

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708525

BRENDA HUGHEY	CLAIMANT
MCDONALDS 10146	RESPONDENT
RISK MANAGEMENT RESOURCES INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 1, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On April 1, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 23, 2008, and a pre-hearing order was filed on October 24, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On August 12, 2007, the relationship of employee-employer-carrier existed between the parties.

3. The claimant experienced a fall on August 12, 2007, at work.

4. Healing period ended December 13, 2007.

5. The claimant is entitled to a weekly compensation rate of \$145 for temporary total disability and permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injuries to her left arm and low back.
2. Claimant's entitlement to related medical.
3. Claimant's entitlement to temporary total disability from August 13, 2007, to December 13, 2007.
4. Intoxication of the claimant.
5. Attorney's fees.

The claimant contends that:

"She is entitled to reasonable and necessary medical treatment for her back and left arm injury which was not caused by or contributed to by the use of illegal substances. The claimant is entitled to temporary total disability benefits from the date of injury of August 12, 2007, to a date yet to be determined, a controverted attorney's fee, and medical expenses."

The respondents contend that:

"They admit that the claimant had a fall at the McDonalds in Eureka Springs on August 12, 2007. The respondents deny that the claimant sustained a compensable injury as defined by the Arkansas Workers' Compensation Act, contending that she tested positive for marijuana."

DISCUSSION

This case involves an injury that occurred while the claimant was employed at McDonalds Restaurant in Eureka Springs, Arkansas.

The claimant contends that while entering the freezer at McDonalds to retrieve biscuits she stepped one foot inside, slipped, and fell to the ground at which time the claimant indicates that she injured, "My elbow, my back, my whole left side." Medical records indicate that the claimant's left elbow was severely fractured.

After the claimant's accident she was taken to the Eureka Springs hospital and then transferred to the Northwest Medical Center in Benton County. Two days later a urine sample was taken from the claimant which returned positive for marijuana metabolites. Under Arkansas law the definition of a compensable injury includes any injury which was "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). It is the burden of the respondents to prove the presence of an illegal substance. Here, I find the respondents have met that burden through the drug test that was performed on the claimant and well documented in Respondents' Exhibit No. 1.

The presence of an illegal drug 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). 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. Ark. Code Ann. §11-9-102(4)(B)(iv)(d).

In this particular case, a urine sample taken from the claimant on August 13, 2007, the day after her injury, was positive for marijuana metabolites. In fact, the test results indicate that

the level was equal to or greater than fifty nanograms. Given this positive test revealing the presence of marijuana metabolites, the claimant has a burden of proving by a preponderance of the evidence that her injuries were not substantially occasioned by the use of marijuana.

The claimant testified that she had not smoked marijuana since the 1970s. She alleges that she was exposed to marijuana smoke at a party at her home on August 10, 2007. She claims that after dinner someone in the living room was smoking marijuana. She contends that her apartment is a small one bedroom apartment with no ventilation and that all doors and windows were closed. She further testified that she was in the kitchen doing dishes while the marijuana was being smoked and that she was exposed for fifteen minutes. Also, the claimant's urinalysis from September 28, 2007, was negative for marijuana or its metabolites.

The claimant also relies upon the testimony of her mother, Brenda Hughey, who testified to being present for the party on August 10, 2007. She testified that the claimant did not smoke marijuana that evening although some individual did smoke marijuana. The claimant also contends that the fall she had in the freezer was not caused by or contributed to by the use of marijuana. Finally, the claimant relies on a drug urinalysis she had performed on September 28, 2007. The result of that urinalysis was negative for marijuana metabolites.

ADJUDICATION

The credibility of the claimant's testimony is a key factor in this case. She testified that she had a dinner party in her small apartment on August 10, 2007. The claimant had three guests at this party which began at 5:30 p.m. or 6:00 p.m. She testified that there was no ventilation or air conditioning and that the windows were closed and the ceiling fan was not in use. She claims that she was exposed to marijuana when the guests at the party began to smoke marijuana and her exposure to this second hand marijuana smoke was about fifteen minutes in length.

The respondents introduced evidence from the National Weather Service indicating that the temperature was above 95 degrees in the general area of the claimant's small apartment. I do not find it believable that the claimant would not open a window or use some sort of air conditioning/ventilation with four occupants in such a small smoke filled apartment with outside temperatures in the 90s. I do not find the claimant's testimony credible regarding the use or non use of marijuana.

The claimant's mother, Helen Brown, also testified that someone other than the claimant was smoking marijuana. However, Ms. Brown testified that she went outside of the apartment while the marijuana was being smoked. Since she was not present with the claimant during that time period, it would be impossible for her to know what the claimant did or did not do. From Ms. Brown's testimony as a whole, it would only be possible to conclude that any testimony given about the claimant not smoking marijuana would

be from occasions when she was present with the claimant. Certainly, she and the claimant spent time apart in that they did not live together and thus Ms. Brown would have no first hand knowledge of the claimant's activities during those times.

The claimant's remaining contention is that the marijuana did not contribute to or cause her to fall. On cross examination the following exchanges took place:

Q. Do you know exactly what you slipped on?

A. Wet stainless steel.

Q. ...so it wasn't unusual for you to be in and out of the freezer on a regular basis?

A. No.

The claimant's attorney called Jeffery Arin Hendrickson as a witness during his case in chief. Mr. Hendrickson testified that he was a shift manager at the McDonalds in Eureka Springs during the time period of August 12, 2007. He also testified that he found the claimant laying on the floor of the freezer after she experienced her fall. Upon questioning, Mr. Hendrickson stated:

Judge wells:...just to clarify something for me. The testimony was that the freezer was not working properly, so the floors were wet.

The witness: Yes, Sir.

Judge wells: Okay. Your testimony also was that you would put antifreeze on the floor to keep them clear and safe?

The witness: Yes.

Judge wells: So is it more dangerous when the floor is wet or when it is slick and frozen and the freezer is working properly? I am not sure.

The witness: --it stays slick in there pretty much all of the time whether we use that--that solvent or not.

From the testimony of Mr. Hendrickson it is clear that the floor is always slick. The claimant goes in and out of this area many times in a given work day. She should have known to exercise caution when entering this area. I find that due to her intoxication she was not exercising the caution that would be called for when entering an area of this slick nature.

The claimant offered as evidence a negative drug screen taken September 26, 2007. I find that this is far too remote in time to have bearing on the matter at hand.

A letter dated March 18, 2008, from Henry F. Simmons M.D., PhD, regarding the claimant's allegations that she tested positive for marijuana metabolites due to second hand marijuana smoke is telling. Dr. Simmons' vitae curriculum shows that he is an expert in toxicology. His opinion is that the levels of marijuana metabolites in the claimant are consistent with the claimant being under the influence of marijuana on the date of the fall. His opinion that the levels could not have been caused by the second hand ingestion of marijuana smoke also adds weight to the claimant being intoxicated and that the intoxication substantially occasioned the claimant's fall.

I find that the claimant did not rebut the presumption that her fall was substantially occasioned by her use of marijuana. The claimant's state of intoxication caused her to fail to use proper caution when entering a slick area that she entered routinely.

From my 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 conclusion of law are made in accordance with Ark. Code Ann. §11-9-704.

FINDINGS & CONCLUSIONS

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 23, 2008, and contained in a pre-hearing order filed October 24, 2008, are hereby accepted as fact.

2. The claimant has failed to meet her burden of proving by a preponderance of the evidence that marijuana did not substantially occasion her injury. Therefore, she has failed to prove that she suffered a compensable injury.

ORDER

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

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE