducted before Administrative Law Judge DALE DOUTHIT on May 22, 2007, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Ms. Emily Paul, Attorney at Law, North Little Rock, Arkansas.

The respondents were represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 22, 2007, the above-captioned claim came on for a full hearing at Little Rock, Arkansas. A prehearing conference was conducted in this matter on March 21, 2007, and a Prehearing Order was filed on March 22, 2007. A copy of the Prehearing Order was introduced into the record, without objection, as Commission Exhibit No. 1, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

1. The employee/employer/carrier relationship existed at all relevant times, including November 29, 2006.
2. The claimant's applicable compensation rate is \$118.00 per week for both temporary total disability and permanent partial disability.
3. All issues not addressed at the full hearing would be reserved.

4. The claimant did in fact test positive for an illegal drug, thereby creating a rebuttable presumption that the claimant's injury was substantially occasioned by the use of the illegal drug.

The parties agreed the following issues would be presented for determination:

1. Whether claimant can overcome the rebuttable presumption that her injury was substantially occasioned by the use of drugs/marijuana.

2. Whether this claim falls under the exclusive remedy provisions of the Arkansas Workers' Compensation Law.

At the full hearing, claimant contended that on November 29, 2006, she suffered a specific incident injury to her left knee while performing employment services for the respondent-employer. Claimant contends she fell while changing letters on the outside sign, as instructed by her supervisor. Claimant contended that the injury in question was not substantially occasioned by the use of alcohol or illegal drugs or prescription drugs used in contravention of physician's orders, as alleged by the respondents. Claimant contends she did not refuse to submit to a drug screen, and that the respondent-employer did not provide reasonable and necessary medical treatment in a timely manner, as required by law. Claimant contends that should the Administrative Law Judge find this injury not compensable, claimant is entitled to a ruling that this claim is not barred by the exclusive remedy provisions of the Arkansas Workers' Compensation Law.

Respondents contended that manager Phyllis Redmon offered to take claimant to the doctor after her alleged fall from a ladder on November 29, 2006. Respondents contend that at the time of the alleged injury, claimant appeared to have a glazed look. Respondents contend claimant refused medical treatment on the day of injury, as well as the following day. Respondents contend claimant went, on her own, to St. Vincent Infirmary for treatment, and was given a drug screen at that time which was positive for marijuana. Respondents contend that under Ark. Code Ann. § 11-9-102, this claim is barred due to a positive drug screen. Respondents contend claimant was an employee and that claimant's exclusive remedy is governed by the Arkansas Workers' Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The parties stipulated to the presence of illegal drugs in the claimant's body, thereby creating a rebuttable presumption that the injury or accident was substantially occasioned by the use of illegal drugs.

4. The claimant has failed to prove by a preponderance of the evidence that her injury was not substantially occasioned by the use of marijuana.

5. Therefore, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on November 29, 2006.

6. This claim falls under the exclusive remedy provisions of the Arkansas Workers' Compensation Laws.

DISCUSSION

A. History

The claimant was working for the respondent-employer on November 29, 2006. The claimant testified that her supervisor, Ms. Phyllis Redmon, asked her to put letters on the marquee sign. The claimant testified that she complied with her supervisor's request and attempted to put the letters on the marquee. The claimant testified that while attempting to put the letters on the marquee, she used a ladder. The claimant testified that while going up the ladder, her leg got stuck in one of the steps of the ladder, which caused her to fall. The claimant testified that when she fell, she heard her knee "pop" three times and knew that she was hurt. (Transcript P. 23, L. 10-25)

The claimant testified that she was crying after the incident, but decided not to seek medical treatment the day of the incident even though her employer offered to take her to the doctor. (Transcript, P. 39, L. 24-25; P. 40 L. 1-3) The claimant ultimately chose to go to St. Vincent Infirmary on December 2, 2006, approximately three days after the incident. On December 2, 2006, the claimant was given a drug screen which came back positive for marijuana. The positive drug screen caused the respondents to deny compensability, and created the stipulated rebuttable presumption that the claimant's injury was substantially occasioned by the use of the illegal drug. The claimant admitted to having smoke marijuana in October of 2006 and on December 1, 2006, but did not admit to smoking marijuana on the day of the incident.

B. Adjudication

The definition of compensable injury under the Arkansas 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 claimant stipulated that the rebuttable presumption had been raised. The only question then becomes whether the claimant has successfully rebutted the 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 (1989). 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 by the use of alcohol” 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 main argument the claimant made at the full hearing was that her injury was not substantially occasioned by her drug use because she had used the marijuana two days after the incident and not for at least 30 days prior to the incident. (Transcript P. 14, L. 6-20) The only evidence before the Commission indicating the claimant did not have the marijuana in her system until after the incident was the claimant’s testimony. For reasons that will be outlined herein, I found the claimant not to be a credible witness. A claimant’s testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985).

Claimant's testimony that she smoked marijuana two days after the incident is absurd in light of her own testimony that she knew she was about to be drug tested. First, she testified that she smoked the marijuana on December 1, 2006 with some friends "for New Years." This Administrative Law Judge takes judicial notice that New Years would be January 1 and not December 1.

Q You also stated, at your deposition, that you have smoked marijuana after the injury at Arby's; is that right?

A That's correct.

Q When did you smoke marijuana after your injury?

A I believe, maybe, it was on the 1st.

Q 1st of what?

A The 1st of December, maybe.

Q Okay. Were you with friends?

A I was, for New Years.

The claimant's "New Years" excuse for smoking marijuana the day before her drug screen is different than the excuse she gave in her deposition, where she stated she smoked the marijuana as a pain reliever.

Q Now, I asked you about -- you had this incident on November 29th, and then you told me that you smoked marijuana a couple of days afterward?

A Right.

Q And what you told me, at your deposition, was that you were waiting to be seen by the doctor, staying at home, correct --

A Right.

Q -- and that you were using the marijuana as a pain reliever?

A Right.

The claimant testified at the full hearing that she lied to the people at St. Vincent and lied in her deposition testimony, further evidencing her lack of credibility.

Q All right. And I asked you, "But you didn't feel it was important to tell them, Saint Vincent's, 'Hey, I'm going to flunk a drug screen here'?" "It's not that I didn't feel that it was important, I guess, what reason I didn't, I don't know." "Well, did you lie to them?" Answer, "Yeah, pretty much." Is that what you told me at your deposition?

A Yes.

Q Is that what happened?

A Well, that they asked me and I didn't answer, I suppose I did lie to them.

...

Q All right. Well, matter of fact, when I visited with you at your deposition, you told me that when the Concentra person called you about the positive drug screen, that you told him that you were shocked that it came back dirty. Do you remember telling me that?

A Yeah.

Q Were you lying to the Concentra man again?

A No. I lied to you.

Q Oh, okay. Tell me how you lied to me.

A Because you said, did I know that my drug screen was going to come back dirty.

Q So you weren't shocked when the Concentra man called?

A No, not really.

Ms. Phyllis Redmon testified at the full hearing that on the day of the incident, November 29, 2006, she asked the claimant, "If they drug test you, could you pass the test?" Ms. Redmon testified the claimant's response was "No." (Transcript P. 62, L. 11-14). When asked about whether she told Ms. Redmon about not being able to pass a drug test, the claimant testified Ms. Redmon was "lying." (Transcript P. 46, L. 23-25). I find Ms. Redmon's testimony to be far more credible than that of the claimant.

The claimant admitted that she knew she would undergo a drug test after her work-related accident, but that she still chose to smoke marijuana after being fully cognizant of the consequences. This appears to be a contrived story by the claimant to get benefits. It is the exclusive jurisdiction of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). The Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995).

The claimant fell at work while on a ladder. To put the letters on the sign would require her to be focusing on the sign while looking upward and using her hands, all while standing on a ladder. Clearly, any impairment at all while doing

this type of task would greatly increase the risk of injury. But for the presence of marijuana in her system, the claimant would not have been injured. The claimant's injury caused her extreme pain. A reasonable person would have insisted on going to the doctor. The claimant knew a drug screen would be performed if she went to the doctor. Claimant figured she could explain the presence of marijuana in her system if the drug screen was performed days later. Simply put, the claimant's story makes no sense. I find the claimant has failed to prove by a preponderance of the evidence that her injury was not substantially occasioned by the use of marijuana. Therefore, I conclude that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury.

The claimant has asked this Administrative Law Judge to determine whether this claim falls under the exclusive remedy provisions of the Arkansas Workers' Compensation Law. At the onset of the full hearing, claimant withdrew her stipulation that the Arkansas Workers' Compensation has jurisdiction of this claim. My review of this claim clearly shows the Commission does have jurisdiction of this work-related incident. The claimant did agree that the employee/employer/carrier relationship existed at all relevant times and allowed that stipulation to remain in effect. Ark. Code Ann. § 11-9-105(a) (Repl. 2002) provides:

The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise

entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his or her capacity as an employer, or prime contractor of the employer, on account of the injury or death, and the negligent acts of a coemployee shall not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

My review of this claim and the applicable law leads me to find the claimant's exclusive remedy lies under the Arkansas Workers' Compensation Act. Clearly, this incident was work related and that was not challenged by the respondents. The only issue was that the work-related injury was not compensable due to the claimant's marijuana use. I find nothing in then Act that says the claimant has other remedies available. As such, I find the exclusive remedy provisions in the Arkansas Workers' Compensation Act applies to this claim.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. Therefore, this claim for benefits must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

HONORABLE DALE DOUTHIT
Administrative Law Judge