

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209567

JAMES TIDWELL,
EMPLOYEE

CLAIMANT

FOUR THIRTEEN, INC.,
EMPLOYER

RESPONDENT

FIREMAN'S FUND,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 10, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant appeared PRO SE at the hearing and represented by
HONORABLE GREG GILES, Attorney at Law, Texarkana, Arkansas,
on appeal.

Respondents represented by HONORABLE ROBERT L. HENRY III,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an opinion and order filed by
the Administrative Law Judge on March 28, 2003. In that
opinion and order, the Administrative Law Judge found in
relevant part that the claimant had the presence of alcohol
and illegal drugs in his system at the time of his accident
at issue on August 7, 2002. The Administrative Law Judge
found that the presence of alcohol and illegal drugs in the
claimant's system raises the rebuttable presumption that the
claimant's accident was substantially occasioned by the
presence of drugs and/or alcohol. The Administrative Law

Judge also found that the claimant was a credible witness, and the Administrative Law Judge found that the claimant has overcome the rebuttable presumption and has proven by a preponderance of the evidence that his fall on August 7, 2002 was not substantially occasioned by the presence of drugs and/or alcohol. After conducting a de novo review of the entire record, we find that the claimant has failed to establish by a preponderance of the credible evidence that his fall and injury on August 7, 2002 were not substantially occasioned by the presence of drugs and/or alcohol. Therefore, we find that the award of benefits of the Administrative Law Judge must be reversed.

Ark. Code Ann. § 11-9-102 precludes an award of benefits for any injury:

(iv) (a) [W]here the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders.

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 a physician's orders.

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 used in contravention of a

physician's orders did not substantially occasion the injury or accident.

The documented presence of marijuana in a worker's body creates a rebuttable presumption that his injury was substantially occasioned by the illegal use of drugs.

Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996). The presence of alcohol in a worker's body likewise creates a rebuttable presumption that his injury was substantially occasioned by the use of alcohol. Despite this presumption, a claimant may still be entitled to compensation if he proves by a preponderance of the evidence that the illegal use of drugs or the use of alcohol did not substantially occasion the injury or accident.

Billings v. Plum Creek Timber Co., Full Commission Opinion, filed February 28, 2002 (E910817). Whether the presumption has been overcome is a question of fact for the Commission. Express Human Resources III v. Terry, 61 Ark. App. 258, 968 S.W.2d 630 (1998).

In the present case, at the time of his accident on August 7, 2002, the claimant had been employed by the respondent for approximately six years. In his capacity as lead carpenter, the claimant's job duties normally included

pouring concrete, tying rebar, and supervising other people's work.

The claimant arrived at the respondent's job site at approximately 7:00 a.m. on August 7, 2002. Upon arriving, the claimant spoke briefly with Mr. Lundry and Mr. Nicholson regarding job assignments for the day. Approximately 11 flatbed trailer loads of rebar were waiting to be unloaded at the job site on August 7, 2002 when the claimant arrived. The claimant testified that he got up on a trailer bed to show a couple of laborers how to rig the steel up with a crane and set it up in a designated spot. The claimant testified that he rigged one end of a bundle and was going towards the front of the truck when he tripped on a piece of number nine wire underneath the steel and was slung off the edge of the trailer. The claimant testified that he tried to catch himself with his arms and consequently crushed both wrists.

While undergoing medical treatment for those injuries later that same day, the claimant gave samples for drug and alcohol testing. The claimant's drug sample came back positive for marijuana metabolites, and the claimant's alcohol testing came back positive for the presence of alcohol. The claimant attempted to explain his positive

marijuana and alcohol test results by testifying that he drank approximately eight beers and smoked marijuana on the evening prior to the accident. The Administrative Law Judge, who heard the live testimony and observed the demeanor of the witnesses, apparently found the claimant's testimony in this regard credible. For the following reasons, we disagree.

As a threshold matter, we note that the Administrative Law Judge has deemed admitted certain requests for admission in Respondents' Exhibit No. 1. Among them, admission number 5 is that a bodily fluid sample taken or obtained from the claimant's body on August 7, 2002 was submitted to a laboratory for analysis. Admission number 6 states that the document attached to the requests for admission is a true and correct copy of a laboratory analysis of the bodily fluid sample taken or obtained from the claimant on August 7, 2002. Notably, the document in question indicates that the claimant had a 0.160 g/dl bodily fluid alcohol level in the specimen collected on August 7, 2002 at 10:37 a.m., approximately three hours after the accident at work. As the respondents note in their brief on appeal, this alcohol concentration found in the claimant's body in the sample taken some three hours after the accident is approximately

twice the alcohol concentration which raises a presumption of intoxication for purposes of operating a motor vehicle under current law. See Ark. Code Ann. § 5-65-103 and 5-65-206.

We note that the Administrative Law Judge's opinion and order which found the claimant credible with regard to his intoxication, or lack of intoxication, makes no reference to the laboratory report attached to Respondents' Exhibit No. 1, which indicates that the claimant's alcohol concentration was 0.160. For his part, the claimant in at least three portions of his testimony asserted that this test result cannot be correct, because if it were, his co-workers would have smelled alcohol on him, and he would not have been able to walk, much less work. (T. 13, 18, 22). However, in light of the requests for admission discussed above, which the Administrative Law Judge deemed admitted, and in light of the laboratory report attached thereto, we find that a preponderance of the credible evidence in the present case establishes that the claimant's alcohol concentration was 0.160 at the time that a sample was taken from his body for testing approximately three hours after the accident. In reaching that conclusion, we note that there is no dispute that the respondents did not request that samples be taken

for drug or alcohol testing, but instead in the present case, a doctor detected the odor of alcohol on the claimant, and blood and alcohol testing were performed at the request of the doctor, not the respondents. In light of the laboratory results and in light of the doctor's detection of alcohol odor, we are not persuaded by the claimant's testimony that he drank the eight or nine beers on the evening prior to the morning of his injury, and we are not persuaded by the claimant's suggestion that he was not intoxicated at the time of the accident. Quite to the contrary, a combination of the admitted requests for admissions and the laboratory report of 0.160 alcohol concentration in the claimant's body at the time a sample was taken some three hours after the accident, both belie the claimant's suggestion that he drank alcohol only on the evening before the accident in question, and was not intoxicated at the time of the accident.

Furthermore, we point out that the claimant's not seeing and then tripping over an exposed piece of wire is consistent with impaired senses and reflexes, and that the claimant's then falling off the trailer is consistent with an impaired sense of reflex, an impaired sense of balance, and a poor reaction time, particularly in light of the

testimony of the claimant's supervisor that he had himself tripped on occasion, but had never fallen off a trailer.

In light of the nature of the accident, the nature and extent of the injuries sustained, and the extraordinary amount of alcohol detected in the claimant's body from a sample taken some three hours after the accident, we find that the claimant has failed to rebut by a preponderance of the credible evidence the presumption that his accident and injury were substantially occasioned by the use of alcohol.

Therefore, after conducting a de novo review of the entire record, and for the reasons discussed herein, we find that the decision of the Administrative Law Judge must be, and hereby is, reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

JOE E. YATES, Commissioner

Commissioner Turner dissents.