

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404635

JACKY GARRETT,  
EMPLOYEE

CLAIMANT

JACK YATES DRYWALL,  
EMPLOYER

RESPONDENT

AMERICAN INTERSTATE INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 24, 2005

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

Claimant represented by the HONORABLE GREG GILES, Attorney  
at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE MICHAEL RYBURN,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed December 10, 2004. The administrative law  
judge found that the claimant "failed to prove by a  
preponderance of the evidence that his injury was not  
substantially occasioned by the use of marijuana." After  
reviewing the entire record *de novo*, the Full Commission  
reverses the opinion of the administrative law judge. The  
Full Commission finds that the claimant proved by a

preponderance of the evidence that illegal drugs did not substantially occasion the accident occurring on May 13, 2004. We therefore find that the claimant proved he sustained a compensable injury.

I. HISTORY

Jacky Lynn Garrett, age 43, testified that he had been employed as a sheetrock finisher for Jack Yates Drywall. Mr. Garrett testified that he had worked for the respondent-employer "off and on for the last ten years."

The claimant agreed on direct examination that he smoked marijuana "from time to time." The claimant agreed on cross-examination that he had been convicted of a felony marijuana violation, at the age of 19. The claimant's testimony indicated that he had smoked marijuana the weekend of May 8-9, 2004. The claimant testified that he did not smoke marijuana during the work week beginning Monday, May 10, 2004. The claimant testified on cross-examination that he did not smoke marijuana when he was working. The claimant testified on direct:

Q. Had you been around anybody else that week during the work week that had smoked marijuana? I'm talking about the Monday, Tuesday, Wednesday or Thursday of that week.

A. Not that I can recall. Now, there is time that - them guys, everybody rides to the store,

you know, and maybe somebody smokes one, but as far as smoking any, no.

Q. On occasion are there employees there who do smoke marijuana?

A. Yes, sir.

Q. That particular week that you had been on the job, had you been around anyone who had smoked marijuana during the work week of Monday, Tuesday, Wednesday or Thursday?

A. I believe so.

Q. When would that have been?

A. That would have probably been at the first of the week.

Q. Who would it have been that you were around doing that?

A. Jimmy Dale McGowan and Cullens - I don't know his name, they just call him Cullens.

The parties stipulated that the employment relationship existed at all relevant times, including Thursday, May 13, 2004. Carl Dean Garrett, the claimant's brother, testified that he worked with the claimant on the date of the specific incident. Mr. Garrett testified that he and the claimant typically drove to work together, and that he did not see the claimant use marijuana at any time during the day on May 13, 2004. Carl Garrett testified that he ate lunch with the claimant, Jimmy McGowan, and Cullen on Thursday, May 13, 2004, and that he did not observe anyone smoking marijuana.

The claimant testified that he was working on a scaffold, and that he had not smoked marijuana that day.

The claimant testified on direct:

Q. Is there like a ladder on the scaffold that you would climb up and down?

A. No, sir, it's not a ladder, it's just a part of the scaffold that you go up and down.

Q. What happened? How did you get hurt?

A. Well, I climbed up - I was sent up there to start the wall and I got up there and I pulled all my tools up there and my mud and I turned around and looked and it was a lot of expansion joints. So I had to go back down and when I went back down, the scaffolding - part of the scaffold come a loose and let me - turned me loose and let me fall.

Q. What part of the scaffold came loose?

A. It was a brace.

Q. And when you grabbed hold of the brace, what happened?

A. It come a loose.

Q. And when it came loose, what happened?

A. I fell....I fell anywhere from twenty to twenty-five feet.

Q. Okay. You said there was something about some expansion joints and that when you saw that there was a lot of those, that's why you had to go back down. What is it about the expansion joints that you had to do something differently about and so you had to go back down?

A. Well, on expansion joints, it's like if there is a big, tall wall or something, they put these plastic joints in there to keep the wall from cracking. That's the reason why they put them up....I was going back down to get the expansion joints....

Q. The brace that you grabbed hold of, that came loose, would you normally have expected that to have come loose?

A. No, sir....

Q. Do you know why it came loose?

A. Because it wasn't - it wasn't up there right.

Q. Is there anything about this particular brace that - I mean, should you have known not to be grabbing hold of a brace like that?

A. No, sir....

Q. Had you ever had a problem with a brace like this coming loose in the past?

A. No, sir....

Q. What time of day was this when you fell?

A. It was after lunch. It was probably - say around 1:00 or after....

Q. When you fell, how did you land?

A. I landed on my feet.

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Q. Was there anything about yourself on May 13<sup>th</sup> - did you feel intoxicated or in any way under the influence of drugs?

A. No, sir.

Q. Had you had any problems performing your job duties on May 13<sup>th</sup>, that day?

A. No, sir.

Q. Had anyone complained to you about your job performance before the fall?

A. No, sir.

Carl Garrett testified, "I was mixing mud and I heard him hollering and I turned around and he was laying there on the floor....I asked him what happened and he said he grabbed the brace and it came loose."

Jerry Lee Shepherd testified that he was a lead man for the respondent-employer, and that he did not observe the claimant being under the influence of any substance on the day of the accident. The claimant's attorney examined Mr. Shepherd:

Q. What was the first thing that you saw after he fell?

A. Well, of course, there was a lot of noise going and I turned around and noticed a man on the floor. I went over there and seen who it was, seen the brace laying there beside him, and lots of people and lots of commotion. It was a pretty freaky deal....

Q. And what is your understanding of what happened?

A. Well, what happened is they had tied off an X brace, you know, made it solid to the scaffold, so that they wouldn't walk off the end of the

walkboards, and it just didn't get tied off right or good. It broke. I can't say what exactly happened because I don't know but, you know, something happened and it just gave way on his way down....

Q. Had you yourself been up on that particular scaffolding that particular day?

A. Yes, sir, I had. Prior to Jacky getting on it I had been up there.

Q. Had you gone up and down that particular scaffolding on that particular day?

A. Yes, sir, but I had fortunately went up on other side of the scaffolding....

Q. Had you heard anyone say on that particular day at any time that there was anything about the scaffolding that was unsafe or was a problem?

A. No, sir....

Q. You indicated that you had not gone up and down that particular side. By your observations that day, had others been up and down the side that Jacky fell from?

A. Yes, sir, several times, several people.

The respondents' attorney cross-examined Jerry

Shepherd:

Q. Now, had you seen anybody ever come back to work after lunch who appeared to be intoxicated or using marijuana?

A. I sure have.

Q. On that job?

A. No, sir, not on that job that I remember, but in the past I sure have.

The claimant's attorney re-examined Jerry Shepherd:

Q. What is your responsibility on this job with regard to Jacky Garrett?

A. To make sure that we get what needs to be done, done.

Q. I mean, were you his supervisor?

A. Yes, sir.

Q. In your experience, have you ever had any problems with Mr. Garrett being intoxicated or unable to perform his job duties?

A. I've never had a problem with Jacky.

Q. Or under the influence of any substance that you thought he couldn't do or perform his job?

A. If he was, he hid it very well.

The claimant was admitted to St. Michael Health Care Center on May 13, 2004:

The patient is a 32-year-old gentleman, who was climbing down a scaffold approximately 18 to 20 feet, when he had fallen. He fell landing on his heels and fell to the ground landing on his left side. He arrived by EMS to the emergency room at which time he was seen by Dr. Weber. He was found bilateral calcaneus fractures and I was consulted for further evaluation and treatment. He has a history of epilepsy. He is on Dilantin. Otherwise he is a healthy gentleman works as a carpenter and was at the Walnut Church of Christ on Moores Lane when he had fallen....

Positive findings in his x-rays include bilateral calcaneus fractures, with more significant comminution of the left compared to the right.

Dr. Michael Pappas diagnosed "Fall with bilateral calcaneus fractures, possible occult pelvic fracture."

The record indicates that a urine specimen was collected from the claimant on May 13, 2004 at 5:20 p.m., for a "Drug Screen Urine W/O Confirm." The result was "Positive" for "Cannabinoids" and "Opiates." (The respondents do not contend that the claimant was intoxicated as a result of any type of illegal "opiate" narcotics.)

The claimant testified on direct:

Q. Before the accident, before you fell, were you taking any pain medication or narcotic medication on a routine basis?

A. No, sir.

Q. That day had you used any marijuana?

A. No, sir.

Q. Had you been around anyone else that day that had been using marijuana?

A. No, sir.

The claimant was discharged from St. Michael on May 19, 2004, at which time Dr. Pappas reported:

He was admitted to the hospital on 05/13/04 and discharged on 05/19/04 to follow back up in the office at which time he will undergo bilateral open reduction internal fixation of the calcaneus. He is to be non weight bearing. He has been placed in Bledsoe boots prior to discharge with yellow compression hoses, also yellow elevation pillows. The point was to get his swelling down. I also

discussed the significance of smoking and calcaneus fractures. At this point he was discharged home with pain medication on 05/19/04 to followup in the office on Monday and we will go ahead and schedule him for open reduction internal fixation of his left, possible open reduction internal fixation versus closed reduction and percutaneous pinning of his right.

A representative of the respondent-carrier informed the claimant on May 19, 2004, "We have completed our investigation of the above claim and have determined that it is not compensable under Arkansas Workers' Compensation Law. Therefore, we cannot voluntarily authorize any treatment or benefits...."

X-rays of the claimant's wrist were taken on May 24, 2004, with the following impression: "Calcific density dorsal to the mid-carpal row likely triquetral chip fracture."

Dr. Pappas performed surgery on May 25, 2004: "Open reduction internal fixation of the left calcaneus with a posterior stent placed postoperatively using Synthes locking plate. The right side was a percutaneous open reduction internal fixation of his right calcaneus fracture." A pre-hearing order was filed on August 16, 2004. The claimant contended that he sustained compensable injuries on May 13, 2004, that he was entitled to temporary total

disability compensation from May 13, 2004 to a date yet to be determined, that the medical treatment he had received was reasonably necessary, and that he was entitled to attorney's fees. The respondents contended that the claimant "tested positive for illegal drugs on the date of the accident." The respondents contended that the claimant's "impaired ability substantially caused the accident."

The parties agreed to litigate the issues of "whether the claimant sustained a compensable injury; whether the claimant's injury was substantially occasioned by the use of illegal drugs; whether the claimant is entitled to temporary total disability benefits; whether the medical treatment received by the claimant has been reasonably necessary in connection with a compensable injury; and controversion and attorney's fees."

Dr. Pappas performed a "Removal of two 7.2 cannulated screws through two different incisions" on October 19, 2004.

A hearing was held on November 4, 2004. The claimant testified that he had not worked anywhere since the accident of May 13, 2004. The claimant testified that he had not had physical therapy, "Because I don't have any insurance. He

wants me to have it but I don't have no insurance so he showed me some stuff to do at home."

Troy Wells testified that he had been a project foreman for the respondent-employer for about nine years. The claimant's attorney questioned Mr. Wells:

Q. And were you on the job site on May 13, 2004, when Mr. Garrett had his accident?

A. Yes, sir.

Q. Did you actually see him fall?

A. No, sir.

Q. Were you present immediately after he fell?

A. Yes, sir....

Q. Did you observe any part of the scaffolding that had fallen with him at that time?

A. No, sir.

Q. Is it your understanding that some piece of scaffolding came loose?

A. Yes, sir.

Q. And how do you have that understanding?

A. That cross brace came down with him and, I mean, everybody that saw it said that it did....

Q. What would have been the purpose of having that brace in place up there? Why were you having it up there to begin with?

A. The purpose of it was to keep someone from walking off the walkboard. It was just put about

three foot about the walkboard to keep someone from walking off the end of the scaffold....

Q. What was it that was different on this particular occasion as to how you used it this time as to how you had used it other times?

A. Well, this time we used it for fall protection and it's actually meant to - it's a cross brace, like an X, to hold the scaffolds together.

Q. Okay. When you had it placed up there, did you intend for it to be placed securely?

A. Yes, sir....

Q. To your knowledge, had anyone complained or indicated that there was a problem with the brace or the scaffolding before this incident?

A. I have heard that one guy had stepped on it going up and it slipped a little. I didn't see it....

Q. So this wasn't before the accident happened, it was after the fall?

A. I heard that it happened before his fall but I didn't hear about it until after his fall....

Q. Had you seen Jacky on the job site that day?

A. I believe I did that morning.

Q. When you saw him on the job site, was there anything that you observed about Jacky that was different from any other day?

A. No, sir.

Q. By his appearance and your contact with him, did he appear to be intoxicated or under the influence of anything?

A. No, sir.

The respondents' attorney questioned Troy Wells:

Q. And this brace, it was wired to the platform?

A. It was wired to the rungs.

Q. If it was wired to the rungs then it is not in the normal progression of going up these rungs to get to the level of the scaffolding you would need?

A. Uh, no, sir.

Q. Do you know what the brace was there for? I mean, you have already said it was to keep someone from going off the end.

A. Yes, sir, but it should have been put on the inside of the scaffolding actually instead of on the outside.

Q. Okay. That makes more sense then. So you have this brace that was wired up there on the outside of some scaffolding?

A. Yes, sir.

Q. And it is not welded to anything?

A. Right....

Q. I'm assuming that it just being wired, it would be loose. Is that right?

A. Yes.

Q. And not a solid thing like a rung?

A. Right.

Q. And do you - in going up this scaffolding, does that require climbing just like on a ladder?

A. Yes, sir.

Q. So if someone had hold of that brace by one hand, wouldn't the other hand be on something else?

A. It just depends on how you do it I guess.

Q. Did you know that there were employees going to lunch and smoking marijuana while they were out on their lunch break?

A. No, sir.

The administrative law judge found, in pertinent part:

3. The respondents have proven by a preponderance of the evidence the presence of illegal drugs in the claimant's body at the time of his injury, thereby creating a rebuttable presumption that the claimant's injury was substantially occasioned by the use of illegal drugs.

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

5. The claimant has failed to prove ... that he sustained a compensable injury.

The claimant appeals to the Full Commission.

## II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) provides:

(B) "Compensable injury" does not include:

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

(b) 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 physician's orders....

(d) 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 utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

In the present matter, the claimant had worked for the respondent-employer for approximately 10 years. The claimant agreed that he occasionally smoked marijuana, including during the weekend of May 8-9, 2004, but the claimant also testified that he never smoked marijuana while he was working. The claimant testified that he did not smoke marijuana during the work week that began on Monday, May 10, 2004. There were no witnesses who observed the claimant smoking marijuana on the date of the accidental injury, May 13, 2004. Nor were there any witnesses who observed any "impairment" on the claimant's part as the result of marijuana intoxication. The claimant credibly testified that while climbing down a scaffold on May 13, 2004, "part of the scaffold come a loose and let me - turned me loose and let me fall."

In addition to the claimant, who the Commission determines was a credible witness, Troy Wells, Carl Garrett, and Jerry Shepherd all credibly testified that the "X-brace" on the scaffolding was not attached properly, and that the

improperly-attached brace was the result of the claimant's accidental fall on May 13, 2004. None of the witnesses observed the claimant using marijuana or otherwise under the influence of marijuana at any time on May 13, 2004. We note the credible testimony of Jerry Shepherd, who recalled that several employees had climbed up and down the side of the scaffolding from which the claimant fell; there was no testimony that any of the other employees were impaired or otherwise noted the loosely-attached brace. The Full Commission recognizes that the claimant was the only employee who fell from the scaffolding on May 13, 2004. Nevertheless, any assertion or finding that the claimant's fall was the result of impairment from marijuana would be based on speculation and conjecture, which can never be submitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

The Full Commission recognizes that a urine sample collected from the claimant on May 13, 2004, the date of the accident, was positive for "cannabinoids." This positive drug screen created a rebuttable presumption that the claimant's accident was substantially occasioned by the use of illegal drugs. Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996). The burden shifts to the

claimant to prove, by a preponderance of the evidence, that illegal drugs did not substantially occasion the accident. Whether the rebuttable presumption is overcome is a question of fact for the Commission to determine. Woodall v. Hunnicut Construction, 340 Ark. 377, 12 S.W.3d 630 (2000). Based on the record before us, the Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accident on May 13, 2004.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding, "The claimant has failed to prove by a preponderance of the evidence that his injury was not substantially occasioned by the use of marijuana." The Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accidental injury on May 13, 2004. The claimant proved that all of the medical treatment of record was reasonably necessary in connection with the compensable injury, pursuant to Ark. Code Ann. §11-9-508(a). The claimant proved that he remained in his healing period beginning on the date of the compensable injury and had not returned to work, so that the claimant proved he was

entitled to temporary total disability compensation from May 13, 2004 until a date yet to be determined. See, Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant rebutted the presumption that his injuries were substantially occasioned by the use of marijuana. After conducting a de novo review of the record, I find that the claimant has failed to rebut the presumption that marijuana use substantially occasioned the claimant's injury.

The claimant tested positive for the presence of Cannabinoids in his body when his urine was tested after his accident. Therefore, the presumption that the claimant's injury were substantially occasioned by the use of illegal drugs. The claimant has the burden of rebutting this presumption. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that the claimant has a long history of marijuana use. In fact, the claimant acknowledged, under oath, that he is a regular smoker of marijuana. He admitted to smoking marijuana the weekend before the accident occurred on Thursday. He also testified that he frequently rides to the store with co-workers at lunch and that these co-workers often smoke marijuana during these trips.

The evidence also indicates that the claimant's injury were caused by the claimant exercising poor judgment. Specifically, the claimant failed to follow the common, safe, practices utilized on the job site. The respondents offered the testimony of Troy Wells, the project foreman, who testified that the cross brace had been wired to the scaffold to prevent someone from walking off the end of the scaffold. Mr. Wells, as

well as the claimant's brother, Carl Garrett, testified that such a mechanism was commonly found on the scaffolding they used. In addition, Jerry Shepherd, the leadman on the job, testified that workers commonly used welded crossbars to climb the structure. His testimony indicated that the workers should recognize a variation to the structure, such as the one that gave-way with the claimant, as being different and warranting extra caution. The claimant admitted that he did not pay any attention to it. In short, had the claimant been using good perception and sound judgment he would have recognized that the brace was not a common part of the scaffolding.

The claimant denied using marijuana on the day of the accident or being around anyone who smoked marijuana on the day of the accident. However, I find that the claimant's credibility is suspect, at best. The evidence demonstrates that the claimant is not an occasional user of illegal drugs. The claimant has a long history of substance abuse. He was convicted of a felony that related to his use of marijuana when he was 19 and he candidly admitted that he is a regular smoker of marijuana. The claimant was also convicted of driving

while intoxicated during the year preceding the hearing. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. The claimant's testimony that he did not smoke marijuana on that day is not sufficient, in my opinion, to rebut the presumption.

In the present claim, the evidence shows that marijuana was present in the claimant at the time of the injury. Therefore, we begin with the assumption that the claimant's injury was substantially occasioned by the drug. The question then becomes whether the claimant's denial of using marijuana on the date of the accident is sufficient to constitute a preponderance of the credible evidence and rebut the presumption that the accident was

substantially occasioned by the use of marijuana. The Commission has previously held that such testimony is insufficient to rebut the presumption. James Sanders v. CFSI Temporary Services, Full Commission Opn. filed October 13, 1995 (Claim No. E408568).

In my opinion, the claimant's testimony that he did not smoke marijuana on the date of the accident is not enough to rebut the presumption that the claimant's accident was substantially occasioned by the use of marijuana. The claimant acknowledged that he smoked marijuana the night before and was a regular marijuana user. The claimant also admitted that he had been in a van driving with other workers who had smoked marijuana, but had not done so "on that day." Marijuana slows your reaction time. The evidence from the other workers demonstrates that the claimant should have been aware that the scaffolding had a mechanism on it that was not commonly found on the scaffolding normally used. Mr. Shepherd's testimony demonstrated that the workers should recognize a variation to the structure such as the one that gave-way with the claimant as being different and warranted extra caution at the very least. Simply put, I could not find that the claimant

successfully rebutted the presumption. Therefore, I find that the claimant has failed to meet his burden of proof and I would deny this claim.

Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner