BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308394

GEORGIA SHOE, EMPLOYEE	**CLAIMANT**
CUSTOM-PAK, INC., EMPLOYER	**RESPONDENT**
TRISSEL, GRAHAM & TOOLE, INC., TPA	**RESPONDENT**

OPINION FILED JULY 12, 2005

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

Claimant represented by HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents from a decision by an Administrative Law Judge filed on November 8, 2004, finding, in relevant part, that the claimant has overcome the rebuttable presumption that her work related injury was substantially occasioned by the use of illegal drugs. More specifically, the Administrative Law Judge found that even though the claimant's post-accident drug test was positive for the presence of marijuana (THC) metabolite, the claimant

proved that she was not under the influence of this drug at the time of her accident.

Our carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to overcome the rebuttable presumption that her injury of July 31, 2003, was substantially occasioned by the use of an illegal drug. Therefore, the decision of the Administrative Law Judge is hereby reversed and this claim is denied and dismissed.

The claimant sustained a left open wrist fracture on July 31, 2003, when she failed to shut down and lock out a CP72 molding machine before attempting to remove plastic flashing that had become tangled in the conveyor belt. The claimant was transported by ambulance to Lawrence Memorial Hospital, where she received emergency medical treatment for her injury. Thereafter, the claimant was transferred to St. Bernard's Regional Medical Center, where she underwent surgery on her left wrist performed by Dr. Brian Dickson. The claimant was discharged from the hospital without complications on August 1, 2003. Later reports from Dr. Dickson reveal that the claimant experienced difficulty

in healing from her wounds, possibly because of her continued smoking.

Hospital records from St. Bernard’s indicate that the claimant denied any drug use. Furthermore, a clinic note from her follow-up treatment with Dr. Dickson on August 6, 2003, indicates that the claimant denied any drug use. However, the results of the drug test conducted on July 31, 2003, at the emergency room of St. Lawrence Hospital, revealed positive for marijuana (THC) metabolite. In accordance with published company policy, the claimant’s employment was terminated and further medical benefits for her injury were controverted.

The claimant’s co-worker and “coach”, Ms. Teresa Oglesby, accompanied the claimant to the hospital after her injury. Ms. Oglesby testified that the claimant confided to her at that time that she feared losing her job because she could not pass a drug test. Another witness, Office Manager, Lynn Curtis, testified that during their first conversation concerning the claimant’s post-injury drug test, the claimant denied ever having used marijuana. Ms. Curtis stated that the claimant explained that she had been exposed to marijuana use, but that she had not personally used

marijuana. Ms. Curtis testified that during a subsequent conversation with the claimant regarding her termination and denial of benefits, the claimant commented that she "knew when they saw her drug screen" that she would not receive medical benefits in association with her injury. Furthermore, the claimant admitted that she did not tell her co-workers that she smokes marijuana on a regular basis for fear that she would be fired. The claimant admitted that she told Ms. Oglesby that she could not pass her drug test. The claimant also admitted having lied to Ms. Curtis about her drug use.

> I told her I did not smoke it [marijuana]. I tried to tell her it was a contact high. I tried to save my job.

In regards to her drug use in general, the claimant testified that she smokes marijuana on the weekends with her husband, and that smoking marijuana "relaxes her." Moreover, the claimant testified that she "felt fine" even after smoking "one or two" marijuana cigarettes. The claimant denied that smoking marijuana impairs her judgement or impedes her ability to discharge her work duties in a safe manner. The claimant's testimony concerning why she did

not turn the conveyor belt off prior to trying to remove the lodged plastic, however, contradicts these assertions. For example, the claimant testified:

> I don’t know why I didn’t do it this time. ... One of those split second decisions, I guess. ... Sometimes I just don’t think.

Although the claimant insisted that she only smokes marijuana on the weekends, she confessed that she understood that she would not receive worker’s compensation benefits if she admitted to drug use during the work week.

The record, including the testimony of Ms. Curtis and copies of company policy concerning drug use and safety violations, confirms that the claimant knowingly violated company policy in regard to the use of illegal drugs and the proper use of machinery.

> Q. So as I - - as we sit here today, do you agree with me that what you were doing that night [July 31, 2003] was contrary to what you were trained to do.
>
> A. Yes, sir.
>
> Q. Contrary to company policy?
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> A. Yes, sir.

> Q. And the two things that were contrary to company policy were smoking marijuana and then not turning the conveyor off?
>
> A. Yes, sir.
>
> Q. And you knew that when you went into work that morning that if you had a drug test, you would have tested positive, because you knew you still had marijuana in your system?
>
> A. Yes, sir.

Prior to the passage of Act 796 of 1993, it was the employer's burden to prove that an employee's accident was caused by intoxication or drug use. Express Human Resources III v. Terry, 61 Ark. App. 258, 968 S.W.2d 630 (1998). However, Act 796 of 1993 shifted this burden of proof by requiring the employee to prove by a preponderance of the evidence that alcohol or drug use did not substantially occasion the injury, if alcohol or drugs were found in his body after an accident. Id. Arkansas Code Annotated section 11-9-102(4)(B) (Repl. 2002 & Supp. 2003) denies 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." The Commission is required to determine whether the appellant has met her burden of proof in rebutting the presumption. Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996). Moreover, whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Id.

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). Furthermore, 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 record reflects that the claimant openly admitted that she lied about her drug use in order to “save her job.” The record further reflects that the claimant made a deliberate choice to smoke marijuana knowing that it was strictly against company policy and could result in her termination. Moreover, the claimant confessed that she uses a significant amount marijuana on a routine basis. Aside from the established fact that the claimant was willing to

lie in certain situations, the fact that she routinely engaged in illegal drug use severely diminishes her credibility; and because the claimant's testimony represents the only first-hand testimony regarding her drug use, her credibility is crucial. For example, among other things, the claimant would have the Commission believe that she had not smoked marijuana since the weekend prior to her accident. Further, the claimant would have the Commission believe that fatigue from long work hours with little rest attributed to her decision to violate company policy: specifically, not shutting down and locking out of her machine before trying to remove tangled plastic. The claimant would have the Commission believe these assertions, in spite of her admissions otherwise. For example, by her own admission, the claimant knew that it was mandatory for her to lock-out of her machine before trying to remove the plastic flashing, and that failure to do so could result in termination. Further, the claimant knew that she was subject to drug screening and that a positive result could result in termination. In addition, after having admitted to Ms. Oglesby that she had used marijuana, she later lied to Ms. Curtis in order to avoid being fired. The claimant

testified that she was aware that a person may test positive for marijuana for several weeks after use. In addition, the claimant knew that her worker's compensation benefits depended upon her testifying that she had not used marijuana in close temporal relation to her injury. In summary, the claimant has proven herself to be a situational liar, and her testimony is, therefore, not credible. Furthermore, the claimant has failed to present evidence that she had not smoked marijuana in close temporal relation to her injury. However, the evidence conclusively establishes that the claimant had marijuana metabolites in her system prior to her injury. Therefore, the claimant has failed to rebut the presumption that her injury was causally related to her use of illegal drugs.

Despite argument to the contrary, short of a life and death situation, there is no "credible" reason to violate safety procedures. Safety procedures are implemented in order to avoid needless injuries to employees, such as the one sustained by the claimant. The fact that the claimant made the conscious decision to violate company policy, knowing the possible consequences of her actions, shows that her judgment was impaired at the time of her

injury. Furthermore, the claimant admitted that she smoked marijuana routinely on the weekends, and that she often removed the flash material without properly shutting down the machine. This regular lack of good judgement on the claimant's part suggests that her reasoning skills were often impaired, likely as a result of her admitted routine use of marijuana.

Claimant argues that she had been working a substantial period of time preceding the incident of July 26, which caused her to suffer from fatigue. Claimant contends that fatigue, and not the influence of marijuana, was the main reason for the claimant's failure to shut down her machine properly. This argument fails, primarily because the claimant was accustomed to working the graveyard shift, that having been her normal shift for nearly three years. Furthermore, the claimant testified that she routinely worked from 11 p.m. through 7:20 a.m., each day of her shift. Therefore, the claimant had the opportunity to go home and rest between each shift.

Finally, the claimant testified that it was common for her to pull flashing out of the machine "50 times or more" per each shift. The claimant further testified that,

contrary to company policy, employees generally did not stop the machine in order to pull out lighter pieces of flashing. Therefore, we could easily attribute the claimant’s failure to shut down her machine before attempting to remove the flash material as reckless disregard for company policy. The fact remains, however, that the claimant tested positive for marijuana contemporaneously with her accident. In addition, the claimant admitted that she smoked marijuana at home on a regular basis, and she had the opportunity to go home between each shift.

Based on the evidence presented in this case, we find that the claimant has failed to overcome the rebuttable presumption that her accident was occasioned by the use of illegal drugs. Therefore, for all of the reasons stated herein, we find that the decision of the Administrative Law Judge is hereby reversed and this claim denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority reverses the Administrative Law Judge’s decision finding that the claimant suffered a compensable injury and would be entitled to receive temporary total disability benefits from August 1, 2003, until the expiration of her healing period and return to work. More specifically, the Majority reverses the Administrative Law Judge’s finding that the claimant’s injury was not substantially occasioned by the use of illegal drugs. I find that the claimant has overcome the rebuttable presumption that her injury was substantially occasioned by the use of illegal drugs. Therefore, I respectfully dissent.

The claimant worked as a machine operator for the employer. The claimant’s job required her to, on occasion, remove flash, which is excess plastic, from the machine. This would involve pulling the flashing out of the top of the conveyor belt and could occur up to 50 times per shift. The employer had a safety policy in place requiring workers to shut down the machines prior to removing the flash,

however, on occasion that policy was not followed in deference to time considerations. Primarily the claimant would pull lighter weight flash without stopping the machine, but would stop it to pull out heavier, flash.

The claimant worked from 11:00 p.m. to 7:20 a.m. on Sunday through Friday morning. On Saturday, July 26, 2003, on her scheduled day off, the claimant smoked marijuana. The claimant had smoked marijuana on other days she was not scheduled to work, but had never smoked it at work.

On Thursday, July 31, 2003 the claimant went to work early because she was responsible for training another worker. At around 6:25 a.m., the claimant attempted to untangle a piece of flash. She did not shut the machine down. Her left hand slipped as she was removing the flash and as a result, her hand was caught in the machine. The claimant immediately told the operator next to her to stop the machine, but she had already sustained a broken wrist with a fracture.

Teresa Oglesby, employer coach, took the claimant to the hospital. On the way, the claimant told Oglesby that she knew she had marijuana in her system. She also told

Oglesby that she was not a, “good person on the weekends.” When admitted to the hospital, no medical personnel made any notation that the claimant appeared to be under the influence of drugs. There is also no indication that the claimant told medical personnel she was under the influence of marijuana at the time of the injury. The claimant submitted to a drug test. It was positive for marijuana.

An investigation of the injury occurred and the claimant readily admitted she had violated the safety policy by failing to stop the machine before removing the flash. After finding out she had failed the test, the claimant told Ms. Curtis that she had not smoked marijuana and that she had a “contact” high from being around someone else that smoked marijuana. The claimant was informed that she would still be discharged due to testing positive for illegal drugs.

The Majority finds that the claimant is not a credible witness and that her conscious violation of the safety policy and drug testing policy is sufficient evidence to support a finding that her injury was substantially occasioned by illegal drug use.

In this instance, there is no dispute that the claimant bears the burden of rebutting that her injury was substantially occasioned by the use of drugs or alcohol. However, the Majority finds that the claimant did not rebut the presumption. I find that the claimant did rebut the presumption and that her injury was not substantially occasioned by the use of alcohol or drugs.

First, the Majority finds that the claimant's violation of policy indicates that her injury was substantially occasioned by the use of alcohol or drugs. I find that the two have no correlation. While I do not dispute that the claimant violated the employer's drug testing policy and safety policy, that does not indicate that she was under the influence of drugs at the time of her injury or that her prior use of marijuana in any way caused or contributed to the accident. As the claimant credibly testified she did not smoke in the days preceding the accident, and the employer has not offered any proof that the claimant was under the influence of illegal intoxicants at the time of the injury or that her prior drug use contributed to the accident, I find that the claimant's injury was not substantially occasioned by the use of drugs.

The claimant testified that she used marijuana on the weekends but not during the work week. The claimant admitted telling Oglesby that she used marijuana on the weekends. Oglesby further testified that there is a, "no tolerance" policy with regards to drug testing. The claimant admits she was aware that she would be discharged due to violating the drug testing policy and admits she told Oglesby she smoked on the weekend. The claimant further testified that she was aware that the marijuana would stay in her system for 30 to 60 days after ingesting it. The claimant's statements to Oglesby were in direct conflict to her own best interest, and indicate the claimant was aware she would likely be discharged for violating the drug testing policy. Despite this, and the fact that Oglesby was a "Coach" and presumably in a managerial position, she confided in her, indicating that her statements to Oglesby were likely truthful, despite the claimant's later, contradictory statement to Curtis that she did not smoke marijuana. I find that the claimant likely made that statement to Curtis in a last ditch effort to save her job and that her statement in no way diminished her other testimony.

The respondent argues that the claimant’s own uncorroborated and contradictory testimony is insufficient to adequately rebut the presumption that her injury was substantially occasioned by the use of drugs. I find that the claimant’s testimony is corroborated by testimony regarding her behavior and the medical reports. It is unrefuted that as soon as the claimant’s wrist got caught in the machine she told another worker to stop the machine, indicating she was not impaired. Additionally, the medical reports fail to mention any type of impairment of the claimant. In fact, the report taken from the date of the incident indicates the claimant is, “alert,” and notes no sensory or motor deficits.

Furthermore, the claimant was accompanied by Oglesby to the hospital, yet Oglesby provided no testimony indicating that she observed any unusual behavior on the part of the claimant. The claimant also spoke with Curtis at the hospital and Curtis did not provide any testimony indicating she believed the claimant was impaired. Since Curtis was ultimately the person that discharged the claimant for failing the drug screen, I find that she likely would have testified as to any unusual behavior on the part

of the claimant at the time of the hearing; particularly since she had already received the drug test results. An investigation was performed regarding the injury and the claimant was training someone on the date of her injury, indicating it is unlikely that the claimant would have been able to smoke marijuana without that person's knowledge or without exhibiting any signs of impairment. Furthermore, no other employees provided any testimony that the claimant seemed impaired, indicating that is likely due to no one witnessing such behavior.

With regards to the Majority's finding that the claimant's violation of the safety policy indicates she was impaired, I find that violation of a policy on one occasion does not warrant such a finding, particularly when the claimant is near the end of her shift, and when the claimant provided a credible reason for violating the policy.

The claimant testified that while it is against the policy to remove, "flash" without stopping the machine, she often did so in order to reduce her production time. The claimant further indicated that she made a "split decision" to remove the flash without stopping the machine. Both of these explanations are plausible explanations of why any

employee would consciously violate the safety policy while **not** impaired.

The respondent argues that the employer did not tolerate safety violations and that other employees did not employ the same methods used by the claimant. As such, I find it curious to note that the claimant was not discharged immediately after her injury, which is when she first admitted to violating the safety policy. In fact, Curtis waited three days after learning of the violation to get the drug test results and only then did she discharge the claimant.

The respondent relies on three cases in supporting its position. Though the Majority does not specifically rely on any of the three cases, I will nonetheless address them. The respondent first relies on ERC Contractor Yard & Sales v. Robertson, 35 Ark. 63, 977 S.W. 2d (1998). The respondent argues that ERC stands for the proposition, that,

> "the claimant must present medical reports, testimony by his supervisors and treating physicians to support the conclusion that the injury was not substantially occasioned by the use of illegal drugs or alcohol as opposed to the Claimant's own corroborated testimony."

First and foremost, I find that ERC, in no way **requires** that the claimant provide testimony of physicians, supervisors, and corroborative medical reports to overcome the rebuttable presumption. Instead, it indicates those were merely factors the Court considered in that particular case.

In ERC, the claimant was a construction worker that fell from scaffolding some 10 to 15 feet in the air. An alcohol test was given after the injury and one of the doctor's at the hospital noted that the claimant had a slight smell of alcohol on his breath. The claimant's blood tested as having a blood-alcohol content of less than .01%. The employer argued the fall was due to a seizure caused by alcohol withdrawal. The court found that due to the presence of alcohol in the claimant's blood, the claimant had to overcome the rebuttable presumption that his accident was not substantially occasioned by the use of alcohol. The court went on to find that the claimant had over come that hurdle. In a supplemental opinion, Judge Judith Rogers, indicated that the claimant's testimony that he had not consumed alcohol near the time of the injury was corroborated by other witnesses and that the claimant had a low blood alcohol level. Id.

In the aforementioned case, I fail to see any language indicating that the claimant would be required to, "present medical reports, testimony by his supervisors and treating physicians," in order to overcome the rebuttable presumption. Furthermore, in this instance the claimant's medical reports show no visible sign of impairment after the time of injury and the employer presented no witnesses indicating the claimant appeared to be impaired which both corroborate the claimant's testimony that she did not smoke during the days preceding the accident.

The respondent next relies on Woodall v. Hunnicutt Construction, 340 Ark. 377, 12 S.W.3d 630 (2000). In Woodall, the claimant was working on a "rickety" scaffold and fell. The claimant tested positive for cocaine metabolites. At the time of the hearing, the claimant admitted to smoking crack cocaine the night before the incident. The Court affirmed the Commission's decision to find that the claimant had not rebutted the presumption created by §11-9-102(5)(B)(iv)(b).

I find that the facts of Woodall are substantially different than the ones in the present case. In Woodall the claimant admitted to smoking crack cocaine the night before

his injury, indicating the time of his ingestion of drugs was very close to the time of the accident and was likely the reason for his injury. Whereas, in the case presently before the Commission, there is no evidence indicating that the claimant smoked marijuana anytime in close temporal relationship to her injury. Furthermore, I note in the present case the claimant tested positive for marijuana, a drug known to stay in the system for lengthy periods of time, whereas in Woodall, the Court was dealing with crack cocaine.

Lastly the employer relies on Flowers v. Norman Oaks Construction Co., 341 Ark. 474, 17 S.W. 3d 472 (2000). In Flowers, the claimant was framing a house and fell off scaffolding. The claimant admitted to drinking six to eight beers the night before and testified he quit drinking around 11:00 or 11:30 p.m. A paramedic noted the odor of alcohol on the claimant after the accident. Another witness indicated that he had, in the past, seen the claimant carrying beer in his coat at work and said that he had found empty beer cans of the same brand at the work site. The Arkansas Supreme Court found that the claimant’s accident was substantially occasioned by the use of alcohol. In supporting this finding

the Court noted that the claimant had admitted to drinking the night before, that the paramedics noted the claimant smelled of alcohol, and that another worker said he found between six to 12 beer cans on the job site days after the accident. Id.

I find that the facts of Flowers are also far different than the facts in the present case. In the present case there is no evidence that the claimant was engaging in ingesting intoxicants while at work. Additionally, the claimant did not admit to ingesting marijuana anytime close in proximity to the time of her incident. Furthermore, there is no evidence that the medical personnel or those that were around the claimant after the time of the incident had reason to believe the claimant was under the influence of intoxicants.

I find the case of Express Human Resources III v. Terry, 61 Ark. App. 258 (1998) to be similar to the present case. In Express the claimant was injured when he was walking forward and fell through a hole. At the time of the injury the claimant had worked seven days straight and was on his twenty-eighth hour of overtime. The accident occurred after the claimant had been at work for approximately eight

and a half hours. The claimant admitted to smoking marijuana four days before his accident. He tested positive for marijuana after the accident and offered no explanation of the reason for the outcome of the test. Two workers testified that someone who was not impaired could have an accident such as the claimant's. Coworkers also testified they worked with the claimant the day of the incident and he did not appear to be impaired. The Court indicated that even without the corroborating testimony of the claimant's coworkers,"appellee's testimony alone provides substantial evidence upon which it could be determined that he rebutted the statutory presumption..." The court also reasoned that the claimant was unable to see the hole given his job task, was in his seventh straight day of working, and that he was fatigued, indicating the court likely attributed part of the reason for the claimant's accident due to being fatigued. Id.

The facts of Express are very similar to the current case. In both cases the claimants had been working a substantial period of time and were many hours into their shift. In the case of the current claimant, she testified that she had worked each day of the week. As such, she was

in her fifth day of work that week. She indicated that at the time of the injury she was on her 37th hour of overtime. The claimant said that she came in early that day because she was training someone and that the accident occurred near 6:30 a.m. As the claimant usually started working at 11:00 p.m., she had been working for at least seven and a half hours at the time of the injury. As such, it is easy to understand why she would be fatigued, even if that was her usual schedule. While I note that in Express the claimant did have witnesses providing corroborating testimony, I also note the Court indicated that the claimant's testimony alone would be enough to rebut the statutory presumption. Though in the present case the claimant did not have anyone testify that she had not ingested drugs the day of the injury, there is no evidence indicating that she had the time or opportunity to smoke marijuana on her shift. Additionally, no witnesses or medical reports make any indication that the claimant seemed to be impaired.

Ultimately, I find that the claimant's injury was caused by her own failure to stop the machine pursuant to company policy. However, I find that failure was likely due to fatigue and due to attempting to meet production quotas

rather than due to being under the influence of marijuana. While the claimant should have stopped the machine before pulling out the flash, her failure to do so does not indicate that her judgment was impaired. The medical reports from the accident provide nothing to indicate the claimant was impaired. The testimony of the claimant’s coworkers, who saw the claimant immediately after the accident, also fail to show that the claimant was under the influence of intoxicants at the time of the injury. Therefore, I find that the claimant’s injury was not substantially occasioned by the use of drugs. For the reasons previously discussed, I respectfully dissent.

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SHELBY W. TURNER, Commissioner