

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512187

FRANK RICHARDSON, EMPLOYEE	CLAIMANT
TYSON, INC., EMPLOYER	RESPONDENT
TYNET CORPORATION, CARRIER	RESPONDENT

OPINION FILED MAY 14, 2007

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE MELISSA LEE, Attorney at Law, Springdale, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 17, 2006.

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. On May 15, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in accordance with Arkansas law while working for the respondent on May 15, 2005.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding the claimant did not suffer a compensable work-related injury on May 15, 2005, that he did not notify his employer of the accident, and that the injury was substantially occasioned by the use of drugs.

I find that the claimant's injury was due to the malfunction of the Hobart lift, which broke and hit the claimant in his head and shoulder, and ultimately landed on

his ankle. I further find the Majority erroneously concluded the claimant was not credible, that he was intoxicated at the time of the accident, and that but for the intoxication, he would not have been in an improper position. For these reasons, I respectfully dissent.

The claimant maintains that he was injured at work on May 15, 2005 when the Hobart lift malfunctioned and fell on him. The claimant also maintains that the injury was not substantially occasioned by the use of illegal drugs. The Majority, by affirming and adopting the decision of the Administrative Law Judge as their own, argues that the claimant's testimony is inconsistent and therefore not credible, and that the claimant was under the influence of illegal drugs at the time the accident occurred. However, it is clear that the claimant was injured by a faulty machine and that the accident would have occurred regardless of whether he was intoxicated.

The Majority, by affirming and adopting the Administrative Law Judge's opinion as their own, seems to argue that although the claimant was injured in some way

while working for the Respondents, he did not notify his employer of the injury until August 19, 2005. However, the claimant's immediate supervisor, Norvill, was made aware of the injury immediately following the accident. In fact, it is undisputed that the claimant actually notified Norvill. Claimant testified that he spoke with Norvill immediately following the accident and related the events to him. Chatham also testified that he informed Norvill of the accident following its occurrence. Norvill also testified that he spoke with the claimant regarding the accident immediately after the accident and noted that the claimant had no visible marks or blood on him. Norvill inquired after the claimant's well-being and suggested that he go to the doctor. Norvill subsequently placed the claimant on light duty. Furthermore, Norvill was subsequently fired because he violated Respondent's policy by not reporting the accident, which is proof that the supervisor knew of the accident and injury and knowingly failed to report it. As such, the respondents had notice of the accident and injury on May 15, 2005.

I further find that the claimant established proof by a preponderance of the evidence that he sustained a compensable injury which arose out of and in the course of employment. Even though there were inconsistencies in the claimant's testimony, those inconsistencies are irrelevant due to the fact that the witnesses all agreed that the Hobart lift malfunctioned and injured the claimant. As such, I find the Majority errs in denying this claim. In fact, the testimony and medical records all support a finding that the claimant was hit and injured and that the accident did not occur because of the use of drugs.

First, the claimant consistently testified about the work-related accident that occurred on May 15, 2005. The claimant testified that he was performing preventative maintenance on the Hobart lift and was using the limit switch, which stops the lift from moving either up or down. The claimant raised the lift up, but it did not shut off, so he let the lift back down. In order to determine what was wrong with the machine, he again used the limit switch to raise the lift up again. At that point, the chain bound up,

and when the claimant tried to turn it off, it would not turn off. Ultimately, the limit switch did not work, and the chain sheared pins and a bolt, throwing the U-shaped frame toward the claimant. The claimant was subsequently struck in the head and the shoulder and was pinned to the ground at the right ankle.

Although there were no witnesses to the accident, co-worker Jerry Chatham testified that he heard the accident and saw the lift on the ground after it fell and the claimant dazed and stumbling around. The claimant and Chatham both testified that Chatham assisted the claimant to the break room. Though he did not witness the accident, Norvill corroborated the claimant's testimony that he was injured in an accident at work. Chatham and Chester even testified that they had to fix the lift after it fell, further proving that the machine malfunctioned, broke, and fell on the claimant.

Furthermore, the claimant's medical records show that the claimant's injury is consistent with the claimant's testimony about how he was injured. Several physicians noted

objective signs of injury which were related to an accident consistent with the accident at work. Dr. Beeman first diagnosed the claimant as having neck pain and radiculopathy, which were caused by trauma to the head. Dr. Beeman prescribed a pain killer for the pain. Subsequently, MRI results showed that the claimant had mild degeneration and a bulging disc at C5-6. Dr. Gallagher, a neurological surgeon, noted that the claimant's pain was from the accident where he was hit in the head and shoulder. Dr. Gary Moffit also diagnosed the claimant as having a contusion of his head and shoulder. Additionally, the claimant sustained an ankle injury, for which he did not seek medical treatment. However, not only did the claimant testify that he sustained an ankle injury, but Chatham testified that the claimant's foot became so swollen after the accident that he tried to convince him to take his boot off. Accordingly, the medical records are consistent with the claimant's and the Respondent's testimonies of how the claimant was injured. As such, there were objective medical findings of an injury consistent with the accident.

Furthermore, the claimant had no previous medical history of sustaining any similar injuries. As such, the claimant's medical diagnoses are consistent with the injury that he sustained on May 15, 2005, while at work, and there are substantial objective medical findings which support that the claimant was injured by trauma to the head and shoulder while at work, as well as consistent testimony that the claimant's ankle was injured in the same accident.

Despite the objective medical findings which prove that the claimant's injuries were consistent with the injury that he sustained at work, the Majority argues that the claimant gave inconsistent statements regarding the accident and should therefore be deemed not credible. However, notably even the Respondents' own witnesses testified that the claimant was injured by the lift at work. The Majority, however, argues that the claimant told his doctors that he was hit in the head with a pipe and that it was not a work-related injury. In fact, the U-shaped frame is made of pipe, and the claimant admitted that he was lying to his doctors so that he would not have to file a worker's

compensation claim. The Majority also seems to argue that the claimant was lying on the worker's compensation claim form, which states that he was hit with an A-frame. The claimant admitted that he did not read the form before he signed it. Also, Cherri Church testified that Evelyn Herman, the safety director, filled out the forms for the claimant and that the claimant had informed them that he was working on the Hobart lift when the chain broke and the carriage hit him in the head and shoulder. It was Church's understanding that the A-frame was part of the Hobart lift. Interestingly enough, there was no mention to the Hobart lift's U-shaped frame in the report. Ultimately, the Majority's arguments are irrelevant as the Respondents own witnesses, Norvill and Chatham, corroborated the claimant's testimony that he was in fact injured at work by the Hobart lift. Furthermore, the objective medical findings are consistent with the injury that the claimant sustained and are therefore proof that the claimant was injured by the machine at work.

Second, the Majority argues that the claimant, while telling the truth about the accident, is lying about

why he asked Norvill not to report the injury. The Majority argues that the claimant was on drugs at the time of the accident and would have be fired for the drug use. In finding that the claimant must have been on drugs at the time of the accident, the Majority relies on the inconsistent testimonies of Norvill, Chatham and Chestnut.

Due to the fact that the injury was work related, the outcome of the present case should ultimately hinge on the issue of whether the Respondents supplied adequate proof to raise the presumption that the claimant's injury was substantially occasioned by the use of drugs and whether the claimant has overcome that presumption if raised. After reviewing the record, I find that the Respondents did not prove that the claimant was intoxicated at the time of the accident, and they fail to meet the presumption. Not only did the Respondents fail to administer a drug test at the time of the accident, but their only evidence of the claimant's alleged intoxication was from the inconsistent testimony of Norvill, Chatham, and Chestnut. Additionally, I find that the claimant has shown by a preponderance of the

evidence that his injury was not substantially occasioned by drug use. Neither Norvill or Chatham, who worked within a close proximity of the claimant on the day of the injury, testified that the claimant seemed impaired or to be under the influence of any drug. Additionally, the claimant had been employed for approximately six months prior to the accident, and the Respondents presented no testimony or evidence that the claimant had ever been impaired during that entire time. Accordingly, the claimant's own testimony that he had experienced with drugs eleven years prior to the accident is irrelevant, as the Respondents would not have continued to employ a person who was impaired at work.

Arkansas Workers' Compensation law provides:

An injury is not compensable if it is the result of an accident that was "substantially occasioned by the use of . . . illegal drugs. . . ." Ark. Code Ann. §11-9-102(4) (B) (iv) (a) (Supp. 2005). Further, the presence of illegal drugs "shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of" the illegal drugs. Ark. Code Ann. §11-9-102(4) (B) (iv) (b). And "[a]n employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the .

. . . illegal drugs . . . did not substantially occasion the injury or 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. Hunnicut Constr., 340 Ark. 377, 12 S.W.3d 630 (2000).

In Davis v. Your Employment Services, Inc., the claimant refused to take a drug test, thereby giving rise to the presumption. The Commission determined that a worker's refusal to submit to reasonable and responsible testing is only one factor which would be considered in determining whether a claimant's injury was substantially occasioned by the use of intoxicants. The Commission also considered whether the claimant's injury resulted from any type of machine malfunction. Davis v. Your Employment Services, Inc., Full Commission Opinion Filed December 5, 1996 (E415603).

In the present case, the presumption that the claimant's accident was caused by the use of drugs or alcohol at the time of the accident was never met by the Respondents. The present case is factually different and

therefore distinguished from Davis, in that the claimant did not refuse to take a drug test. Rather, the Respondents failed to administer a drug test after the accident occurred. Ark. Code Ann. § 11-9-102 specifically allows an employer to prove that the claimant was under the influence by administering a drug test immediately following an accident. Respondents should not be allowed to seek shelter under this statute when the misconduct of their own supervisors was the reason no drug test was performed.

On August 17th, 2005 Norvill provided a handwritten statement that the claimant was injured in a work-related accident and that he did not file a report. In that statement, Norvill made no mention of any drug related activities by the claimant. Interestingly enough, only after being fired, did Norvill make a statement that the claimant asked him not to call the nurse or file a report because he would fail the drug test. Norvill testified that he agreed not to write the report or call the nurse so that the claimant would not lose his job. Norvill also testified that

he would have fired any other worker that tested positive for drugs or admitted to using drugs.

Chatham's testimony is also riddled with inconsistencies. On August 17, 2005, Chatham wrote a note to the Respondents that he heard the accident and seeing the claimant stumbling around, he took the claimant to the break room and informed Norvill of the accident. On September 1, 2005 Chatham changed his story and wrote a different statement which indicated that on the date of the injury he heard the claimant tell Norvill that he could not pass a drug test. Interestingly enough, Chatham did not report that the claimant had any unusual activity or behavior consistent with drug abuse. In fact, he testified that he had never seen the claimant use any illegal substances, nor had Norvill ever failed to file a report of drug use for anyone else. Most importantly, Chatham testified that he was such good friends with Norvill and Chestnut that they would hang out together outside of work.

Chestnut testified that he was present at work on May 15, 2005, but that he did not see the accident nor did

he ever hear the claimant say anything to Norvill or Chatham or say anything regarding drug use. However, on September 1, 2005 Chestnut also filed a statement with the Respondents stating that after the accident, he witnessed the claimant telling Norvill that he could not pass a drug test. At the hearing, Chestnut testified that he gave the statement because he was mad at the claimant, but that it was, in fact, a lie.

It is evident that Norvill, Chatham, and Chestnut were all mad at the claimant and blamed him for Norvill's firing. As such, they all reported a story of the claimant's drug abuse as a means of revenge. This is evident not only in Chestnut's admission of it, but also by everyone's testimony that Chestnut was not even around at the time of the accident. Furthermore, Norvill, Chatham, and Chestnut all changed their stories only after Norvill was fired for not filing an injury report. As such, the Majority erroneously relied on the inconsistent testimonies of Norvill, Chatham, and Chestnut in finding that the claimant must have been impaired at the time of the accident.

Therefore, I find that the Respondents failed to meet the presumption that the claimant's accident was substantially occasioned by the use of drugs or alcohol.

If the Respondents meet their burden, then the claimant must rebut the presumption by proving that the accident was not substantially occasioned by the use of drugs or alcohol. In Thompson v. Jeffrey Sand Company, the Commission relied on Davis in finding that the claimant's refusal to submit to a drug test was only one factor to consider in determining whether a claimant's injury was substantially occasioned by the use of intoxicants. In Thompson, the claimant was using a ladder, when the ladder slipped on the ground, causing him to fall and become injured. According to the testimony of the claimant and a witness, the ladder was missing rubber feet, which caused the ladder to slip across the floor. Despite the fact that the claimant refused to take a drug test, the Commission found that the lack of rubber feet on the ladder was the "immediate and direct" cause of the claimant's accident and injury. Essentially, the accident would have occurred

whether or not the claimant was impaired. Therefore, the claimant rebutted the presumption by proving that the accident was not substantially occasioned by the use of drugs or alcohol. Thompson v. Jeffrey Sand Company, Full Commission Opinion Filed October 27, 1999 (E705151).

In Apple Tree v. Grimes, the claimant was cutting down trees, when a tree fell, striking a smaller tree, which ultimately struck and killed the claimant. A drug screen rendered positive results for marijuana. The Commission found that the claimant could not have predicted that the accident would have happened or planned to avoid it, and that even if he had not been impaired, he could not have gotten away from the falling tree. Therefore, the claimant proved by a preponderance of the evidence that the illegal drugs did not substantially occasion his accidental injury. Apple Tree Service, Inc. v. Grimes, 94 Ark. App. 190 (2006).

In Arkansas Elec. Coop. v. Ramsey, the claimant was cutting down a tree, which subsequently fell, striking and killing him. A drug screen was proof that the claimant had illegal drugs in his system at the time of the accident.

Respondents argued that the claimant was not using his safety harness at the time of the accident nor was he using ropes to pull down the tree, which would have been the safest method. Ultimately, the Respondents argued that the claimant would not have been injured but for his drug use. However, the claimant's wife testified that he was not impaired when he left for work that morning. None of the claimant's co-workers, out of four witnesses, saw the claimant use drugs or otherwise exhibit signs of impairment. Also, the claimant's boss testified that even though the crew should have used ropes to pull down the tree, it was ultimately a judgment call, and the crew used poor judgment in not utilizing ropes. The Commission noted that there was no evidence that indicated that the drug use caused the poor judgment. Therefore, the Commission's conclusion that the claimant's arguable deviation from routine safety precautions was substantially occasioned by the presence of illegal drugs, appeared to be based upon speculation and conjecture, which can never be permitted to take the place

of proof. Arkansas Elec. Coop. v. Ramsey, 87 Ark. App. 254, 190 S.W.3d 287 (2004).

In the present case, as in Ramsey, there was no objective evidence that the claimant was impaired at the time of the accident. The Majority gives considerable weight to Gary Richardson's testimony that he had seen his brother use illegal drugs eleven (11) years earlier. As a supervisor, Gary Richardson had a duty to report any drug activity to his employer, yet he never reported any drug activity by the claimant. Gary Richardson also testified that he had repossessed a vehicle from the claimant in 2004, in which he found an illegal drug, but could not testify that he knew that the drugs did in fact belong to the claimant. Ultimately, Gary Richardson could only speculate that the drugs found in the truck belonged to the claimant. The claimant, however, does not dispute that eleven (11) years earlier he had experimented with illegal drugs, but it is evident that the claimant's drug use eleven years prior to the accident is totally irrelevant. The Respondents presented no evidence that the drugs in the vehicle in 2004

belonged to the claimant, and to assume that the drugs in the vehicle belonged to the claimant would be impermissible speculation. As in Ramsey, any conclusion that the claimant's accident was substantially occasioned by the presence of illegal drugs appears to be based upon speculation and conjecture, which can never be permitted to take the place of proof.

Also, there was no testimony from the Respondents regarding the claimant's sobriety on the date of the accident, evidently because he had not been under the influence of any illegal drugs during the time he worked for the Respondents. Neither Norvill nor Chatham testified that the claimant appeared to be impaired or under the influence of drugs on that day. If the Respondents had suspected or known that the claimant had been using drugs on the date of the accident, it is more likely that the claimant would have been fired or at least asked to submit to a drug test. Norvill even testified that he would have fired anybody else for apparent drug use. Additionally, the claimant had been employed for approximately six months prior to the accident,

and the Respondents presented no testimony or evidence that the claimant had ever been impaired during that entire time. In fact, it is unlikely that the Respondents would have knowingly hired and continued to employ a drug abuser. Furthermore, the Majority ignored Frankie Henry's testimony that it was odd that the claimant would maintain that he was not injured at work especially because a drug test at that time would be irrelevant. As such, the claimant clearly rebuts the presumption by establishing proof by a preponderance of the evidence that the accident was not substantially occasioned by drugs or alcohol.

In the present case, as in Davis, the Commission must consider if the machine malfunctioned. In the present case, there is no dispute that the machine malfunctioned, which caused the injury. The claimant was working as a maintenance man, and he was working on the Hobart lift because it was not working properly. The claimant testified that he raised the lift up, but it did not shut off, so he let the lift back down. In order to determine what was wrong with the machine, he again used the limit switch to raise

the lift up again. At that point, the chain bound up, and when the claimant tried to turn it off, it would not turn off. Ultimately, the limit switch did not work, and the chain sheared pins, causing the U-shaped frame to go toward the claimant. The claimant was struck in the head and the shoulder and was pinned to the ground at the right ankle. Therefore, as in Thompson, the malfunctioning lift was the direct and immediate cause of the accident, thereby rebutting the presumption that the illegal drugs substantially occasioned his accident.

In the present case, as in Grimes, even if the claimant was under the influence, he could not have avoided the accident. The Majority erroneously found that the claimant must have been under the influence of an illegal substance, or else he would not have been standing where he could be injured when the machine malfunctioned. The claimant testified that he was bent over and in a semi-squatting position, and that the lift was only approximately two to three feet over his head when the lift fell, striking him in the head. Chatham corroborated the claimant's

testimony by admitting that if a person was operating the limit button it would be "very possible to be hit by the carriage" of the Hobart lift, just as the claimant was hit. Common sense would indicate that a person in a squatting position with a three hundred pound falling object only two to three feet above that person's head, would have almost no chance getting out of harm's way. As such, there was no evidence that the claimant's use of drugs would have prevented the accident. Thus, the claimant established proof by a preponderance of the evidence that use of illegal drugs did not substantially occasion his accidental injury.

Ultimately, the Majority, found that the Respondents met their burden despite not administering a drug test, by relying instead on the inconsistent testimony from Norvill, Chatham, and Chestnut, that the claimant was under the influence of drugs at the time of the accident. Evidently, the Majority also gave more weight to the irrelevant testimony that the claimant had used drugs eleven (11) years earlier, rather than to Frankie Henry's testimony that it was odd for the claimant to maintain that he was not

injured at work, when a drug test at that point was irrelevant. In fact, the Respondents presented no objective evidence that the claimant was under the influence of any substance on May 15, 2005. Also, the Majority erroneously concluded that the claimant would have moved out of harm's way, but for the use of illegal drugs. I believe this finding ignores Chatham's testimony that the accident could easily have occurred. Furthermore, it is simply illogical that the claimant could have avoided injury given the circumstances of his injury. Therefore, the Majority erroneously found that the claimant's injury was substantially occasioned by the use of drugs and alcohol.

Therefore, for the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner