

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F805467

ANDREW RUBOTTOM,
EMPLOYEE

CLAIMANT

T E C THE EMPLOYMENT COMPANY, INC.,
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 16, 2009

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

Claimant represented by the HONORABLE EDDIE H. WALKER,
Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed March 3, 2009. The administrative law judge
made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at
the pre-hearing conference conducted on August 20,
2008, and contained in a pre-hearing order filed
August 21, 2008, are hereby accepted as fact.
2. The claimant has failed to meet his burden of
proving by a preponderance of the evidence that

marijuana did not substantially occasion his injury.

Therefore, he has failed to prove that he suffered a compensable injury.

After reviewing the entire record *de novo*, it is our opinion that the administrative law judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed. We find that the findings of fact made by the administrative law judge are correct and are therefore adopted by the Full Commission.

The record contains a report from the Clinical Laboratory Department, Sparks Regional Medical Center. This report, based on a urine specimen collected from the claimant on June 3, 2008, indicates that the claimant tested positive for THC. We affirm the administrative law judge's conclusion that this document created a rebuttable presumption that the injury was the substantially occasioned by the use of an illegal drug, marijuana. See *Waldrip v. Graco Corp.*, 101 Ark. 101, ___ S.W.3d ___ (2007). We recognize language included on the report, to wit: "This is a screening procedure and inadequate for legal purposes. If situation warrants, results should be confirmed by a reference method." This internal language from Sparks

Regional does not affect admissibility of this exhibit or the Commission's adjudicatory finding, pursuant to Ark. Code Ann. §11-9-102(4)(B)(iv)(b), that a rebuttable presumption has been created.

Therefore we affirm as modified the March 3, 2008 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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant successfully rebutted the presumption that his injury was substantially occasioned by the presence of marijuana in his system. I would award medical and indemnity benefits, and attorney's fees, to the claimant.

An injury is not compensable where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. Ark. Code Ann. Sec.

11-9-102(4)(B)(iv)(a). "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." Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). Once a positive drug test has shown the presence of illegal drugs after an accident, in this case marijuana, the burden shifts to the claimant to show that the drug use did not substantially occasion the injury. Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Ward v. Hickory Springs Manufacturing Co., ___ S.W.3d ___, ___ Ark. App. ___, (Ark.App. January 31, 2007).

Two drug screen reports were entered into evidence. The specimen for the first screen was purported to have been collected on June 3, 2008 at 12:45 pm. It appears that the test was positive for THC in that it fell

within the reference range of 0-49 ng/mL. The form then states "06/03/2008 21:45:00 U THC Scr: This is a screening procedure and inadequate for legal purposes. If situation warrants, results should be confirmed by a reference method." There is no confirmation of the results in the record. The record does not reflect that further testing of the sample was performed.

A large portion of the hearing was devoted to the testimony of Angela Morrison, who collected the June 5, 2008, specimen and sent it the laboratory for testing. This testimony, while useful in weighing the report of the testing of the June 5 specimen, is not useful in weighing the report of the testing of the June 3 specimen.

There is no evidence of the type of testing or the chain of custody procedures utilized in testing the June 3 specimen. On its face, the report notes that it is merely a screen, requiring a confirmation by reference method. None was performed. No testimony was offered as to the collection and testing procedure, as to the interpretation of the report, or as to why no confirmation was performed. In fact, the claimant testified that he had no recollection of providing a urine sample for drug testing. There is no

record of an authorization or consent for such testing, or for the release of information regarding it. On the other hand, another arm of the same hospital system collected a specimen for testing on June 5, first requiring the completion, by the claimant, of an authorization for exam and testing and a release of information to his employer. Five separate documents memorializing the steps taking in the collection of the specimen of June 5, testing of the specimen, and evaluating and reporting the results were entered into evidence. For the specimen collected on June 3, one document was entered into evidence, which on its face denied its own probative value.

I find that the document reporting the test results of the urine specimen collected June 3, 2008, the day after the claimant's injury, is entitled to no probative value.

A second drug screen was performed on a urine specimen collected on June 5, 2008. A document, memorializing the collection, chain of custody and review of the results, reflects that the urine specimen was collected from the claimant on June 5, 2008 by Angela Morrison, LPN, and that it was released to DHL for transport to the testing

facility. The form indicates that Dr. Carson reviewed the result, on June 9, 2009, which was positive for marijuana. This form also supplies a place for the laboratory to record the receipt date, the identity and signature of the accessioner, the condition of the specimen container seal and the identity of the person to whom the specimen container was then released. On the form in evidence, none of this information was supplied. Thus, there is an incomplete chain of custody, and therefore the results are questionable.

Morrison, the nurse responsible for the collection of the urine specimen and shipping it off for testing, testified extensively on the high standards of her clinic in adhering to Department of Transportation procedures for each and every drug test, without regard for whether such stringency was required. However, the document presented which outlines the steps taken to preserve the chain of custody has an entire section of the chain of custody report missing. The testimony of Morrison is undermined by the absence of a complete chain of custody on this form.

Another important fact regarding the test of the June 5 specimen is that the accident happened on June 2, the

claimant was released from the hospital on June 3, but the specimen was not collected until June 5. The more appropriate course of action would have been to retest the sample collected on June 3 or to confirm the results by a reference method.

Lastly, Dr. Carson, the medical review officer, noted that the test result of the June 5 specimen was 26 ng/mL was a "weakly positive result."

I find that the evidence offered by the respondent employer is insufficient to trigger the rebuttable presumption against the claimant, because neither the June 3 nor June 5 tests have been shown to be reliable.

Even if there was a reliable report of the presence of an illegal substance in the claimant's system sufficient to trigger the rebuttable presumption, the claimant has proven that the injury was not substantially occasioned by the use of an illegal substance.

The current claim is similar to the fact situation in Arkansas Elec. Coop. v. Ramsey, 87 Ark. App. 254, 190 S.W.3d 287 (2004), in which the substantial evidence showed that the accident which caused that claimant's injuries and death was unavoidable and that the claimant did not behave

in a manner consistent with impairment, even where an expert testified that claimant was probably under the influence of methamphetamine within the prior seven hours, although not THC. The accident was caused by a tree which fell in an unusual and unexpected way, without fault on the part of claimant. In that case, claimant failed to connect a safety lanyard, but the evidence showed that the lanyard could not have prevented the accident or the injuries. In Ramsey, the Court of Appeals affirmed the Commission's finding that the claimant successfully rebutted the presumption that the injury was substantially occasioned by the drugs. The Court of Appeals affirmed the Commission's similar determination in Systems Contracting Corp. v. Reeves, 85 Ark. App. 286, 151 S.W.3d 18 (2004), where the claimant jumped out of the bed of an out-of-control truck, along with several co-workers.

The incident in which the claimant was injured is not the subject of dispute. The claimant testified, and the medical records reflect, that the claimant's foot was crushed in a baler, as he was climbing out of the machine. The machine was turned on by the baler operator before the claimant was out of the machine and safely on the platform.

It is difficult to imagine a scenario in which a person could be less in control of the mechanism of injury than this one. The claimant was in the baler machine under the direction of the baler operator, working with him to loosen a clog. The claimant had helped the operator at least four times earlier in the day. The incident occurred at 4:15 in the evening, shortly before the end of the day. At the time of the incident, the operator had indicated that they were working on the final bale of the day. As the claimant climbed out of the baler, his foot slipped and was caught by a part of the baler and crushed. The machine was turned on by the operator before the claimant had safely exited the machine. This accident was unavoidable by the claimant, without regard to the presence of any illicit substance in his system.

I disagree with the conclusion that the claimant's foot slipping off the ledge which he was using to climb out of the baler caused the injury. If the baler had been off, nothing would have been moving so the claimant's foot would not have been pulled by the ram and it would not have been crushed. While the machine was off, the claimant and the baler operator could safely be inside the baler. The danger

did not occur until the baler was turned on, before the claimant was able to exit the machine. The fall did not damage his foot, the moving part - the ram - damaged the claimant's foot. The claimant could have been completely sober or stoned out of his mind, and the only thing that would have prevented his injury is for the baler operator to leave the machine turned off until the claimant got out of it.

Interestingly, the claimant gave the only testimony about the circumstances of the injury. The respondent did not call any witnesses to contradict the testimony of the claimant about the mechanism of the accident.

Even if I did find that the rebuttable presumption had been triggered by either of the test results, I find that the claimant has successfully rebutted the presumption by showing that the injury was not substantially occasioned by the presence of marijuana in his system but was caused by the baler operator who turned the baler on while the claimant was still in it. Because the respondents have otherwise conceded the compensability of the claim and the claimant's entitlement to benefits, and for the foregoing

reasons, I would award all appropriate benefits to the claimant.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner