

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305608

FREDERICK MARSHALL, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., SELF-INSURED EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

OPINION FILED AUGUST 1, 2005

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

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

Respondent represented by the HONORABLE MIKE ROBERTS,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
Modified in part.

OPINION AND ORDER

The Respondent appeals a decision of the
Administrative Law Judge filed on June 16, 2004, finding
that Claimant incurred a compensable injury as a result of a
fall at work and the award of medical and TTD benefits from
May 23, 2003, the date of the injury, until October 30,
2003, the date that he was released to light duty work.
Claimant cross-appeals for additional TTD benefits from
October 30, 2003 to a date yet to be determined, which is

the period that Respondent has not returned Claimant to work.

After conducting a de novo review of the record, we find that the Administrative Law Judge's opinion should be affirmed in part and modified in part. Specifically, we find that the award of medical treatment and finding of compensability should be affirmed because it is supported by a preponderance of the credible evidence. We find, however, that the Administrative Law Judge's award of TTD benefits should be modified because Claimant's continuing to work a long-held side job does not disqualify him from TTD benefits. See Wal-Mart, Inc. v. Westbrook, infra.

The ALJ found that Claimant suffered a compensable injury arising out of and in the course of his employment and supported by objective medical findings, specifically muscle spasms, head contusion and swelling of the spinal cord. The Administrative Law Judge also found that Claimant had overcome the rebuttable presumption that his accident was substantially occasioned by the use of drugs. After reviewing the video tape of Claimant's injury and the record, we find that the Administrative Law Judge's findings regarding compensability should be affirmed in all respects. We affirm the following findings of fact and conclusions of law entered by the Administrative Law Judge:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The Respondents have proven by a preponderance of the evidence the presence of illegal drugs in the Claimant's body, thereby creating a rebuttable presumption that the Claimant's injury was substantially occasioned by the use of illegal drugs.
4. The Claimant has proven by a preponderance of the evidence that his accident was not substantially occasioned by the use of prescription drugs in contravention of doctor's orders.
5. The Claimant has proven by a preponderance of the evidence that his accident was not substantially occasioned by the use of illegal drugs.
6. The Claimant has therefore overcome the rebuttable presumption established by Ark. Code. Ann. §11-9-102(4)(B)(iv)(b).
7. The Respondents have failed to prove by a preponderance of the evidence that the Claimant's fall was idiopathic.
8. The Claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment, caused by a specific incident and identifiable by time and place of occurrence.
9. The Claimant has proven by a preponderance of the evidence that his injury caused internal or external physical harm to the body which required medical services, and that his injury is established by medical evidence supported by objective findings.
10. The Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on May 23, 2003.

The Respondent's theory of the claim is that the Claimant had a seizure or a fainting spell and fell to the ground, due to the combined effect of getting too hot and his supposed misuse of prescription medication. The Claimant testified that he was not hot, that he had taken his medication as directed, and that his fall was caused from losing his grip on the pallet jack he was pulling out of the trailer. The Respondent's theory is based almost entirely on the notes and report of Dr. Robert Fry, the emergency room physician who treated the Claimant first. After reviewing the record and the videotape of the accident, we feel that Dr. Fry's notes and reports should not be given much weight.

The video initially shows Claimant in a bent position with his arms in front of him. Claimant then falls straight backward landing with his feet near the doorway and head away from the door. Though his upper body is blocked from view by boxes, his legs remain perfectly still for several minutes until coworkers assist him and the boxes are eventually moved. His body remained still until paramedics arrive and transport him. Like the Administrative Law Judge, we did not observe any seizure like activity.

Under the Arkansas Workers' Compensation Act the definition of a compensable injury 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 statutory presumption set forth does not quantify the term "presence"; therefore, an intoxicant is present whenever any amount of the intoxicant is revealed, no matter how small. Flowers v. Norman Oaks Construction Co., 341 Ark. 474, 17 S.W.3d 472 (2000). Testing positive for marijuana metabolites - that is, cannabinoids - is sufficient to raise the statutory presumption. Wood v. West Tree Service, 70 Ark. App. 29, 14 S.W.3d 883(2000); Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584(1996).

Cannabinoids were detected in the Claimant's urine in a test taken ten days after the accident. It does not appear that the courts or the Full Commission have determined whether a drug test that was administered that long after an accident is sufficient to raise the rebuttable presumption. Precedent suggests that such a lapse of time will not bar the creation of the rebuttable presumption, but the lapse may be considered in determining whether the

rebuttable presumption has been overcome. See, Circy v. Townsends, Inc., A.W.C.C. E810120 (Jan. 14, 2000); Morrilton Manor v. Brimpage, 58 Ark. App. 252, 952 S.W.2d 170 (1997). Act 796 of 1993 requires the Commission and the courts to strictly construe the provisions of the Workers' Compensation Act. Ark. Code Ann. §11-9-704(c) (3). The intoxication statute does not require that a drug test be given within a certain period of time, nor does it limit the meaning of "presence" to mean "presence at the time of the injury." It says only that the mere "presence" of an intoxicant is sufficient to create the presumption. Ark. Code Ann. §11-9-102(4) (B) (iv) (b). The presence of the cannabinoids in the Claimant's urine is enough to create a rebuttable 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 (1998). 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" is that there must be a direct casual link between the use of alcohol or illegal drugs and the injury for the injury to be compensable. Id.

As indicated above, the Claimant's testimony corroborates what is seen in the videotape of the accident. We would agree with the Administrative Law Judge that the Claimant seems very credible. There is no evidence to support a contention that the Claimant was impaired by marijuana at the time of the accident. The Claimant has overcome the rebuttable presumption established by Ark. Code Ann. §11-9-102(4)(B)(iv)(b).

The Respondents contend in the alternative that the Claimant sustained an idiopathic injury. The word "idiopathic" is defined as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause. Unexplained-fall cases begin with a completely neutral origin of the mishap, while idiopathic-fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution

to offset the prima facie showing of personal origin. Moore v. Darling Store Fixtures, 22 Ark. App. 21, 732 S.W.2d 496(1987). Injuries from idiopathic falls do not arise out of the employment unless the employment contributed to the risk or aggravates the injury. Id.

There is no evidence to support a theory of an idiopathic injury. The doctor's report from the emergency room on the day of the accident is full of speculation and conjecture. The Respondent's have failed to prove by a preponderance of the evidence that the Claimant's fall was idiopathic.

The Claimant's testimony and the videotape of the accident are sufficient to prove by a preponderance of the evidence that the Claimant sustained an injury arising out of and in the course of employment, caused by a specific incident and identifiable by time and place of occurrence. The medical records are sufficient to prove by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services, and that the injury is established by medical evidence supported by objective findings. The Claimant has successfully proven each element of a compensable injury and has overcome the rebuttable presumption that his accident was occasioned by the use of

drugs; therefore, the Claimant has shown that the injury sustained on May 23, 2003 was a compensable injury.

As for TTD benefits, the Administrative Law Judge's award should be modified because Claimant is entitled to these indemnity benefits after October 30, 2003. The Administrative Law Judge awarded TTD benefits from May 23, 2003 until October 30, 2003 when Dr. Nazer Qureshi released Claimant to light duty. Claimant testified that when he presented the release to Cindy Brown, Respondent's store manager, she told him that Respondent did not have a job available for him within his limitations. Claimant testified that he did not try to work anywhere else because he did not want to jeopardize his position with Respondent. Claimant testified at the hearing that he was still on medical leave from his employment with Respondent. (R. 54). Claimant also gave testimony that he continued to mow yards, which he had done for several years prior to the fall, to earn extra money:

Q: Now, Mr. Marshall, you discussed mowing these yards and you did this before this accident, right?

A: Yes.

Q: And in fact, from my understanding you have been doing it for at least a few years before your alleged accident at Wal-Mart?

A: Yes.

Q: And you told us Ms. Mcullough in your deposition that you actually had regular customers that you routinely cut their yards?

A: Yes.

Claimant also explained that he would spend two to three hours mowing a yard from time to time and that he did not mow yards eight hours a day. (R. 27, 37-8).

We find that Claimant's continued participation in his side job of mowing yards after the accident does not jeopardize his right to TTD benefits for the period following October 30, 2003. The facts here are analagous to Wal-Mart, Inc. v. Westbrook, 77 Ark. App. 167, 172, 72 S.W.3d 889 (2002), where the court held that a Claimant's continuation of his work as a minister within the disputed TTD period did not forfeit the Claimant's right to those benefits:

Appellants argue that because appellee worked as a minister and received full pay, he was not totally incapacitated from earning wages, and thus, appellee failed to establish that he was entitled to temporary total disability benefits from February 7, 2000, to April 24, 2000. We note that "[t]emporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages." Arkansas State Hwy. & Transp. Dep't. v. Breshears, 272 Ark. 244, 247, 613 S.W.2d 392, 393 (1981). "Disability' means incapacity because of compensable injury to earn, in the same or any other employment, the wages which

the employee was receiving at the time of the compensable injury. . . ." Ark. Code Ann. § 11-9-102(8) (Repl. 2002). However, while appellee was able to earn wages as a minister during that period, as we explained in Stevens v. Mountain Home Sch. Dist., 41 Ark. App. 201, 203-04, 850 S.W.2d 335, 336 (1993), for the purpose of defining disability, "any other employment' means any other employment in lieu of the one in which the employee was injured." Because appellee was working both jobs when he was injured, his job as a minister was not "any other employment" undertaken in place of his employment at Wal-Mart. Accordingly, we affirm the Commission's award of temporary total disability benefits.

Here, the Administrative Law Judge held that Claimant's ability to mow yards after October 30, 2003, was evidence that he was not "totally incapacitated from earning wages." According to the court's analysis in Westbrook and Stevens, however, where a Claimant is working both jobs at the time of the injury, the secondary job is not 'any other employment' undertaken in place of his employment with the Respondent and this continued employment does not apply to "totally incapacity" analysis. The record undisputedly shows that Claimant has mowed lawns for income in the years preceding the injury and at the time of the injury. Therefore, we find that the Administrative Law Judge's holding regarding TTD should be modified, because Claimant continuing to engage in his side job of mowing yards after

October 30, 2003 does not disqualify him from receiving TTD benefits after that date. Accordingly, we find that Claimant is entitled to TTD benefits from May 23, 2003 to a date yet to be determined.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the Claimant's injury occurred after July 1, 2001, the Claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715(Repl. 2002). Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W. 3d 463 (2002).

Since the Claimant's injury occurred after July 1, 2001, the Claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, Claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. At the time of his alleged accident, the claimant was unloading merchandise from a transport trailer onto a pallet jack. The claimant alleges that he was walking backwards through the doorway of the transport trailer into the dock area when the pallet jack he was pulling failed to clear the top of the trailer. "It just stopped," the claimant stated, "hit the top, and jarred me loose." This event allegedly caused the claimant's hands to jar loose, which in turn, caused him to fall backwards striking his head and rendering him unconscious. The claimant next recalls waking up in the emergency room of Wadley Hospital, where Dr. Robert Fry noted that the claimant had suffered a seizure. Dr. Fry concluded that the claimant had not been taking his thyroid medication, that he had come back on a full dose too quickly, and that this likely resulted in a

"dysrhythmic problem."

Arkansas Code Annotated § 11-9-102, in relevant part, requires that the claimant prove by a preponderance of the evidence that he sustained an accidental injury as a result of a specific incident identifiable by time and place of occurrence, which caused internal or external harm, arose out of and in the course of his employment, and which either required medical services or resulted in disability or death. Thus, in order to prove a compensable injury, the claimant must prove among other things, a causal relationship exists between the injury and the employment. McMillan v. U.S. Motors, 59 Ark. App. 85, 953 S.W.2d 907 (1997). The burden of proof is on the claimant to show that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. Moore v. Darling Store Fixtures, 22 Ark. App. 21, 732 S.W.2d 496 (1987). Moreover, courts generally have held that when a claimant suffers from an unexplained injury, it is compensable; whereas when a claimant suffers from an idiopathic injury, it is not. Little Rock Convention & Visitors Bureau v. David Pack, 60 Ark. App. 82 (1997); 959 S.W.2d 415(1997). Unlike an unexplained injury, an "idiopathic" injury is generally not compensable because it is personal in nature and therefore

does not arise out of or in the course of employment. See generally, ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998; Little Rock Convention and Visitors Bureau v. Pack, 60 Ark. App. 82, 959 S.W.2d 415 (1997). Finally, pursuant to Ark. Code Ann. §11-9-102(4)(B)(iv)(a), the definition of a compensable injury under the Arkansas Worker's Compensation Act excludes any injury "substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." Furthermore, the presence of any such intoxicant creates a rebuttable presumption that the injury or accident was substantially occasioned by" the use of such substances. Ark. Code Ann. §11-9-102(4)(B)(iv)(b). An intoxicant is "present" whenever any amount of the intoxicant is revealed, no matter how small. Flowers v. Norman Oaks Construction Co., 341 Ark. 474, 17 S.W.3d 472 (2000). Moreover, testing positive for marijuana metabolites - that is, cannabinoids - is sufficient to raise the statutory presumption. Wood v. West Tree Service, 70 Ark App. 29, 14 S.W.3d 883 (2000); See also, Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996).

It is undisputed that the claimant was injured on the date in question. However, the record indicates that the claimant's injury sustained on May 23, 2003, was the result

of an idiopathic fall which was occasioned by the use of prescription drugs taken in contravention of a doctor's orders. First, the medical record reveals that on the day of the injury, the claimant informed emergency room personnel that he had taken a double dosage of Celebrex, as well as a full dose of thyroid medication, which he had stopped taking over a month prior to his fall. The emergency room records indicate that the combination of the claimant's medication, enlarged ventricle, and hot working environment likely led to a dysrhythmic problem which caused the claimant to become dizzy and pass out. Dr. Fry's emergency room report reiterates that the claimant suffered from seizure activity at the time of his fall. Furthermore, on the next day following his alleged accident, the claimant reported to the emergency room with complaints of pain between his shoulder blades. The claimant initially insisted to ER personnel that the pain medication prescribed to him the previous day was not working and that he needed a shot for pain. After somewhat persistent inquiry, the claimant finally admitted to ER personnel that he had not filled his prescription for pain medication. In his emergency room report, Dr. Morgan M. Rozenboom wrote the following:

When I inquired about the medication he got that wasn't working, he, in fact, never filled it. I asked him how he could tell me his medicine wasn't

working when he never went and got it filled and he said he just didn't have enough time to get it filled. Nonetheless, he is back wanting a shot.

In addition, Dr. Rozenboom reported that the claimant had gotten too hot, become dizzy and weak, and that this may have caused him to pass out on the previous day.

In my opinion, a review of videotaped footage of the actual event in question supports a conclusion that the claimant may have been unconscious, or at least semi-conscious, for several minutes after he fell. However, in contradiction to the claimant's testimony, the claimant was reportedly awake and alert upon his arrival to the emergency room. Moreover, it is impossible to determine from the tape whether the claimant was jarred loose from the pallet jack as he alleges. In fact, the tape offers very little in terms of conclusive evidence regarding the exact nature and cause of the claimant's fall.

The weight of the evidence, including the objective medical evidence, indicates that the claimant has failed to prove by a preponderance of the credible evidence that his injury was occasioned by a series of events as described in his testimony. Rather, the credible evidence presented in this claim supports Dr. Fry's emergency room analysis of the incident:

The picture as best I can tell is one of someone who had been low on thyroid because he has not been taking his medication, came back on it and came back on a full dose too quickly and went into a hot working environment and with a big left ventricle it is likely that the had a dysrhythmic problem.

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). Although the claimant repeatedly testified that he "can't recall" having told Dr. Fry specifics about his prescription drug usage on the day in question, it is reasonable to conclude that such information is vital to the proper treatment of patients, especially in an emergency situation. Finding no logical reason why Dr. Fry would open himself up to liability by making false representations about the claimant's state of consciousness or the claimant's statements to him regarding his medication usage, I find that the claimant's testimony concerning this issue is not credible. Based upon the medical record, it is more likely than not that the claimant confessed to Dr. Fry that on the date of his alleged accident he had not taken his thyroid medication and his Celebrex as prescribed. Therefore, based upon information provided to him by the claimant, Dr. Fry

came to a logical medical conclusion about events precipitating the claimant's alleged accident. In addition, the medical reports do not show that the claimant revealed his past history of marijuana use to Dr. Fry. This omission also weighs heavily against the claimant's credibility. More specifically, the claimant's urine sample taken June 2, 2003, tested positive for cannabinoids. Although the claimant admitted in testimony that he has smoked marijuana in the past, he testified that the positive result was due to his recent exposure to marijuana while visiting a friend a few days after the accident. No testimony was offered to corroborate the claimant's story. Because a drug screen was not performed contemporaneously with the alleged accident, however, the presumption that the claimant's alleged accident was occasioned by the use of marijuana does not necessarily arise in this instance. However, as previously stated, the fact that the claimant's urine screen was positive for cannabinoids ten days after his accident, regardless of his explanation as to why, combined with the claimant's admission that he has used marijuana in the past weighs against his credibility and it speaks to his misuse of drugs in general. Moreover, the claimant's emergency room admissions concerning his misuse of prescription medications on the day of the alleged accident, plus his admission the

following day to emergency room personnel that he had not filled his medication as prescribed, supports the conclusion that the claimant has a propensity to use prescription medication in contravention to the prescribing doctor's orders. To illustrate, the following is hand-written under Physician's Notes in the Emergency Department Record dated May 24, 2003:

Fill your medication [and] take as discussed.

From this it appears that even the claimant's attending physician recognized his tendency not to take his medication as prescribed.

Finally, on May 5, 2004, Dr. James Spence wrote:

Mr. Frederick Marshall presented to my office on February 25, 2004, following an injury he sustained on May 23, 2003 while working at Wal-Mart. Mr. Marshall stated that he was unloading a truck of merchandise when he became dizzy from getting too hot. He assumed he had passed out and fallen backwards, because when he regained consciousness he was lying on the floor.

Certainly the above account of the claimant's accident, as obviously told to Dr. Spence by the claimant, varies greatly from the account of his accident that the claimant gave during his hearing. In addition, this account of events more closely matches those explanations contained

within the emergency medical records, with the exception of the claimant's admissions concerning his prescription medication usage on the day of the event.

Based upon the above and foregoing, I find that the claimant has failed to overcome the rebuttable presumption that his accident was occasioned by his misuse of prescription medications. Furthermore, the record clearly demonstrates that the claimant's misuse of Celebrex and his thyroid medication led to his becoming dizzy and passing out. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that his fall at work on the day in question was work related.

I further dissent from the majority opinion awarding additional temporary total disability benefits. The claimant alleges that he is unable to return to work, yet readily admits to mowing lawns for compensation since his injury. In other words, the claimant has demonstrated that he is physically capable of engaging in strenuous physical labor since his accident of May 23, 2003. Moreover, the claimant testified that the reason he did not begin to mow lawns sooner after his accident, is due to the fact the it was winter time and there were no lawns to mow. Finally, the claimant admitted that prior to his employment with the respondent employer, he was self-employed in the lawn care

industry. Therefore, by his own actions and admissions, the claimant has failed to prove that he was, or ever has been, totally incapacitated from earning wages after his accident of 2003. Strict constriction of the Workers' Compensation laws requires a finding that the claimant is not totally incapacitated from earning wages. In my opinion, this claim is distinguishable from Wal-Mart v. Westbrook, 77 Ark. App. 167, 72 S.W3d 889 (2002). The claimant's second job as a minister in Westbrook was not a physical job. Thus while Westbrook was able to continue his job as a minister which called for utilization of his mental capacities rather than his physical abilities, there was no evidence that he was restricted by his compensable injury from carrying on in the second job. However, in the present claim, the claimant was restricted from returning to his job as a truck unloader lifting greater than 15 pounds, yet he performed his second job mowing lawns which in and of itself is a physically demanding job. Thus, it cannot logically follow that if the claimant is not incapacitated from returning to work in this physically demanding job of mowing lawns, that he is incapacitated from his job with respondent. Accordingly, strictly construing the Act, I find that the claimant has failed to prove by a preponderance of the evidence that he was temporarily totally disabled after his release to return

to light duty on October 30, 2003. Because the claimant has failed to meet his statutory requirement for receiving temporary total disability benefits, these benefits should be denied regardless of a finding of compensability, with which I would not agree. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner