

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606305

BRYAN POWELL, EMPLOYEE	CLAIMANT
ADVANCED ENVIRONMENTAL, EMPLOYER	RESPONDENT
INSURANCE COMPANY - STATE OF PENNSYLVANIA, CARRIER	RESPONDENT

OPINION FILED JANUARY 2, 2008

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 JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on March 16, 2007, finding that the claimant had overcome the rebuttable presumption that the injuries that the claimant sustained were occasioned by the presence of illegal drugs in the claimant's system. Based upon our de novo review of the record, we find that the claimant has failed to rebut the presumption. We further find that the claimant's injuries to

his fingers were substantially occasioned by the presence of illegal drugs in his system.

The claimant was employed by the respondent employer for approximately three months when on June 2, 2006, at approximately 1:00 a.m. the claimant stuck his hand into a machine without shutting the machine off. As a result, the tips of the claimant's left index and middle fingers were amputated. The claimant was taken to the emergency room and a urine sample was taken. The results indicated the presence of cocaine and morphine in the claimant's system. Based upon a positive drug screen, the respondents denied the claim. The Administrative Law Judge found that the claimant had rebutted the presumption. After conducting a de novo review of the record, we find that the claimant has failed to rebut the presumption.

Act 796 of 1993 made substantial changes in the law regarding an injury substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders. As amended by Act 796, an injury which is substantially occasioned by the use

of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders is not compensable, just as under prior law. However, under the amended law, every employee is deemed by his performance of services to have impliedly consented to testing for any of these substances in his body, and the presence of any of these substances creates a rebuttal presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order. Ark. Code Ann. § 11-9-102(4)(B)(iv)(a) (Supp. 2005).

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. The Commission is

required to determine whether the claimant has met his 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.

A statutory presumption is a rule of law under which the finding of a basic fact compels the finding of a presumed fact, unless sufficient evidence to the contrary is presented to rebut the presumption. See, Black's Law Dictionary, (5th Ed.). If evidence which is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. Ross v. Vaught, 246 Ark. 1002, 440 S.W.2d 540 (1969); Curtis Circulation Co. v. Henderson, 232 Ark. 1029, 342 S.W.2d 89 (1961); Ford & Son Sanitary Co. v. Ransom, 213 Ark. 390, 210 S.W.2d 508 (1948); and Ball v. Hail, 196 Ark. 491, 118 S.W.2d 668 (1938). Just as the determination of the weight to be given to the evidence is a matter within the province of the trier of fact, the

determination of the weight to be given to the presumption is a matter within the province of the trier of fact. Dunn v. Dunn, 255 Ark. 764, 503 S.W.2d 168 (1973). In this regard, the presumption should be given the weight necessary to "best serve the interest of justice." Id.

With regard to the effect of the testimony of an interested party on a presumption, the Arkansas Supreme Court made the following statements in Dunn, supra, (Barnhart, Use of Presumptions In Arkansas, 4 Ark. L. Rev. 128, 141 (1950):

Except as the court may be restrained by constitutional requirements of due process of law..., there would seem to be no reason in law or logic why there should not be accorded to any or all presumptions the weight which the court feels would best serve the interest of justice. If dissipation by a bare denial from an interested witness seems to accord too trifling in effect to a presumption, the court would seem justified to require more before the presumption is rebutted.

Therefore, the question of whether the testimony of an interested party is sufficient to rebut the presumption remains a question for the trier of fact.

However, in determining if the testimony of an interested party is entitled to sufficient weight to overcome the presumption in itself, it must be remembered that the testimony of interested parties is not to be treated as undisputed in determining the weight it is to be accorded. Ball, supra; Phelps v. Partee, 208 Ark. 212, 185 S.W.2d 705 (1945). A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Further, it is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). The Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

In the present claim, the evidence shows that cocaine was present in the claimant at the time of the injury. Therefore, we begin with the presumption that the claimant's injury was substantially occasioned by the drug. The question in this case then becomes whether the claimant's denial of having used cocaine on the date of the accident is sufficient to constitute a preponderance of the credible evidence and rebut the presumption that the accident was substantially occasioned by the use of cocaine. The Commission has previously held such testimony is insufficient to rebut the presumption. Sanders v. CFSI Temporary Services, Full Commission Opinion October 13, 1995 (Claim No. E408568).

The claimant's accident came soon after he had taken his lunch break and he provided numerous stories regarding where he went on his lunch break. On direct examination, the claimant indicated that he had talked with Josh Hinchliffecliffe for a solid hour before injuring himself. However, later, on cross-examination, the claimant testified that it is "possible" that he left the plant to go

get food from a local restaurant. The claimant was working from 7:00 p.m. to 7:00 a.m., and he estimated that the accident occurred around 1:00 a.m. The claimant had taken a break that was about forty-five minutes to an hour long. However, he also noted that he "might" have taken a break earlier in the night where he left the plant premises. With regard to the breaks he had taken on the night of the accident, the claimant testified as follows:

Q. You explained in your depo that the time sheets wouldn't indicate that you had left for lunch or not because sometimes you guys didn't clock out for lunch; is that right?

A. Yes.

Q. In fact, the night of the accident, you hadn't clocked out at any point since you had been there at seven, had you?

A. Not very many people do.

Q. But that night, you didn't clock out?

A. No.

Q. As far as the break situation, you typically take 10- to 15-minute break and then a half-hour lunch at some point during the night?

A. Yes.

Q. And you said you had noted a 15-minute break. You can go to your car during that time, can't you?

A. If needed, yes.

Q. Can you go to your car at various times during the night if you need to go out there for something?

A. You can.

Q. Okay. That's something you had done before; correct?

A. Yes.

Q. And as far as this specific night, you said you don't remember one way or the other whether you had been to lunch before the accident?

A. Because I had gone many times before.

Q. But you don't remember one way or the other this specific night?

A. No, sir.

Q. And when we questioned you further, you said that the day of the accident, you may have gone down the street and gotten a burrito from a Mexican restaurant, but you just didn't remember one way or the other; is that right?

A. Yes, sir.

Q. That would have been before the accident, I take it?

A. Yes.

Later, on re-cross examination, the claimant testified further:

Q. Mr. Powell, you said that you didn't leave the building and that you were on break with Josh, but when we asked you during your deposition, you said - - I asked you whether it was possible that you left and went to lunch and you said, "Yeah, it's possible," didn't you?

Before I had - -

Q. Before the accident, yes.

A. Before I had the meeting with Josh.

Q. Correct.

A. Yes.

Q. That's still your testimony today?

A. It's possible that I could have taken off.

Q. Right.

A. I mean when I was asked that, it had been, you know, one or two or three months after the accident and it's kind of hard to remember if I want to lunch

that day or not when there had been multiple occasions that I would go to lunch.

Q. I think we asked you three different times and each time, you said it's entirely possible that you could have left and went and got lunch somewhere.

A. Yes.

The claimant's testimony raises many questions concerning his credibility. It is curious that on the night he lost the tips of two of his fingers he cannot remember whether or not he left the premises. The claimant recalled the events of the night without any trouble, and it was not until he was questioned regarding his whereabouts earlier in the evening that he claimed not to be able to remember what he had been doing. The trip to the burrito stand the claimant cannot remember certainly provided the opportunity to ingest cocaine prior to his work related injury. The claimant's suspiciously vague testimony is insufficient to rebut the presumption that his injuries were substantially occasioned by the use of cocaine.

The claimant tested positive for morphine and cocaine at the hospital. The claimant does not challenge the results of the test, but instead he maintains that he had taken the drugs two days earlier. The claimant's explanation was that he had actually come to work on Wednesday night after using cocaine and drinking heavily (the accident happened late Friday night/early Saturday morning). According to the claimant he had gone to work at 1:00 a.m. on Thursday morning after drinking Crown Royal whiskey, vodka and at least six or seven beers. The claimant testified that he had been using cocaine with four other people that night, but, he could only identify one of them by name. He could not provide any specific details regarding whose house he was at or how he came to ingest the cocaine. When this testimony is coupled with the claimant's testimony it is simply insufficient to rebut the statutory presumption that his injury was caused by the illegal drugs in his system.

The Administrative Law Judge held that the claimant's actions were not negligent or reckless. However,

that proof of negligence and/or recklessness is not required to establish that a person is impaired. Nonetheless, the evidence at the hearing clearly indicates that the claimant would have had to have been negligent to stick his arm as far into the machine as he did. The claimant had been working on the machine that caused his injury for three months prior to the accident on June 2, 2006. The claimant claimed he had never been shown how to work on the machine when clumps of plastic started backing up on the grate in front of him. However, when confronted he conceded that his supervisor, Josh Hinchliffe, had personally trained him concerning how to safely operate the machine. Additionally, the claimant had participated in no less than five safety meetings regarding the safe operation of machinery and the importance of being careful when operating and maintaining the machines. The claimant also signed numerous lock out/tag out certifications, and he testified that he knew the machine should be shut down if the grate was going to be removed. The claimant also conceded that he knew that the machine should be turned off, tagged out and locked out any

time that he was going to change or clean the blade. When asked why this was necessary, the claimant ironically stated "to make sure you don't lose no limbs." The claimant conceded that he had left the machine running despite the availability of a shut off switch near by. Assistant Plant Manager, Billy Hufford explained that the machine should be de-energized any time the employee is troubleshooting, repairing or cleaning the machine. The claimant's failure to take the safety precautions necessary to prevent his injury despite the immense amount of evidence indicating that he was aware of the dangers of working on the machine with it running is clear evidence of impairment.

Additionally, the evidence and testimony introduced at the hearing indicates the claimant's injury could only have occurred if he had reached his arm at least 8 inches further into the machine than he normally would have with the safety grate in place. The claimant conceded that with the grate in place, his fingers would not be in any danger. Billy Hufford explained:

Q. Okay. Is there anything obstructing your view into that funnel if you're standing right there at the machine?

A. No.

Q. That bin is open; there's no guardrail or anything that you have to reach over?

A. No.

Q. As far as the grate itself, how far below the grate are these blades that are spinning around?

A. Probably six to eight inches.

Q. So with the grate in place, you stick your fingers through the grate, you're not reaching those blades?

A. The grate was about an inch thick itself, too, so if you add all that in--

Q. So about eight or nine inches?

A. Yeah, probably eight or nine inches from the top of that valve to the top of the grate.

Despite Mr. Hufford's testimony regarding the visibility of the grate and the blades on the star valve, the claimant stuck his arm three-quarters of a foot further into the machine because he thought the grate was still there, and

not because he was being reckless or negligent due to his intoxication/impairment.

The claimant also provided numerous scenarios concerning how he came to be hurt and why he could not see the moving parts that amputated his fingers. In one instance, the claimant maintained that he could not see into the machine because of the angle and the close proximity between he and coworker, Hoby Brown. Yet, later he testified that his view of the star-valve blades was obstructed by excess plastic shavings. The testimony of the respondents' witnesses clearly indicates that neither account of what occurred on June 2, 2006, was credible.

Early in the hearing the claimant tried to insinuate that he was reaching over into a machine that he could not see the moving parts that severed the tips of his fingers.

Q. How did you not know that he had taken that [the grate] off?

...

A. Because where he was standing was to my right and I had turned to my left to cool off my hand and when I turned

back around, I stuck my hand back in there.

However, Billy Hufford provided unequivocal testimony that nothing would obstruct the machine operators' view if they were standing in front of the hopper. Later, the claimant changed his story regarding whether or not he could see into the chute he had stuck his arm in and he informed the judge that he had looked into the machine before sticking his hand in, but saw "nothing but plastic." Josh Hinchliffe pointed out the falsity of the claimant's statement by testifying as follows:

Q. On the night of the accident, the claimant told the Judge that when he turned back around, there was material covering up part of the opening. If that grate is there, is it possible for there to be material built up - - if the grate is not there?

A. If you remove the grate, that material is going to be on there and gone, like that, because that grate is what's holding up the material and holding up those big pieces, and once that grate is removed, that material is gone.

Q. Is there anything there to hold up the material and make any type of

blockage, aside from the lip the grate was on?

A. No.

Bill Hufford provided similar testimony, and he added that if the grate was removed there would be absolutely nothing blocking the claimant's vision of the 8-inch star valve blades.

The claimant listed numerous people whom he maintained talked with him on the night of the accident. Yet, the claimant only called one witness in his case in chief, other than himself. Interestingly, the claimant failed to call the one person who could provided definitive testimony regarding his actions on the night of his injury, namely, coworker, Hoby Brown. According to the claimant Mr. Brown worked beside him all night and was an eyewitness to his work related injury. The claimant blames the removal of the grate on the machine on Hoby Brown. Yet, the claimant did not call this witness to corroborate his version of how things transpired on June 16, 2006. The absence of testimony in support of the claimant's story, together with the

numerous inconsistencies, demonstrates that the claimant is not credible.

Therefore, after conducting a de novo review of the record, we find that the claimant failed to rebut the statutory presumption in §11-9-102(4)(B)(iv)(a)-(b). Accordingly we reverse the decision of the Administrative Law Judge. This claim is hereby denied and dismissed.0

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 even though the claimant suffered a compensable work-related injury on June 2, 2006, that the injury was substantially occasioned by the use of drugs. Specifically, the Majority found that the claimant did not

overcome the rebuttable presumption that the injuries he sustained were occasioned by the presence of illegal drugs. Based on a de novo review of the record, I find that the claimant overcame the presumption that the injuries he sustained were occasioned by the presence of illegal drugs.

The claimant testified that he began working for the respondents on March 1st or 2nd of 2006 as a pulverizer technician. The claimant testified that on June 2, 2006, he was clearing clumps out of the machine with his co-worker, Hobby Brown, when he sustained an injury to two of his fingers on his left hand. The claimant testified that Mr. Brown had removed the grate, which would have protected his fingers, but that he did not know that Mr. Brown had removed the grate. The claimant further testified that it was not proper procedure to remove the grate and reach into the machine.

The claimant testified that in order to clean out the machine he had put his hand into the machine to pick clumps off the plastic inside. The claimant admitted that while the procedure that he used to clean out the machine

was not the proper procedure, he had in fact learned it from observing his supervisor, Joe McGee. The plastic is hot, and the claimant pulled his hand out to cool his hand off. This is when Mr. Brown removed the protective grate. The claimant testified that when he turned back around to stick his hand into the machine, the tips of two of his fingers on his left hand were sliced off by the machine.

The claimant was taken to the emergency room for treatment and was given a drug test. The claimant's drug test was positive for cocaine. The claimant testified that he had in fact used cocaine thirty (30) hours prior to being at work. The claimant testified that on Wednesday (May 31, 2006), he had used cocaine and drank Crown, vodka, and beer at approximately 6:00 or 7:00 p.m. The claimant testified that he went to work at 1:00 a.m. on Thursday morning and worked until 7:00 a.m. The claimant testified that he returned to work at 7:00 p.m. on Thursday, and was scheduled to work until 7:00 a.m. Friday morning.

The claimant testified that on the day of the accident, it was possible that he could have taken a break

to get some dinner at a local Mexican restaurant. However, he testified that if he had left work to get food, it would have been before 10:00 p.m. because that is when the Mexican restaurant closed. The claimant testified that it is normal to take a ten (10) to fifteen (15) minute break at some point during the night, however he did not recall whether or not he had actually gone to get something to eat on that particular night.

The claimant testified that later that evening he had spent approximately 45 minutes to an hour in the office of Josh Hinchliffe, the assistant night manager. The claimant testified that he frequented Mr. Hinchliffe's office to test sample materials. On June 2, 2006, the claimant and Mr. Brown went to Mr. Hinchliffe's office and began making fun of Mr. Hinchliffe for "reading a book about love or something." The claimant testified that Mr. Hinchliffe was dealing with marital problems, and that he stayed in Mr. Hinchliffe's office to talk with him for a while.

The claimant testified that he remained in Mr. Hinchliffe's office until approximately 12:48 a.m., when he and Mr. Brown returned to work. The claimant testified that he noticed machine no. 1 was having a problem, and he and Mr. Brown began working on it. The claimant testified that they had worked on the machine for approximately ten (10) minutes when the accident occurred and the machine severed his fingers.

The claimant was questioned about why Mr. Brown, the only witness to the event was not testifying at the hearing. The claimant testified that Mr. Brown had joined the military.

Larry Carl Harris, the claimant's immediate supervisor and the lead man for the claimant's department, testified that he had observed and spoken to the claimant on more than 3 occasions, during the claimant's shift on June 2, 2006 and prior to the accident. He stated that, at these times, the claimant did not appear to be under the influence of any drugs or alcohol. He further testified that following the claimant's accident, he performed the required

accident investigation. During this investigation, he was told by Mr. Brown that he had removed the grate or screen from the hopper, prior to the accident. Based upon this investigation, Mr. Harris recommended that the grates or screens be fastened down and that a lock out tag on the machine be required, in the future.

Josh Hinchliffe, the assistant plant manager for the respondent, testified that he, too, saw and talked to the claimant on several occasions during the claimant's shift, on June 2, 2006 and prior to the accident. He stated that the last of these occasions was approximately 15 to 20 minutes prior to the accident and that he talked to the claimant for approximately 30 minutes on this particular occasion. He stated that, although he was not familiar with the signs of cocaine intoxication, he noticed no abnormalities in the claimant's speech, balance, or logic during any of these various conversations. Mr. Hinchliffe testified that the conversation that they had was logical, and there was not anything about it that was illogical or unusual.

William R. Hufford, general manager for the respondent, testified on the respondent's behalf. However, Mr. Hufford testified that all of the grates were now welded down.

The medical records reveal that the claimant was treated by Dr. Peter Tang at Northwest Medical Center on the date of the injury. Dr. Tang's medical records reveal that the claimant was patient and oriented. The claimant's vital signs are, "afebrile with stable vital signs." There is no indication that Dr. Tang considered the claimant to be intoxicated or under the influence of an illegal substance.

Dr. Tang's medical records note that the x-ray results of the claimant's left index and middle finger show a transverse amputation through the distal phalanx on both index and middle fingers. Dr. Tang noted that the claimant needed to have the fingertips of the claimant's left index and middle fingers amputated. The amputation was performed that same date. Dr. Tang gave the claimant morphine at this time.

The claimant's drug screen was administered after the claimant was given morphine by Dr. Tang. The test results show that the claimant tested positive for both cocaine and morphine. The morphine level tested at 2000 ng/mL. The cocaine level tested at 300 ng/mL under the Initial Test and 150 ng/mL under the OC/MS Confirm Test. There is no explanation on the drug screen test result form which indicates that these levels are unusually high. In fact, the only indication is that the drug screen test result form reveals that the claimant was positive. The test result does not give any indication how long the cocaine had been in the claimant's system.

The respondents offered the report of Dr. Harry F. Simmons, dated October 14, 2006. In his report, Dr. Simmons indicates that the presence of cocaine metabolites in the claimant's urine could be compatible with the actual narcotic or "parent" compounds being present and in active circulation in the claimant's bloodstream at that time. However, he further stated that the presence of these cocaine metabolites would be equally compatible with the use

of cocaine some 24 to 48 hours prior and after the effects of the actual drug or narcotic in the claimant's system had dissipated.

The Majority erroneously concluded that the claimant's testimony was not credible and that even through the claimant sustained a work-related injury, that the claimant's injury was substantially occasioned by the use of drugs or alcohol. The claimant maintains that he was injured at work on June 2, 2006, when he was clearing clumps out of the machine which severed two of his fingers on his left hand. The claimant also maintains that the injury was not substantially occasioned by the use of illegal drugs. The Majority finds 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 when a grate was removed without the claimant's knowledge and that the accident would have occurred regardless of whether he was under the influence of an illegal substance.

There is no doubt that on June 2, 2006, during regular working hours and on the employer's premises and while the claimant was performing his assigned employment position, the claimant suffered an accidental injury to the first and second fingers of his left hand. This injury resulted in the traumatic amputation of the distal phalanges of these two fingers. The dispute centers over whether these injuries are expressly excluded from the category of "compensable injuries" by Ark. Code Ann. § 11-9-102(4)(B)(iv). This subdivision provides that when there is a showing by the respondent of the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders in the claimant's system, a rebuttable presumption is created that the injury or accident was substantially occasioned by the use of such alcohol, illegal drugs, or prescription drugs in contravention of a physician's orders. The claimant must then rebut this presumption by proving by a preponderance of the evidence that his injury was not substantially occasioned by the presence of these substances, or excluded

from the category of "compensable injuries". In the present matter, I find that the claimant rebutted the presumption.

In the present case, the respondents have offered medical records to show that, on the claimant's arrival at the Northwest Medical Center emergency room on June 2, 2006, a urine sample was taken. This urine sample was subsequently tested and revealed the presence of cocaine metabolites in the claimant's system. The laboratory report, dated June 4, 2006, also appears to indicate that a positive test was obtained for the specific opiate morphine. However, after review of all of the evidence, especially test documents, it appears that the positive result for the opiate morphine is in error. On the laboratory report itself, no initial positive findings for opiates, including both codeine and morphine is noted. On the supposed "follow up" testing a value of 2000 ng/mL is recorded for both the opiates codeine and morphine. However, such this test result is indicated to be "negative" for codeine, but "positive" for morphine. More importantly, I would note that when the results of these tests were medically reviewed, the only test that was

determined to be positive was the test for cocaine. The test for all opiates, including morphine, was indicated to be negative (Respondents' Exhibit No. 1, page 3). Furthermore, it is clear from the medical records, that Dr. Tang gave the claimant morphine while he was at the hospital. Therefore, I find that the respondents have proven by the greater weight of the credible evidence that, at the time of his accident and injury on June 2, 2006, the claimant had the metabolites of the illegal drug, cocaine, in his system, but did not have morphine present in his system.

The presence of these cocaine metabolites is sufficient, in and of itself, to raise the presumption of Ark. Code Ann. §11-9-102(4)(B)(iv)(b). However, given the claimant's testimony in combination with the corroborative testimony of Mr. Harris and Mr. Hinchliffe, the claimant clearly rebutted the presumption. Additionally, the respondent's own witness, Dr. Harry F. Simmons, could only speculate as to the effects of the drugs on the claimant.

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 Grimes, even if the claimant was under the influence, he could not have avoided the accident. First, the claimant testified that while he was clearing clumps out of the machine with his co-worker, Hobby Brown. The claimant testified that in order to clean out the machine he had put his hand into the machine to pick

clumps off the plastic inside. The claimant admitted that while the procedure that he used to clean out the machine was not the proper procedure, he had in fact learned it from observing his supervisor, Joe McGee. The plastic is hot, and the claimant pulled his hand out to cool his hand off. This is when Mr. Brown removed the protective grate. The claimant testified that Mr. Brown had removed the grate, which would have protected his fingers, but that he did not know that Mr. Brown had removed the grate. The claimant further testified that it was not proper procedure to remove the grate and reach into the machine. The claimant testified that when he turned back around to stick his hand into the machine, the tips of two of his fingers on his left hand were sliced off by the machine.

It is apparent from the claimant's testimony that he was performing his work in a manner consistent with his supervisor's actions. Additionally, the claimant did not know that the grate had been removed when he stuck his hand back into the machine. His co-worker, Mr. Brown had removed the grate when the claimant turned his back. Mr. Harris, the

claimant's immediate supervisor and the lead man for the claimant's department, corroborated this testimony.

Mr. Harris testified that during this investigation, he was told by Mr. Brown that he had removed the grate or screen from the hopper, prior to the accident.

Additionally, the respondents had not taken all the proper safety precautions to ensure workers' safety. It is evident that the respondents had provided safety meeting for the workers, but they did not take any steps to ensure their safety. This is evidenced by the testimony of both Mr. Harris and Mr. Hufford, who both testified that the grates were now welded down, only subsequent to the claimant's accident. As such, the evidence proves that not only did the claimant not know about the impending danger because he did not know that Mr. Brown had removed the grate, but the respondents could have prevented the accident all together by taking the appropriate precautionary safety measures, which were easily made after the accident occurred. and therefore, his actions cannot be related to the drugs found in his system.

Second, as in Ramsey, there was no objective evidence that the claimant was impaired at the time of the accident. The claimant testified that he used cocaine thirty hours prior to the accident. The claimant testified that he was not impaired at work, and the testimony of Mr. Harris and Mr. Hinchliffe, corroborates this testimony.

Additionally, the medical records and the respondent's own witness corroborate this testimony. Mr. Harris testified that he had observed and spoken to the claimant on more than 3 occasions, during the claimant's shift on June 2, 2006 and prior to the accident. He stated that, at these times, the claimant did not appear to be under the influence of any drugs or alcohol.

Mr. Hinchliffe testified that he, too, saw and talked to the claimant on several occasions during the claimant's shift, on June 2, 2006 and prior to the accident. He stated that the last of these occasions was approximately 15 to 20 minutes prior to the accident and that he talked to the claimant for approximately 30 minutes on this particular occasion. He stated that, although he was not familiar with

the signs of cocaine intoxication, he noticed no abnormalities in the claimant's speech, balance, or logic during any of these various conversations. Mr. Hinchliffe testified that the conversation that they had was logical, and there was not anything about it that was illogical or unusual.

Additionally, the medical records reveal that the claimant was treated by Dr. Peter Tang at Northwest Medical Center on the date of the injury. Dr. Tang's medical records reveal that the claimant was patient and oriented. The claimant's vital signs are, "afebrile with stable vital signs." There is no indication that Dr. Tang considered the claimant to be intoxicated or under the influence of an illegal substance.

Furthermore, The respondents own witness, Dr. Simmons, indicates that the presence of cocaine metabolites in the claimant's urine could be compatible with the actual narcotic or "parent" compounds being present and in active circulation in the claimant's bloodstream at that time. However, he further stated that the presence of these

cocaine metabolites would be equally compatible with the use of cocaine some 24 to 48 hours prior and after the effects of the actual drug or narcotic in the claimant's system had dissipated. As such, it is evident that even the respondent's own witness could not conclude without sheer speculation that the accident was occasioned by the use of drugs. 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.

The Majority erroneously finds that the claimant's "sufficiently vague testimony" is insufficient to rebut the presumption that his injuries were substantially occasioned by the use of cocaine. First, the Majority cites the fact that the claimant could not recall whether he had gone to the burrito stand earlier in the evening to get dinner. The Majority argues that had the claimant left work to get a burrito, then he had the opportunity to use cocaine on his break. Conjecture and speculation, even if plausible, cannot

take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Not only is the Majority speculating, but the idea that the claimant used cocaine while at work that evening is contrary to the drug screen results and Dr. Simmons' opinion. According to Dr. Simmons, the amount of drugs found in the claimant at the time of the accident was consistent with the claimant's own testimony that he used cocaine 30 hours prior to the accident. Dr. Simmons stated that the presence of these cocaine metabolites would be equally compatible with the use of cocaine some 24 to 48 hours prior to the accident. Therefore, the Majority's argument that the claimant used cocaine while at work is erroneous and completely contrary to the medical evidence and testimony of the respondents' own witness.

The Majority also argues that the claimant only called one other witness and that the claimant did not call Mr. Brown as a witness. The Majority argues that the

claimant's testimony cannot be corroborated with out Mr. Brown's testimony. The Majority is simply wrong. First, the claimant credibly testified that Mr. Brown, the only actual witness to the claimant's fingers being severed, joined the military after the accident occurred. As Mr. Brown is serving his Country in the United States Military at this time, he was not called to testify. Second, the claimant's witness, Mr. Harris, credibly testified that following the claimant's accident, he performed the required accident investigation. During this investigation, Mr. Harris was told by Mr. Brown that he had removed the grate from the hopper, prior to the accident. Based upon this investigation, Mr. Harris recommended that the grates or screens be fastened down and that a lock out tag on the machine be required, in the future. Therefore, as Mr. Brown was not available to testify, I find that Mr. Harris's testimony is sufficient to corroborate the claimant's testimony regarding the events of that night.

In conclusion, I find that the claimant established by a preponderance of the evidence that the

accident was not substantially occasioned by drugs. The claimant's testimony reveals that he used cocaine 30 hours prior to the accident. The corroborating testimony of Dr. Simmons revealed the presence cocaine in the claimant's system was equally compatible with the use of cocaine some 24 to 48 hours prior and after the effects of the actual drug or narcotic in the claimant's system had dissipated. Furthermore, the testimony of Mr. Harris and Mr. Hinchliffe establishes that the claimant was not intoxicated while at work on the night of the accident.

Therefore, for the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner