

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301504

BARRY WARD,  
EMPLOYEE

CLAIMANT

HICKORY SPRINGS MFG. CO.,  
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 22, 2006

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

Claimant represented by the HONORABLE MICHAEL HAMBY,  
Attorney at Law, Greenwood, Arkansas.

Respondents represented by the HONORABLE JAMES ARNOLD, II,  
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed August 30, 2005. The administrative law judge found, among other things, that the claimant's injury was substantially occasioned by the use of illegal drugs. 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. We therefore find that

the claimant proved he sustained a compensable injury, and that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability compensation.

I. HISTORY

The testimony of Barry K. Ward, age 50, indicated that he began working for Hickory Springs Manufacturing Company in about 2001. Mr. Ward testified that he was a machine operator for the respondent-employer. Vern Hanna testified that he had been employed with the respondents for 10 years. Mr. Hanna testified that he had "incidental contact" with the claimant at work, and that he had never suspected the claimant was under the influence of an illegal drug.

The parties stipulated that the employment relationship existed on February 4, 2003. The claimant testified that he arrived at work that day at about 5:30 a.m. and that he took a 30 minute lunch break at noon. The claimant testified regarding an accident which he said occurred at about 2 p.m., near the end of his shift:

Q. Tell us what happened.

A. I was adjusting a little trailing bar on the top that somebody had made and put on the machine that kept vibrating out, and it was in between runs, fixing to change from one job to another, and leaned over to slide this bar forward and it got my shirt, pants, and not really sure what happened.

Q. Had you adjusted the machine like this before?

A. Every time that it started sliding out. It wasn't anything that I hadn't been doing.

Q. And did you see other people operate the machine do the same thing?

A. Not really because when I took the job, the one guy had quit and I got - bid on the job and took the job, and the line I was on, which was the other line, you can't really see that much if you're doing your job over on the other line.

Q. How long had you been doing this particular job before you were hurt?

A. Five or six months.

Q. Had anybody trained you on how to use the machine and adjust this bar?

A. Well, there was never any telling me how to adjust this bar because it was one of those that only when you're running light pipe, that when it went through the deburr and start bouncing, and this was to prevent it from slipping the pipe out into the work area.

The claimant testified on cross-examination:

Q. Now, let's talk about the operation of this particular piece of machinery. The teeth of

machinery or the part of the machine that your clothing became entangled in is a hexagonal or octagonal shaped rotating bar; is that correct?

A. Yes.

Q. And this bar is not a high speed rotating bar? I mean it doesn't turn at a thousand r.p.m.'s or anything like that?

A. No.

Q. It rotates slowly; is that correct?

A. Well, fairly slowly, depending on the length of pipe that you're running and the type pipe.

Q. But it rotates in such a manner that you can actually see the sides of the bar turning; is that correct? It's not turning so quickly that it's just a blur?

A. No....

Q. Your clothing touched or came in contact with that bar as it was rotating and basically, your clothing wound up and became entangled in that bar; is that correct?

A. Yes....

Q. And you were involved in a procedure that is set up when you're changing from one size pipe to another?

A. Yeah.

Q. The machine is not supposed to be operating when you're doing that, is it?

A. Well, when you're already set up and ready to go, usually you've got the machine sitting there running - as it was put by one person there, if you shut the motors on and off, it burns the motors up quickly.

Q. Who told you that?

A. Bruce Rowe.

Q. Well, you were not only setting the machine up, but something had come loose or was out of place; is that correct?

A. Yes.

Q. There is a safety procedure in effect that was in effect at that time, which indicated, did it not, that when you were doing any type of adjustment to the machine, the machine is to be turned off?

A. Well, there again, that is one of those that -

Q. Yes or no?

A. Yes, theory says that - or rules say that, yes, it should have been turned off, but when it's a procedure that you reach over there and you slide it up and you've done that since you've been on the machine because it kept moving back. It's called getting comfortable in a job, is my recollection of that I would call it. You know, you're just used to just - and it's done.

Vern Hanna testified that he did not see the accident, but that he ran to help the claimant after he heard the claimant yell. Mr. Hanna testified, "after we stopped the

machine, it tore all his clothes off, you know, and he turned and went to the bathroom[.]”

Bruce Rowe testified that he had been employed with the respondents for about 19 years, and that had been the claimant's "lead man." Mr. Rowe testified on direct:

Q. And the Haven, is that the machine he was injured on?

A. Yes.

Q. Did you train him on that machine?

A. Yes.

Q. Tell me what your training involved. Would you stand there with him and run it for a day or two or what?

A. You show them how to start it and stop it and everything, and all the basics to it, and then he more or less runs it and if he has problems, why, you go help him. You can't just show him everything all at one time. They're pretty basically on themselves over there....

Q. Are you familiar with the bar that was responsible for his injury?

A. Yes.

Q. Have you ran that machine before?

A. Yes, I have.

Q. And did that bar kind of vibrate back and forth if you run lighter pipe? Did you notice it doing that before?

A. The bar doesn't, no. That bar is solid....The brushes move around.

Q. What do you do whenever they start moving around like that?

A. Most of the time, depending on what tubes you're running, you don't worry about it. It usually only goes so far and stops....If you're on lighter stuff, then if you ain't got them brushes over your tube, then your brush - your tube will vibrate.

Q. So what do you do then?

A. You've got to get your brush put back into place.

Q. How do you do that?

A. You have to push it back in there.

Q. Reach up and slide it back over?

A. Yes.

Q. You don't turn the machine off and wait for it to quit running and then move it back and then turn the machine back on and start running the parts?

A. You're supposed to, but hardly anybody ever does.

Q. During the time that you have worked with him in both departments, have you ever come up on him

during the ten visits a day and suspicioned that he was under the influence of drugs or alcohol?

A. No, I couldn't tell....As far as I know, he wasn't.

Q. Have you been around people that have been under the influence?

A. Yes, I have.

Q. Of marijuana?

A. Yes, I have.

Q. And what do you usually notice about them that you can tell they're under the influence?

A. You can usually tell by red eyes, and they're usually just moping around and stuff....

Q. If you suspected somebody was under the influence of marijuana or any other drug, what would you do?

A. I'd send them home....

Q. Do you remember talking to him or having any contact with him that day?

A. No, I don't.

Q. When did you become aware that he had been involved in an accident?

A. Just right after it happened. I walked out there right after they got the machine shut off....Barry was standing there and Vern was standing there and I knew something was wrong, and I seen Barry's clothes not on him and I knew something was wrong.

Mr. Rowe agreed on cross-examination that there was a "kill switch" on the machine, stating, "The main purpose is it's an emergency stop and if something goes wrong, you can hit it and the machine will stop instantly." Mr. Rowe testified on cross-examination:

Q. How far away was the kill switch from where Barry was entangled in the machine?

A. Probably within two foot.

Q. Could he have reached it with his hand as -

A. Yes, he could.

Q. - he was standing there being entangled in the machine?

A. Yes.

Q. Would this injury have occurred if Barry had stopped the machine before he started adjusting the brace?

A. No, it wouldn't have....

Q. If you shut the machine down, the bar stops rotating; is that correct?

A. That's correct....

Q. This is not the type of rotating bar that's going to get you so quickly that you can't get away from it, is it?

A. Not normally.

Q. Okay. You've got to basically lean up against the thing and stand there while the machine continues to run; isn't that correct?

A. That's correct.

Q. And that's what he had to do in order for this injury to have occurred?

A. That's correct....

Q. What was his demeanor like after this injury occurred?

A. He was calm, just like nothing had happened.

The parties stipulated that the claimant sustained an injury to his penis and groin area on February 4, 2003. A physician assessed "degloving injury of the genitalia" on February 4, 2003. The claimant subsequently underwent surgery.

The record indicates that Chad Keever wrote the following on a Supervisor's Accident Investigation Report, dated February 5, 2003: "Employee was adjusting tube hold down on the Haven debur machine, when his clothing became 'wound up' in the conveyor drive shaft, pulling his clothing from his body and tearing flesh from his genital area." Mr. Keever wrote on the Report following Corrective Action: "Insist that every employee follows the Lockout/Tagout

procedure and wait for all moving parts to stop, before adjusting, repairing, or setting-up the equipment."

The parties stipulated that the respondents provided "some benefits in the form of medical expenses."

On February 7, 2003, the claimant authorized a post-accident drug test.

The record contains a Confidential Test Report dated February 12, 2003. The Report indicated that the Drug Test Result for Barry Keith Ward was "Positive." The Collect Date was February 7, 2003. The Report indicated that the claimant tested Positive for Cannabinoids and Opiates. For Cannabinoids the Report indicated, "45 ng/ml;" for Morphine, "4642ng/ml."

The claimant testified on direct:

Q. You are aware of the results of that test came back positive for cannabinoids?

A. Yes.

Q. And at the time this injury happened, had you smoked any marijuana within 24 hours?

A. No, I hadn't....

Q. When was the last time that you smoked marijuana prior to this accident, if you recall?

A. Somewhere around nine to eleven days. I think that's what my deposition says.

Q. Do you smoke marijuana on a regular basis?

A. No.

Dr. James E. Kelly, III returned the claimant to restricted work on March 17, 2003. Dr. Kelly indicated that the restrictions would be in effect for six weeks.

A urologist indicated on March 18, 2003 that the claimant could return to work on April 2, 2003.

Dr. Kelly noted during an April 28, 2003 follow-up visit, "He certainly had a significant amount of torquing on the lower back and may actually have a back injury that may need to be delt (sic) with. I will certainly be looking at this in the future....In the meantime we will release him back to regular work duties."

Dr. Thomas E. Cheyne examined the claimant on May 1, 2003 and noted the following: "X-rays of the lumbar spine indicate mild to moderate degenerative change primarily at the L4-5 level, but no acute findings. X-rays of the thoracic spine indicate mild to moderate degenerative change." Dr. Cheyne's impression was, "Acute lumbar and

thoracic strain with myofascitis with a possibility of lumbar radiculopathy." Dr. Cheyne indicated that the claimant could return to restricted work on May 5, 2003.

A Form AR-E, Employer's Supplemental Report, indicated that the claimant began losing time from work on February 5, 2003, and that he returned to work on May 5, 2003.

The claimant testified that he returned to work "for about three hours" and afterward, "they told me I was pretty much suspended from work."

A lumbar spine MRI was taken on May 7, 2003, with the following impression:

1. Left paracentral disc herniation at the L5-S1 level which may contact the left S1 nerve root and the left lateral recess. No significant central stenosis. Clinical correlation.
2. Mild diffuse bulge L5-S1 level.
3. Hypertrophic degenerative changes of the facets.

Dr. J. Michael Standefer, a neurosurgeon, evaluated the claimant on June 3, 2003. Dr. Standefer stated, "I would advise continued conservative care. No surgical lesions are identifiable. Electromyography should be undertaken to more fully and complete evaluate his problems and in addition to

this he should be seen by a gastrointestinal specialist for evaluation of his abdominal complaints."

Pat Meek, a Licensed Practical Nurse with Occupational Medical Services, wrote the following on August 22, 2003:

I, Pat Meek, was notified by Hickory Springs on February 6, 2003 to collect a post-accident drug screen on Barry Keith Ward, accident date February 4, 2003. I was informed Barry was in surgery on the 6<sup>th</sup> so the drug screen was delayed until February 7, 2003. The specimen had to be collected from his Foley catheter. I had Peggy Ward, Barry Ward's sister-in-law, who is an employee at Sparks Hospital to go with me to witness the collection. This was explained to Barry and he was agreeable to this. Barry initialed the tamper proof label on the specimen bottle and signed the consent and the chain-of-custody form. Notation was made in the remarks on the COC form that this was collected from the Foley catheter and witnessed by Peggy Ward. Specimen was sent via Air Borne Express to Keystone Laboratories, Inc in Asheville, NC. The results of the test were sent to Hickory Springs by Keystone Lab.

A pre-hearing order was filed on September 16, 2003. The claimant contended that he sustained "an accidental injury in the course of his employment on February 4, 2003. The injury consisted of a degloving of the groin area; spinal and gastrointestinal injuries. As a result of the injuries the claimant is entitled to the award of medical

benefits; temporary total disability from the date of the injury through a date yet to be determined; and attorney's fees."

The respondents contended that the claimant "did not sustain a compensable injury in the accident of February 4, 2003, without waiving other defenses, and the respondents will contend that the claimant's accident was substantially occasioned by the use of illicit drugs."

The parties agreed to litigate the following issues:

1. Whether the injuries to the claimant's penis and groin area on February 4, 2003, represent compensable injuries.
2. Whether the claimant also sustained compensable injuries to his spine and gastrointestinal system on February 4, 2003.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from February 5, 2003 through a date yet to be determined, and an appropriate attorney's fee.

Dr. Randall Carson wrote on July 19, 2004, "I have reviewed the drug screen results dated 2/7/03. The test was positive for opiates, which could be prescribed medication. The screen is also positive for cannabinoids (marijuana/THC). This could be legitimized only with a prescription for Marinol (dronabinol), which is a

prescription cannabinoid. This medication is used in AIDS patients and chemotherapy patients to try to help with side effects of the chemotherapy drugs."

Kim Edward Light, Ph.D., prepared a report for the claimant's attorney on August 15, 2004. Dr. Light stated in part:

The report provided by WolfeData (Item A5) regarding the urine sample attached to Chain of COC-V033125 indicated that the urine sample was positive for cannabinoids and opiates with quantitative cannabinoid levels of 45 ng/ml and morphine level of 4642 ng/ml. In addition, this report from (sic) indicates that no Medical Review Officer report was provided.

In my opinion this report of a 45 ng/ml cannabinoid concentration can not, and should not, be considered accurate or valid for used (sic) to indicate any reasonable causation or association with the accident leading to Mr. Ward's injuries of February 4, 2003. Specific points of concern that result in my opinion are listed in the following paragraphs.

The sample was collected on February 7, 2003 some 72 hours after the injury. The sample was not collected directly from Mr. Ward's body. He had been catheterized using a Foley catheter which is a tube inserted through the urethra into the bladder and connected to a collection bag attached to the side of the bed. The collection bag was the source of the urine collected under COC-V033125 and does not in any manner represent a secure container. There is no indication of when or how often the bag had been emptied by medical

personnel. It is thus likely that several people had access to this bag and had been involved in emptying the bag over the course of the three day hospitalization. As a result, no assertion is possible that an outside party could not have tampered with this collection bag unbeknownst to Mr. Ward or other involved personnel....

During the time between the injury and the urine sample collection, Mr. Ward experienced a severe level of trauma that resulted in two surgical procedures and three days of hospitalization. This time included treatment with various drugs, administration of intravenous fluids, and alterations to his physiological and metabolic state in a highly variable and unpredictable manner. There is a significant possibility that the administered drugs and fluids substantially interfered with the metabolism and processing of any THC (active ingredient of marijuana) within Mr. Ward's body to the point that no interpretation to a reasonable degree of medical certainty is possible....

The parties deposed Pat Meek on December 8, 2004. Ms. Meek credibly testified regarding her collection of a urine specimen from the claimant and related chain of custody procedures.

The parties deposed Dr. Henry F. Simmons, Jr., a medical toxicologist, on December 16, 2004. The respondents' attorney questioned Dr. Simmons:

Q. Without regard to the deposition of Pat Meek, which Dr. Light did not have available to him when he wrote his report because her deposition hadn't

been taken, but based upon the documents that Dr. Light and you reviewed is there any basis to conclude from a medical standpoint that her reading on the temperature was false?

A. No. I saw no reason whatsoever to question that....

Q. Was there anything about Pat Meek's collection process as she described in her December 8, 2004, deposition which concerned you from a standpoint of the validity of the test results themselves?

A. No, sir. I did not have any problem whatsoever with allowing fresh urine to drain into the bag and then draining that urine from the bag into the specimen cup as she described. It would be sheer speculation to assume that the catheter, the bag or the cup were adulterated with THC metabolites....

Q. Was one of the documents that you reviewed the transcript of Mr. Ward's deposition?

A. I read several pages of his deposition that were provided.

Q. And did he outline marijuana usage prior to the time the drug specimen was collected?

A. Yes, he did.

Q. So in the absence of the drug Marinol or any history of the consumption of huge quantities of hemp seed oil, what do you believe to be the source of any cannabinoids that would have been found in the testing of the urine specimen that Pat Meek took?

A. Well, I think it's far more likely than not that the positive test is a result of consumption of marijuana.

Q. That would be consistent with his testimony?

A. It would, although based on the temporal aspects of his testimony, I would have - and his habits as described - I would not have expected him to have still been positive for THC at the cutoff levels used in this assay....

Q. Do you have any concerns as a physician and a toxicologist about the validity and reliability of this test to establish that, at the time the urine specimen was taken, cannabinoids were present in Mr. Ward's system?

A. No, from a medical standpoint, I do not. I don't see any evidence that this gentleman received a medication that would cause the test to be positive for THC metabolites which were there, were confirmed as being there. I don't see anything about the nature of trauma itself that would cause his body to manufacture a cannabinoid out of thin air. Furthermore, the urine test itself also had a relatively high concentration of opiates in it, specifically morphine, and of course as we know, this gentleman had been supplied with a patient-controlled anesthesia machine that basically pushed morphine into his venous system. All that being the case, there's no medical reason to question the validity of the result....

Q. So actually the presence of the opiates, the fact that the drug test revealed the presence of opiate in the urine specimen, is further evidence that this was in fact Mr. Ward's urine because that was consistent with the medications that he had been administered in the hospital?

A. That's right. Had there not been opiates in the specimen, then I would certainly have told you long ago that you should disregard this specimen.

A hearing was held on June 7, 2005. The claimant testified that he had not worked since the accident.

Mark Bryant testified that he was plant manager of the respondent-employer's tube plant, and that he normally would see the claimant "throughout the entire day, several times." Mr. Bryant testified that he never suspected that the claimant was under the influence of drugs.

The administrative law judge found, in pertinent part:

4. On February 4, 2003, the claimant sustained a physical injury to his penis and groin area.

5. Any injuries sustained by the claimant, as a result of the specific incident or accident on February 4, 2003, are expressly precluded from constituting "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv). Specifically, the greater weight of the credible evidence establishes the presence of the illegal drug, marijuana, in the claimant's body at the time of the incident on February 4, 2003. Thus, raising the rebuttable presumption that the claimant's accident and resulting injuries were substantially occasioned by his use of this illegal drug. The claimant has failed to prove by the greater weight of the credible evidence that his use of this illegal drug played no causal role or only an insubstantial causal role in occasioning the accident or resulting injuries.

The administrative law judge therefore denied and dismissed the claim; claimant appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Ark. Code Ann. §11-9-102(4)(A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16).

(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.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(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.

#### 1. Groin Injury

The administrative law judge found in the present matter, "The claimant has failed to prove by the greater weight of the credible evidence that his use of [marijuana] played no causal role or only an insubstantial causal role in occasioning the accident or resulting injuries." The Full Commission reverses this finding.

The parties stipulated that the employment relationship existed on February 4, 2003. Near the end of his shift at work that day, the claimant was adjusting a "trailing bar" on an industrial machine. The claimant's clothing became caught in the machine, and as a result he sustained a

degloving injury of the genitalia as documented by the medical records. The preponderance of evidence therefore demonstrates that the claimant sustained an accidental injury which caused physical harm to the body. The injury arose out of and in the course of the claimant's employment, required medical services, and was caused by a specific incident identifiable by time and place of occurrence. The claimant also established a compensable injury by medical evidence supported by objective findings.

A post-accident drug test was taken on February 7, 2003. The post-accident drug test, in the form of a urine specimen taken from the claimant, showed that the claimant tested positive for "cannabinoids." The Full Commission assigns minimal weight to the August 2004 report of Dr. Light which attempted to cast doubt on the collection procedures for analyzing the claimant's urine. We also attach minimal weight to Dr. Light's subsequent deposition testimony in this regard. The purpose of establishing a chain of custody is to prevent the introduction of physical evidence that has been tampered with or is not authentic. Newman v. State, 327 Ark. 339, 939 S.W.2d 811 (1997). Minor

uncertainties in the chain of custody are matters to be argued by counsel, but they do not render the evidence inadmissible as a matter of law. Crisco v. State, 328 Ark. 388, 943 S.W.2d 582 (1997).

The Full Commission attaches more significant weight to the credible August 2003 report of Pat Meek, which document carefully detailed the collection and chain of custody procedures with regard to the claimant's drug testing. We also attach significant weight to the credible testimony of Dr. Simmons. Dr. Simmons saw no reason to question the chain of custody procedures or the authenticity of the claimant's drug screen. The evidence thus demonstrates that the illegal drug marijuana was present in the claimant's system at the time of the February 4, 2003 accidental injury. The presence of marijuana in the claimant's urine created a rebuttable presumption that the claimant's accidental injury was substantially occasioned by his use of illegal drugs. Ark. Code Ann. §11-9-102(4)(B)(iv)(b); Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996).

Therefore, the claimant shall not be entitled to compensation unless it is proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accident. Ark. Code Ann. §11-9-102(4)(B)(iv)(d). Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Woodall v. Hunnicutt Construction, 340 Ark. 377, 12 S.W.3d 630 (2000). In the present matter, the Full Commission finds that the claimant indeed proved that illegal drugs did not substantially occasion the February 4, 2003 accidental injury. We note the testimony of Vern Hanna, who never suspected that the claimant was using an illegal drug at work. The claimant's lead man, Bruce Rowe, never thought that the claimant was under the influence of marijuana. Mark Bryant, the respondent-employer's plant manager, never thought the claimant may have been using illegal drugs.

Moreover, the preponderance of evidence does not demonstrate that the February 4 2003 specific incident was in any way the result of marijuana intoxication on the claimant's part. The claimant arguably should have shut

down the machine while performing the work-related duty which caused injury on February 4. The claimant testified, though, that Bruce Rowe informed him "if you shut the motors on and off, it burns the motors up quickly." Mr. Rowe testified with regard to turning off the machine before adjusting the tubes, "You're supposed to, but hardly anybody ever does." The Full Commission recognizes Bruce Rowe's testimony that a "kill switch" was just two feet away from the claimant, and that the claimant could have stopped the machine at the moment his clothes became entangled. Nevertheless, there is simply no evidence before us indicating that the claimant's failure to activate the "kill switch" was in any way related to marijuana intoxication. Additionally, we note Mr. Rowe's testimony, "He was calm, just like nothing had happened." Any assertion that post-accident "calmness" on the claimant's part was the result of marijuana usage would be based on conjecture and speculation, which can never take the place of probative evidence. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

The Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the February 4, 2003 accident. The Full Commission therefore finds that the claimant proved he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(A)(i) *et seq.*

## 2. Back and Gastrointestinal System

The claimant alleges in his brief that he sustained injuries to his back and gastrointestinal system as a result of the February 4, 2003 accident. The record does not indicate that the claimant sustained any injury as a result of the accident, other than the degloving injury to his genitalia. There was never any indication of a back injury at the time of the claimant's initial hospitalization. The Full Commission is aware of Dr. Kelly's April 2003 note, to wit: "He certainly had a significant amount of torqueing on the lower back and may actually have a back injury that may need to be delt (sic) with." However, subsequent diagnostic testing did not reveal a back injury. The lumbar MRI taken in May 2003 did not show an injury to the claimant's back. We note Dr. Standefer's interpretation of the lumbar MRI,

where he stated, "No surgical lesions are identifiable." We note Dr. Standefer's suggestion of a possible gastrointestinal evaluation, but the record does not indicate a gastrointestinal injury, and the claimant does not ask for such an evaluation.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he sustained an accidental injury causing physical harm to his back or gastrointestinal system. Nor did the claimant establish such an injury to his back or gastrointestinal system by medical evidence supported by objective findings. The claimant is not entitled to any worker's compensation benefits for his back or gastrointestinal system.

B. Temporary Disability

Temporary total disability for unscheduled injuries is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). One might argue that, because the claimant sustained a stipulated injury to his "penis and groin area," the Commission rely on the standard for analyzing temporary

disability pursuant to scheduled injuries. See, Ark. Code Ann. §11-9-521(a)(17). An injured employee who has suffered a scheduled injury is to receive temporary total disability compensation during his healing period or until he returns to work, regardless of whether he has demonstrated that he is actually incapacitated from earning wages. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We can find no published cases discussing whether or not the instant claimant's injury falls within the statutory schedule.

In any event, the Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from February 5, 2003 through April 21, 2003. The claimant sustained a compensable injury near the end of his shift on February 4, 2003. The claimant's healing period thus began on February 4, 2003, and he was unable to work beginning February 5, 2003. Dr. Kelly indicated that the claimant could return to regular duty beginning April 21, 2003. The preponderance of evidence in the present matter therefore indicates that the claimant's healing period for his compensable injury ended no later

than April 21, 2003. The claimant would therefore not be entitled to temporary total disability after April 21, 2003, whether the claimant's injury was scheduled or unscheduled. We are aware that the claimant worked "for about three hours" on May 5, 2003. The record indicates, however, that the claimant's dismissal subsequent to that time was based on his refusal to submit to additional drug screening rather than an inability to perform restricted work duties.

Based our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accident occurring February 4, 2003. The Full Commission finds that the claimant proved he sustained a compensable injury on February 4, 2003, namely a "degloving injury of the genitalia" on that date. We find that the claimant proved he was entitled to reasonably necessary medical treatment provided in connection with his compensable injury. The claimant did not prove he sustained a compensable injury to his back or gastrointestinal system. The claimant proved he was entitled to temporary total disability compensation from February 5, 2003 until May 5,

2003. The Full Commission therefore reverses the opinion of the administrative law judge. The claimant's attorney is entitled to fees 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. §11-9-521(b)(2)(Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_I respectfully concur in part and dissent in part from the Majority decision. Specifically, I concur with the Majority's finding that the claimant sustained a compensable injury to his groin area and that the injury was not substantially occasioned by the use of illegal drugs. However, I must respectfully dissent from the portion of the decision finding that the claimant did not sustain a compensable back or gastrointestinal injury.

\_\_\_\_\_The Majority opines that the claimant did not show objective findings illustrating a compensable back injury. In making this finding the Majority notes that the claimant did not report a back injury at the time of the injury. They further note that subsequent testing did not show a back injury and conclude that a May 2003 MRI did not show any injury to the claimant's back.

In my opinion, these findings overlook the medical records indicating that the claimant sustained a back injury that was substantiated by objective findings. Specifically, I find that the claimant's MRI showed that he suffered from a herniated disc. Furthermore, the claimant's treating physician opined that the claimant's work-related injury was the cause of that condition.

The Majority opines that because the claimant did not immediately present with a back injury, he did not sustain one. In my opinion, the claimant provided credible testimony that he told the workers' compensation nurse that his back was hurting as his pain medication was reduced. Additionally, I note that as early as April 28, 2003, there are notations that the claimant was suffering from back

problems. At that time Dr. Kelly noted that the claimant had a "significant amount of torquing on the lower back." Dr. Kelly also noted the possibility of a back injury to the claimant.

On May 1, 2003, the claimant presented to Dr. Cheyne with low back and mid-thoracic pain. The claimant reported that he was suffering from numbness in the posterior portion of his thighs after sitting for a long period of time. While x-rays performed on May 1, 2003 only showed degenerative changes to the claimant's lumbar and thoracic spine, the claimant was diagnosed with, "Acute lumbar and thoracic strain with myofascitis with a possibility of lumbar radiculopathy." He was placed on Celebrex and was scheduled to undergo an MRI. In my opinion, the fact that the doctor believed it was plausible for the claimant's condition to occur after his work-related injury, in conjunction with the doctor's diagnosis of the claimant having a strain, both bolster the claimant's credibility that he suffered a back injury.

Further evidencing the claimant's back injury is the MRI performed on May 7, 2003. The report from the MRI

indicated that the claimant had a "left paracentral disc herniation at the L5-S1 level into the lateral recess which may very well contact the left S1 nerve root." The claimant was also noted to have hypertrophic degenerative changes of the facets. Likewise, a doctor's note from Dr. Standefer, dated June 3, 2003, notes that the claimant suffered from a disc protrusion at the L5 level. As the claimant could not control the results of those tests, I find that the medical records show the claimant had objective medical findings illustrating a back injury sustained when the machine caught his clothing.

Last, I note that the claimant's chiropractor believed the claimant's condition was caused by his work-related injury. In my opinion, this corroborates the opinion of Dr. Kelly that the claimant might have sustained a back injury. On July 18, 2003, a note from H.C. Sloat, D.C., indicated that the claimant complained of headaches, pain in the mid back and neck, and in the low back after his work-related accident. The doctor opined, "Based on an assessment of Mr. Ward's history, along with his subjective complaints, objective findings, radiographic analyses, and

other test results, it is evident from a standpoint of medical certainty, that his current condition did result from the type of injury/onset described in this report."

\_\_\_\_\_In my opinion, this language also indicates that the claimant suffered from an objective injury to his back. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould

Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In this instance, the doctor opined that he was basing his opinion based on multiple factors, including the radiographic analyses, test results, and objective findings that the claimant's condition was caused by his work-related injury. Accordingly, I attach great weight to his opinion.

In conclusion, I find that the claimant sustained a compensable back injury which was shown by objective medical findings. While the claimant did not immediately report back pain, he reported it shortly after his injury and there is no other explanation in the record for why the claimant would have suffered a disc herniation. In my opinion, the MRI showing that the claimant suffered from a disc herniation constitutes objective medical proof of the claimant's injury. Further, in my opinion, the medical

records, including those of Dr. Sloat and Dr. Kelley show that the claimant's injury was directly related to his work-related injury. In fact, Dr. Sloat's opinion specifically indicates that he has concluded such and there is no medical opinion to the contrary.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

DISSENTING OPINION

I must respectfully concur in part with and dissent in part from the majority opinion. I specifically concur with the find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury to his back on February 4, 2003, when his clothing and genitalia became entangled in a machine. However, I dissent from the finding that the claimant has overcome the presumption that his work related injury was substantially occasioned by the use of illegal drugs. Based upon my de

novo review of the entire record, and without giving the benefit of the doubt to either party, I find that the claimant has failed to overcome this presumption. Therefore, I find that the claimant's injury is not compensable pursuant to A.C.A. § 11-9-102(16) which specifically excludes from compensability an injury that is substantially occasioned by the use of illegal drugs. Subsection (b) specifically provides that the presence of illegal drugs shall create a rebuttable presumption that the injury was substantially occasioned by the use of illegal drugs.

The majority has found that the claimant tested positive for "cannabinoids" thus giving rise to the rebuttable presumption that his injury was substantially occasioned by the use of marijuana. In this regard, I must agree with the majority. However, in analyzing the evidence the majority relies upon the testimony of Vern Hanna, Bruce Rowe, and Mark Bryant to the extent that these gentlemen testified that they never suspected the claimant of using an illegal drug at work, or that they never suspected that the claimant was under the influence of marijuana. However, this

general testimony is not relevant to the issue of whether at the time of the injury the claimant was or was not under the influence of an illegal drug. None of these witnesses could recall any conversation or involvement with the claimant prior to his injury on February 4, 2003. Thus, none of these witnesses offer any evidence regarding whether the claimant was, in fact, under the influence of an illegal substance at the time of his injury. Moreover, while Mr. Rowe testified that he had been around people that have been under the influence of marijuana and that they usually have red eyes and mope around, there is no evidence in the record that Mr. Rowe is an expert in detection of marijuana usage or that his past exposure to people who have used marijuana fully educated him as to the effect marijuana can have on a person. Furthermore, not one witness was able to testify as to whether the claimant had red eyes or was moping around prior to the injury as none of them could recall any direct observation of the claimant or of a conversation with the claimant prior to his injury on February 4, 2003. Thus, I give no weight to the testimony of these gentlemen when determining whether the claimant has overcome the

presumption that his injury was substantially occasioned by the use of marijuana.

The majority has also found that the evidence does not demonstrate that the claimant's injury was the result of marijuana intoxication. In this regard, I must strenuously disagree. Although the claimant was not taught to turn the machine off when adjusting the tubes on his machine, and "hardly anybody ever does" shut the machine down when making such adjustments, it is common knowledge that work on any type of machinery is dangerous and that such machinery should not be running when any part of the human body is to come in close contact. Moreover, even though it was prevalent practice at this facility to disobey basic safety procedures, the claimant's actions of placing his body within such close contact so as to suffer a degloving injury of his genitalia is, in and of itself, indicative of an impaired judgement on behalf of the claimant. Even more important than the claimant's senseless lack of judgement in getting too close to the machine, was the claimant's simple failure to hit the kill switch and stop the machine when his clothes first came in contact with the rotating shaft. This

lack of judgement leads credence to the presumption that the use of marijuana substantially occasioned the claimant's injury. Contrary to the majority's finding that there is no evidence indicating that the claimant's failure to activate the kill switch was in any way related to marijuana intoxication, I find that the claimant's slow response time which is a known consequence of marijuana intoxication together with his failure to adequately assess his situation and promptly stop the machine prior to sustaining serious injury is, in and of itself, sheer evidence of impaired judgement and intoxication.

Accordingly, I am not persuaded that the claimant has presented sufficient evidence to overcome the presumption that his injury of February 4, 2003, was substantially occasioned by the use of illegal drugs. Therefore, I respectfully dissent from this finding by the majority.

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KAREN H. MCKINNEY, Commissioner