

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407327

JOHN A. SKORUPSKI, EMPLOYEE	CLAIMANT
AFFILIATED FOODS, EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INS. CO., TPA	RESPONDENT

**OPINION FILED OCTOBER 17, 2006**

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

Claimant represented by HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed November 14, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

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 and/or prescription drugs used in contravention of physician's orders in the claimant's body at the time of his accident.

4. The claimant has failed to prove by a preponderance of the evidence that his accident was not substantially occasioned by the use of illegal drugs and/or prescription drugs used in contravention of physician's orders.

5. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies

the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

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

I respectfully dissent from the Majority's decision affirming and adopting the Administrative Law Judge's November 14, 2005 opinion. Based upon my de novo review of the record in this claim, it is my opinion that

Claimant has met his burden of proving that his right wrist injury is compensable.

The parties stipulated that the Arkansas Workers' compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including July 5, 2004; that on July 5, 2004, the claimant was hit by a forklift, breaking his wrist; and that the respondents now controvert this claim in its entirety. At the hearing the parties further stipulated that the claimant earned an average weekly wage of \$361.00, entitling him to a compensation rate of \$240.00 for total disability benefits and \$180.00 for permanent partial disability benefits; that medical records indicate that the claimant reached the end of his healing period on September 1, 2004; and that the claimant has been assigned a permanent anatomical impairment rating of six percent (6%) to the right upper extremity.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury to his right wrist; whether the claimant is entitled to medical

treatment; whether the claimant is entitled to temporary total disability benefits; whether the claimant is entitled to permanent partial disability benefits; and attorney's fees.

The claimant contends that he sustained a compensable injury and is entitled to the requested benefits.

The respondents contend that the claimant did not sustain a compensable injury within the course and scope of his employment; and that the claimant tested positive on a drug screen shortly after the alleged injury.

The Administrative Law Judge found that the claimant failed to rebut the presumption that his accident was substantially occasioned by the use of illegal drugs and/or prescription drugs used in contravention of physician's orders and therefore denied compensability of the injury.

Claimant worked for respondent employer as a "module stacker" for approximately eight months. Claimant testified that he was in a serious car accident in 1991 in

which he injured his eye, spleen, both legs, and lost ten percent (10%) of his brain. Since that accident Claimant has had a prosthetic right eye.

Claimant testified that he was hired by the respondent employer as a forklift driver on the night shift. Claimant testified that he is not aware of the reasons for his transfer to the day shift.

Mr. Weber, claimant's supervisor at the time of the accident, testified that to his knowledge Claimant was not authorized to operate a forklift and that was why he was transferred to the day shift. Mr. Weber also testified that he was not aware of Claimant having any physical handicaps or disabilities.

Claimant testified that he used both a forklift and a pallet jack regularly in the scope of his employment. Claimant stated that the first time he had heard that he wasn't certified to operate a forklift was at the hearing. Claimant also testified that he had never been told not to use a forklift.

Claimant testified as follow in regard to the mechanics of the incident on July 5, 2004:

Q. Okay. Would you tell the judge, in the best of your memory, exactly what happened?

A. I had a forklift and I had it parked because I was helping on the line. And we have ice tubs for packing, and one of our ice tubs was empty, so one of the Latinos got on my lift, went over to the tub to move it, because nothing was coming down the line, but something started coming down the line, so he told me to go finish it. And then another Latino come around the corner and unplugged my lift and ran. And then another Latino got on the forklift and came from my blind side and came over to my lift. And there was no water involved. I'm sorry, but there was no water involved in this. There was just crunch.

. . .

A. And in order for the forklift to work, your forklift has to be plugged into the battery; otherwise, it is like dead in the water.

Q. Okay.

A. And in order for me to finish what I had to do, to swap out ice chests

- - ice tubs, I needed my forklift to work, so he came and unplugged my lift as a joke. He had been reported several times over it.

Q. Okay. Well, let me ask you this: Had you been driving that forklift all day?

A. Yeah.

Q. And how long had you been on the day shift, approximately?

A. Three or four weeks.

Q. Okay. And during that three or four weeks, you operated the forklift day-in/day-out?

A. Yes.

. . .

Q. Okay. I'm going to try to describe what you did for the record. You were reaching down to replug in your forklift with your right hand. Is that correct?

A. Yes.

Q. And at that point in time, the other piece of equipment came and ran into your right hand. Is that correct?

A. Yes.

Q. And it's your right eye that's blind. Is that correct?

A. Yes.

Q. Did you - - I mean, could you see anybody coming from that angle at all?

A. No. I was concentrating on plugging in my battery.

Claimant testified that the only medications he was on at the time of the accident was an Albuterol inhaler and what he calls "Two-ways" (mini ephedrine) both for the treatment of chronic bronchitis.

Claimant was taken to Southwest Regional Medical Center where he was diagnosed with a transverse fracture of the right wrist. Claimant was also given a drug test which showed positive for Amphetamines.

The definition of a compensable injury under the Workers' Compensation Act 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).

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). Therefore, if a claimant is found to have illegal 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 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 ... illegal drugs" is that there must be a direct causal

link between the use of illegal drugs and the injury for the injury to be noncompensable. Id.

In my opinion, Claimant has proved by a preponderance of the evidence that the his injury was not substantially occasioned by the alleged drugs in his system at the time of the accident. Both Claimant and his wife testified that Claimant had not used amphetamines. The Claimant told his treating physician that he had failed a drug test because of the medications he was taking for his bronchitis. The fact that Claimant's story has been consistent since the day of the accident adds to his credibility in my opinion.

In my opinion, this accident would have happened with or without the presence of drugs. Claimant was simply trying to get his forklift operational when he was struck by another forklift from the right. He was not moving and therefore did not in anyway contribute to the accident. Furthermore, Claimant is blind in his right eye, the direction from which the other vehicle was coming. Also, it should be noted that the forklifts used by respondent

employer are electric and therefore do not make very much noise. There are many forklifts in use at one time making it very hard to hear if one is coming in your direction.

For the foregoing reasons, I respectfully dissent from the Majority decision affirming and adopting the Administrative Law Judge's November 14, 2005 opinion.

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SHELBY W. TURNER, Commissioner