

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711461

CARL JOHNSON, EMPLOYEE	CLAIMANT
U. S. FOOD SERVICE, INC., EMPLOYER	RESPONDENT NO. 1
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 18, 2009

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

Claimant appears Pro Se.

Respondents No. 1 represented by the HONORABLE CAROL L.  
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part;  
reversed in part.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal  
an administrative law judge's opinion filed December 31,  
2008. The administrative law judge found that the claimant  
proved he sustained a compensable left shoulder injury but  
not a compensable low back injury. After reviewing the  
entire record *de novo*, the Full Commission finds that the

claimant did not rebut the presumption that his alleged injuries were substantially occasioned by the use of an illegal drugs. We therefore find that the claimant did not prove he sustained a compensable injury to his left shoulder or lower back.

I. HISTORY

The record indicates that Carl Edward Johnson, age 50, was hired at U.S. Food Services on February 25, 2002. Mr. Johnson received medical treatment beginning in August 2003 after reporting that he had injured his left shoulder at work. The record contains correspondence from the respondent-employer to Mr. Johnson dated September 22, 2005: "As you are aware, the drug screen result from your test on Sept. 15, 2005, was positive." The claimant was given several guidelines in order to remain employed, including participation in rehabilitation, after care, and random drug testing. It was indicated that the positive substance was "PCP."

The parties stipulated that an employment relationship existed on September 21, 2007. The claimant testified, "I was at one of my stops, and I was lifting some heavy boxes of meat, like 80 or 90-pound boxes of meat. Then that pain hit me again in my shoulder and also in my lower left back."

The claimant sought treatment at Concentra Health Services on September 21, 2007. On a Patient Information form, the claimant wrote that he had injured his "left middle back." Dr. Cynthia Almond examined the claimant and diagnosed "1. Lumbar strain. 2. Lumbar pain." The claimant informed Dr. Harold B. Betton on September 24, 2007 that he was suffering from left shoulder and lower back pain.

The record contains a First Report Of Injury Or Illness, prepared September 24, 2007, indicating that the employer was notified on September 21, 2007. The Type Of Injury was sprain/strain of the lower back area. The injury was described on the First Report: "As driver was lifting box, he fealt (sic) sharp pain in his left middle portion of his back, around the rib cage area."

The record contains Drug Test Results dated September 28, 2007, physically collected from the claimant at Concentra on September 21, 2007. The Drug Test Results indicated that the claimant tested Positive for "Phencyclidine." The respondents' exhibits include a Web definition of Phencyclidine, abbreviated PCP: "a dissociative drug fomeryly used as an anesthetic agent, exhibiting hallucinogenic and neurotoxic effects. It is commonly known as Angel Dust."

An administrative law judge questioned the *pro se* claimant:

Q. Can you tell me - do you have any testimony at all about how that drug did or did not end up in your body?

A. I really could not tell you, Sir, to be honest....

The claimant's employment with the respondents was terminated on or about October 3, 2007. The claimant testified that he was terminated "because of the positive drug test." The claimant testified that he began working for another employer on March 14, 2008.

A pre-hearing order was filed on September 16, 2008. The claimant contended that he injured his low back and left shoulder "when he experienced pain while lifting meat on September 21, 2007. It was necessary for his supervisor, Willie Sheppard, to go get the claimant after the injury on the claimant's route." The claimant contended that he "has been off work for all but a three month period since September 21, 2007."

The respondents contended that the claimant "did not suffer a compensable injury under the Arkansas Workers' Compensation Act in light of the positive drug test that was done within 24 hours of his injury." The respondents

contended that if compensability was found, then "the claimant's current need for medical treatment, if any, is associated with pre-existing problems and not any alleged injury that occurred on September 21, 2007." The respondents contended that there were no objective findings of a back or shoulder injury. The respondents contended that they "had no notice of a shoulder injury before the September 15, 2008, pre-hearing conference."

After a hearing, an administrative law judge found an opinion on December 31, 2008. The administrative law judge found, among other things, that the claimant proved he sustained a compensable left shoulder injury on September 21, 2007. The administrative law judge found that the claimant failed to prove he sustained a compensable back injury on September 21, 2007. The claimant appeals to the Full Commission and the respondents cross-appeal.

## II. ADJUDICATION

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

- (A) "Compensable injury" means:
  - (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[.]

(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....

(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.

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).

Whether the presumption set out in Ark. Code Ann. §11-9-102(4) (B) (iv) (b) is overcome is a question of fact for the Commission to determine. *Woodall v. Hunnicutt*, 340 Ark. 377, 12 S.W.3d 630 (2000).

In the present matter, the claimant contends that he sustained compensable injuries to his left shoulder and low back on September 21, 2007. The claimant testified that he

sustained these injuries as the result of lifting heavy boxes of meat. The claimant testified that he gave a urine sample on September 21, 2007. A Drug Test dated September 28, 2007 indicated that the claimant tested positive for "Phencyclidine," abbreviated "PCP," on September 21, 2007. The claimant does not appeal the administrative law judge's determination that phencyclidine is a scheduled controlled substance, possession of which is unlawful pursuant to the Arkansas Code. The evidence therefore demonstrates that an illegal drug was present in the claimant's body at the time of the alleged accidental injuries. The presence of PCP in the claimant's body created a rebuttable presumption that the accident was substantially occasioned by the use of an illegal drug. Ark. Code Ann. §11-9-102(4)(B)(iv)(b). The claimant did not offer any testimony or other evidence to rebut the statutory presumption that the accident was substantially occasioned by the use of an illegal drug.

Based on our *de novo* review of the entire record, the Full Commission finds that the alleged September 21, 2007 accidental injury was substantially occasioned by the use of the illegal drug Phencyclidine. The Full Commission therefore finds that the claimant did not prove he sustained a compensable injury to his left shoulder or low back. We

therefore affirm the administrative law judge in part and reverse in part. Because we find that the alleged injury was substantially occasioned by the use of an illegal drug, the Full Commission need not adjudicate whether or not the claimant proved he sustained a compensable injury pursuant to the elements of Ark. Code Ann. §11-9-102(4)(A)(i). This claim is denied and dismissed.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.