

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F907809

HAZEL M. BROOKS,
EMPLOYEE

CLAIMANT

SOUTHLAND RACING CORPORATION,
EMPLOYER

RESPONDENT

NATIONAL UNION FIRE INS.-PITT.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 19, 2010

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by the HONORABLE WILLIAM C. FRYE,
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed April 12, 2010. The administrative law judge found that the claimant sustained an injury arising out of and in the course of employment. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant proved she sustained a compensable injury. The Full Commission

finds that the accidental injury was substantially occasioned by the claimant's use of illegal drugs.

I. HISTORY

The record indicates that Hazel Maria Brooks, age 42, became employed as a "leadout" for Southland Racing Corporation in June 2008: "A leadout, and I walked the dog - meaning, okay, we would get them from the cage in the back. We'd take them and just walk them around to get their urine, you know, their sample, and bring them back across the scale and weigh them, put their numbers on them, then we'd walk them on the track."

The record includes a Delaware North Companies Associated Handbook, revised February 2007. The Handbook includes the following language:

UNAUTHORIZED USE OF DRUGS AND/OR ALCOHOL

To provide a safe, healthy and secure work environment, it is the policy of the Company to prohibit the use and/or possession of unauthorized drugs and/or to restrict the possession and/or use of alcohol. Associate involvement with illegal drugs, controlled substances, or on-the-job abuse of alcohol not only interferes with effective job performance, but also does not allow DNC to provide a safe work environment.

Associates must report to work sober and free from the influence of illegal drugs and alcohol, and they must remain in that condition while on the job in order to protect themselves, guests, other Associates, and Company property....

Post-Accident Testing

Any associate who is involved in an on-the-job accident that requires medical attention either for the Associate or any other person, will be subject to immediate drug testing for illegal drug use....

Any associate who refuses to sign a Consent and Release form or who refuses to be tested will be deemed to have voluntarily resigned.

Associates who are tested will be suspended pending the outcome of the investigation and the results of the drug test....

The claimant signed a CONSENT AND RELEASE on May 27, 2008. The CONSENT AND RELEASE provided in part: "I hereby consent to be tested for the presence of illegal drugs and controlled substances pursuant to the Policy and to disclosure of the results of the test to the Company for use by and internal communications to personnel who, by reason of their job responsibilities or position supervision of me, have a reason to know." The claimant signed a Receipt of Handbook, April 2009 Edition, on April 24, 2009.

The parties stipulated that the employment relationship existed at all pertinent times, including August 21, 2009. The claimant testified on direct examination:

Q. Now, Ms. Brooks, specifically, tell us what happened on August 21st, 2009, while you were working for Southland Racing Corporation.

A. Okay. At night, I was on the seventh dog, where Donald Wilburn - he had - it wasn't long, but he had started making the leadouts get their dogs in 30 seconds....I was the seventh dog. We all have a certain position we have when we do numbers. The seventh and eighth dogs get the tags in that race, so it's just - and we hang them on a board, you know, the tags to the races. So, that was my job. I was to hang the tags. I was hanging the tags up. My phone beeped like I had a message, so I finished hanging the tags and we have two more minutes so, I thought, you know, when I went into the break room. Well, I went in the break room, I checked my message right quick. That's when I heard Donald counting down 21, 20 - so I got up, and started down this little hallway to get to where Donald's at - in where the dogs are at. So, what he would do it, if they didn't get there in 30 seconds, he would slam the door, and give them points, you know, so I wasn't in - I'm trying to get - I had made it in there, but when he turned around, I tripped over his feet....

Q. Which side of your body did you hurt?

A. The left side....

Q. So, around 10:30 in the evening this happened?

A. Uh-huh, yes, sir....

Bryan Erny testified that he was Racing Secretary and Department Manager for the respondent-employer. The respondents' attorney examined Mr. Erny:

Q. You all have video cameras, right?

A. Yes, sir, I have....

Q. Your observations - what did you see on the tape?

A. After I was notified that Hazel had been in an accident, I immediately went to the back room and re-wound the tape, to observe what happened. I observed Hazel coming in with the other leadouts from the group, sitting down on the couch, checking her phone. She then laid back on the couch, propped her feet up on the end, and made a phone call....I could see Calvin open the door to the ginny pen (phonetic), and make the first call....You can see five to six leadouts leave the break room and start heading down the back hallway -it's the first call.

Q. And that's what they're supposed to do?

A. And that's what they're supposed to do. A few seconds - a minute or so later, the second call is made. You have the remaining leadouts get up, except for Hazel - she's still on the couch, on the phone. At that point, I could see Donald come out of his office, make the 30-second call down the hallway, as he's looking at his watch. Hazel sits there for a few more seconds, she gets up, puts her cell phone back in her pocket, she comes around the corner, and she takes off in a dead run right past all these greyhounds standing along the wall, runs right past the greyhounds. As Donald's turning around to see her coming, she trips over his foot and falls and lands on her shoulder....

Q. So, you went over that with her - what did you do next with Ms. Brooks.

A. I informed her that I had already called Security and that the policy dictates that I take her upstairs to the interview room for a post-accident drug screen.

Q. And what occurred during that interview?

A. At that point, Marshall Parker actually escorted us up to the interview room.

There, I was met by the Security Supervisor, Keith Montgomery. Keith and I entered the room with Hazel. Keith and I were on one side of the table, Hazel on the other. I informed Ms. Brooks of the post-accident drug screen and that if she refused to submit to the post-accident drug screen, I would have to suspend her. When I told her this, she looked back across the table from me and told me, point blank, I can't make this test, I'm not clean, I can't pass it. I believe I told Hazel something about that breaks my heart, and that I, you know, I felt bad about it, but I asked her again, if you don't submit to this drug screen, then I'll have to suspend you, pending termination. She said well, I can't pass it, I'm not clean.

Respondents' Exhibit Two is a compact disc containing audio and video of the post-accident interview described by Bryan Erny. The claimant expressly admitted in the recorded interview that she "wouldn't come back clean" on a drug test, although the claimant also said, "I'm not high now." The record indicates that the claimant "Refused to sign" a **CONSENT AND RELEASE FORM: FOR-CAUSE AND ACCIDENT TESTING** on August 21, 2009.

The respondents' exhibits include a **Record of Associate Counseling**, dated August 21, 2009, which stated in pertinent part:

On Friday evening you ran through the paddock because you were late getting to your post. You then tripped and fell and injured yourself. Security was notified of an accident. Once in the security office you refused to be transported for

post accident drug screening and medical attention. Because you refused to be tested you are hereby suspended pending termination for refusal to submit to a drug screen.

The claimant was seen at Memphis Orthopaedic Group on August 24, 2009. The claimant wrote on a Medical History Sheet that she had sustained an "AC Joint Separation" as the result of an injury on August 21, 2009. The claimant wrote on another form at Memphis Orthopaedic Group that she "fell at home playing with dog."

Dr. Kenneth Grinspun noted on August 24, 2009, "The distal clavicle is slightly elevated....Outside x-ray of the left shoulder reveals a Type III AC separation." The assessment was "Closed dislocation of acromioclavicular (joint)." Dr. Grinspun planned "A figure of eight brace, some pain medication and she will be off work."

The claimant's employment with the respondents was terminated on or about August 30, 2009.

The claimant followed up with Dr. Grinspun on September 14, 2009: "X-rays: The following medical imaging was ordered, obtained, and reviewed today: Left shoulder reveals mild between Grade II/III AC joint separation." Dr. Grinspun reported on October 12, 2009:

The patient continues to have pain with her left shoulder. She states she has been laid off from work. She states now that the accident occurred at work. I reviewed the initial history form filled out by the patient and there she states she fell at home....

X-RAYS: The following medical imaging was ordered, obtained and reviewed today: of the left shoulder reveals a Type II AC separation....

PLAN: I would place her at sedentary work at this point. Given the new historical reports presented, I think it is in everyone's best interest in this case to get an MRI of the shoulder....Patient is to return after the MRI.

A pre-hearing order was filed on December 7, 2009. The claimant contended she "was working in the course and scope of her employment for the respondent-employer on or around August 21, 2009, when she sustained a specific incident injury when she fell over her manager's feet. At the time of the accident the claimant did not feel she was injured badly enough to obtain medical care. However, her condition became worse within a short time and she needed medical care for her left shoulder. When she requested medical care from her employer the request was denied and she was suspended from work. A few days later her employment was terminated. The fall caused a dislocation of the claimant's left shoulder. The respondent has not provided any medical treatment or other benefits for the claimant's injuries. The claimant contends that her injury is compensable and

that she needs medical care and is unable to work. Therefore, she is seeking temporary total disability from the date of the accident until she is released by a physician."

The respondents contended that the claimant "was running late to a race and tripped over another associate's foot on August 21, 2009. The security department was immediately notified and a first responder was sent to the scene. Upon arriving at the scene, the first responder advised the claimant that he would escort her to the hospital for treatment and a post-accident drug screen. At that point, the claimant refused medical treatment and to take a drug test. She was then escorted from the premises and placed on suspension for violation of company policy. It is the respondents' position that the claimant's refusal to submit to a drug screen is tantamount to a positive drug screen."

After a hearing, an administrative law judge filed an opinion on April 12, 2010. The administrative law judge found that the claimant "sustained an injury to her left shoulder arising out of and in the course of her employment." The administrative law judge found that the

claimant was entitled to temporary total disability benefits and medical treatment. The respondents appeal to the Full Commission.

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.

(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.

In the present matter, the Full Commission finds that the claimant did not prove she sustained a compensable injury. The claimant was employed as a "leadout" for a dog racing track, preparing dogs to race. The parties stipulated that an employment relationship existed on August 21, 2009. The claimant testified that she went into a break room to check a message on her cell phone. The claimant testified that she heard Donald Wilburn begin counting down the time for the claimant and other leadouts to get to their posts for the next race. The claimant testified that she "made it in there" to where she was supposed to be to carry out her work duties, but that she tripped over Mr. Wilburn's feet and fell on her left side. Bryan Erny, a department manager, testified that he observed a videotape of the events testified to by the claimant. Mr. Erny observed the claimant sitting on a couch, checking her phone. As Mr. Wilburn began the 30-second count for the next race, the claimant remained in place for several seconds, but finally put her cell phone away and began running past the greyhounds. The claimant tripped over Mr. Wilburn's feet and fell on her shoulder.

Bryan Erny and Keith Montgomery then conducted a required post-accident interview with the claimant. Mr. Erny testified that the claimant told him she would not be able to pass a post-accident drug screen, because "I'm not clean." The contents of Respondents' Exhibit Two corroborated Bryan Erny's testimony. The claimant expressly admitted during the recorded post-accident interview that she "wouldn't come back clean" on a drug test. This constitutes an admission by the claimant of the presence of illegal drugs. The Full Commission finds that illegal drugs were present in the claimant's body at the time of the August 21, 2009 accident. Pursuant to Ark. Code Ann. §11-9-102(4)(B)(iv)(b), the presence of illegal drugs in the claimant's body on August 21, 2009 established a rebuttable presumption that the accident of that date was substantially occasioned by the claimant's use of illegal drugs.

The claimant argues that the administrative law judge erred in allowing Respondents' Exhibit Two to be admitted into evidence, because the exhibit was not submitted at least seven days prior to the hearing, as required by a pre-hearing order. However, the Commission is not bound by technical or statutory rules of evidence. See Ark. Code

Ann. §11-9-705(a) (Repl. 2002). The Commission is directed to conduct the hearing in a manner as will best ascertain the rights of the parties. *Clark v. Peabody Testing Servs.*, 265 Ark. 489, 579 S.W.2d 360 (1979). The Commission has broad discretion with reference to admission of evidence, and our decision will not be reversed absent a showing of abuse of discretion. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001), citing *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998). The Commission should be more liberal with the admission of evidence rather than more stringent. *Id.* In the present matter, the Full Commission finds that admission of Respondents' Exhibit Two into evidence was proper in order to best ascertain the rights of the parties.

The instant case is distinguishable from *Curt Bean Transport, Inc. v. Hill*, CA09-419 (Nov. 11, 2009). In *Curt Bean Transport, Inc.*, the claimant was involved in a work-related motor vehicle accident on December 1, 2007. On December 5, 2007, while the claimant was seeking medical treatment, the respondent-employer requested that the claimant undergo a hair-follicle test for intoxicants. The claimant at first did not agree to a hair-follicle test but

did provide a urine sample. The claimant also testified that he asked medical personnel to take a hair sample, but no hair sample was taken. The Commission determined that the respondents in *Curt Bean Transport, Inc.* failed to establish an "intoxication defense." The Court of Appeals affirmed the Commission's finding that the respondent-employer did not meet its burden of proving the presence of alcohol or drugs in order to create the rebuttable presumption of intoxication. The Court held that the plain language of the statute did not require an employee to take a drug test of the employer's choosing but referred only to "reasonable and responsible testing." *Id.*, citing *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998).

In the present matter, unlike the claimant in *Curt Bean Transport, Inc.*, the claimant refused to undergo any sort of post-accident drug or alcohol testing. The record also shows that the instant claimant informed the respondents she would not "come back clean" on a post-accident drug test. The evidence in the present matter demonstrates that there was a presence of illegal drugs in the claimant's body at the time of the August 21, 2009 accidental injury.

A statutory presumption is a rule of law by which the finding of a basic fact gives rise to the existence of a presumed fact, unless sufficient evidence to the contrary is presented to rebut that presumption. *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998), citing *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973). In the instant case, the basic fact that invokes the application of the presumption is the claimant's admission that illegal drugs were present in her body at the time of the accident. There is therefore a statutory presumption that the accidental injury was substantially occasioned by the claimant's use of illegal drugs. Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998).

In the present matter, the claimant did not overcome the rebuttable presumption that the August 21, 2009 accidental injury was substantially occasioned by the use of illegal drugs. The evidence demonstrates that the claimant's behavior on the evening of the accident was inattentive and lethargic. Bryan Erny testified that the claimant was seen lying on a couch, feet propped up, talking

on a cellphone even after the other leadouts were heading to their work stations. When the 30-second call was sounded, the claimant began running, which activity was a violation of the company's posted safety procedures. The claimant offered no probative evidence to rebut the statutory presumption that her accidental injury was substantially occasioned by the claimant's use of illegal drugs. Nor was the claimant a credible witness. The claimant informed a medical provider on August 24, 2009 that her accident was caused when she "fell at home playing with dog." Dr. Grinspun noted this discrepancy in the claimant's history in his report of October 12, 2009.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant proved she sustained a compensable injury. The Full Commission finds that the August 21, 2009 accidental injury was substantially occasioned by the claimant's use of illegal drugs. This claim is therefore denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant sustained a compensable shoulder injury. I agree with the Administrative Law Judge that the evidence of record is not sufficient to raise the rebuttable presumption contained in §11-9-102(4)(B)(iv).

In order for the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: proof by a preponderance of the evidence of an injury arising out of and in the course of employment; proof by a preponderance of the evidence that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by

objective findings, as defined in Ark. Code Ann. §11-9-102(4)(D), establishing the injury; and proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mickel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

It is undisputed that the claimant sustained an accidental fall on August 21, 2009, when she tripped over the feet of her supervisor and landed on her left shoulder. The claimant initially declined medical treatment, maintaining that she was not hurt. The claimant also refused to take a drug screen. The claimant later sought emergency medical treatment at Crittenden Memorial Hospital's emergency room and was diagnosed with a left AC Joint separation. Respondents received notice of the claimant's receipt of medical treatment on August 24, 2009.

Ark. Code Ann. §11-9-704(c) (Repl. 2002) requires strict construction of workers' compensation statutes. Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. American

Standard Travelers Indemnity Co. v. Post, 78 Ark. App. 79, 77 S.W.3d 554 (2002).

Ark. Code Ann. §11-9-102(4)(B)(iv)(Supp. 2009), provides, in pertinent part:

(4)(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 a 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.

In the instant claim, respondents advance an argument which was previously addressed and rejected by the Arkansas Court of Appeals in Curt Bean Transport, Inc. v. Hill, 2009 Ark. App. 760. The Court noted that the plain language of the statute does not specify that a refusal of a drug test is sufficient to create the presumption set forth in the above statutory provision. Rather, the statute specifically states that the presence of alcohol or drugs creates the presumption. Thereafter, the Court declined to interpret the statute to mean that the claimant's refusal to submit to a drug test creates the rebuttable presumption. Contrary to the majority, I cannot distinguish this claim from Hill.

In the present claim, there is no showing of the "presence" of alcohol or drugs to create a rebuttable presumption that the August 21, 2009 accidental injury to the claimant's left shoulder was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. The evidence reflects that, while running to make the thirty seconds countdown to reach the area in back to get her greyhound before the door was shut, the claimant tripped over the feet

of the Paddock Judge, Donald Wilburn, who was her supervisor, and fell, landing on her left shoulder.

A review of the videoed interview of the claimant following the August 21, 2009 accidental fall clearly discloses that the claimant refused to take the post-accident drug screen and declined medical treatment. The claimant requested to be allowed to return to work on more than one occasion during the interview. Likewise, the claimant was specifically informed that her refusal to take the post-accident drug screen test would result in the suspension of her employment pending termination. Finally, the video does reflect that the claimant relayed that she was "not clean" in refusing the post-accident drug screen.

Other than the claimant's statement regarding her refusal to take the post-accident drug screen test, there is no evidence in the record to reflect that the claimant's accidental fall of August 21, 2009, and resulting injury was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's order. There is no evidence in the record reflecting the presence of the odor of alcohol on the claimant's person at the time of the accident, nor is there

any evidence in the record to reflect that the claimant appeared intoxicated or impaired at the time of the accident. Finally, the video interview of the claimant does not reflect evidence of intoxication or impairment. I find that the claimant has sustained her burden of proof by a preponderance of the evidence that she sustained an injury to her left shoulder on August 21, 2009, arising out of and in the course of her employment.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner