

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F902716

WILLIAM HARMON, EMPLOYEE	CLAIMANT
ARMEDICA MANUFACTURING CORP., EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, INC., CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 30, 2010

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

Claimant represented by the HONORABLE MICHAEL HAMBY,
Attorney at Law, Greenwood, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the
Administrative Law Judge filed December 21, 2009.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 8, 2009, and contained in a pre-hearing order filed July 8, 2009, are hereby accepted as fact.
2. The respondents have met their burden of proving the presence of an illegal substance.

3. 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.

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.

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 injury to the claimant's right hand is compensable, that he successful rebutted the presumption of intoxication, and that he is entitled to temporary total disability benefits from March 30, 2009 until April 21, 2009, and attorney's fees.

The claimant testified that he was employed by the respondent-employer on March 16, 2009, and had been employed for six months. The facility built physical therapy equipment. He was 55 years old at the time of the hearing. He usually got to work early, with everyone else, around 7:15 or 7:20 am. The smokers would go outside, either in front or on the side of the building, to smoke and visit until the buzzer rang at 7:30.

The claimant explained that, on March 16, 2009, the normal group was there when he came in, Nancy Llewellyn, Charlie, and Glen Woolsey, who was at the hearing and was his supervisor. Woolsey did not smoke with them that morning. After they smoked, they would go in, do their work orders and get to work. For a couple days, and on March 16, Woolsey had him working at the mill machine.

The claimant testified that the drilling machine, the mill, could be a pretty dangerous machine. The mill was like a drill press. There was a handle which brought the drill bit down, but the mill had a bit that turned laterally. The mill worked on a horizontal basis. There was a lot of paperwork and math involved. The machine and the part had to be set up, tested, and then the finished piece had to be approved by Woolsey, before the work could proceed. The claimant recalled talking to Woolsey off and on that day, around six times. Everything that was worked in the facility required approval by Woolsey.

The claimant testified that the accident occurred between 12:30 and 1:00 o'clock in the afternoon. Lunch was from 11:30 a.m. to noon, thirty minutes. Employees could leave the facility, but the claimant usually brought lunch and stayed there. On March 16, he ate at the table in shipping and receiving. He did not recall, in particular, with whom he ate. There would be two or three people standing around eating at the table. He went out for another smoke break after lunch. Charlie, Nancy, Bobby and his girlfriend were there. The claimant never left the premises.

The claimant explained that he had been working on the same parts pretty much all day. First, the part was marked where the holes which needed to be made. Second, the holes were ground. He would have the mill set up so that he could just put the piece in and lock it down. Sometimes the machine could be set to automatically pull the piece into the bit, and sometimes he did it manually. The bit had rows of teeth which were at a 45-degree angle on the bit itself. The claimant thought that he was using the crank to manually pull the piece into the bit with his left hand. The crank did not operate the drill bit. It operated the table holding the piece. Using his right hand, he regularly applied oil with a brush to both the piece and the bit, to minimize friction and help the bit cut. At the same time, he had to watch a digital readout of the depth of the cut and, when the target was reached, he would stop the cut. The readout was at the upper right at about eye level. He was using his left hand to crank, his right hand to oil, and his eyes were moving between the bit and the readout. He was milling one piece approximately a minute.

The claimant explained that, while he was cranking with his left hand, oiling with his right, and watching the cranking, the oiling and the digital readout, the bit

grabbed his oiling brush. He was looking up at the readout, because he was close to being finished with that piece: "I was watching that real close and I just applied some oil and the next thing I knew it had my hand." The bit grabbed the brush and pulled his hand into it. He was wearing very thin, very flexible, very sensitive gloves made of cloth, nylon or something similar. They had rubber-dipped palms, that helped with all the oil involved. The gloves helped the claimant hang onto the parts and do his job. There was no "die hard rule" not to wear gloves. He was not instructed not to wear them. Woolsey had "chided" them to not wear gloves, because an employee named Everett had been injured on the same machine. The claimant testified that there was not an "or else" policy about gloves. When doing the work with the mill, it was important to be able to feel what one was doing. He was also provided safety glasses.

The claimant explained that his right hand was caught in the bit quickly, before he could pull away. There was an emergency shut off and an emergency brake. The shut off was right in front of the operator at waist level, and the brake was about the operator's head. When the operator pulled down on the brake, the bit stops. He reached up for the brake with his left hand, but could not get to the shut-

off with his right hand. He had to let go of the brake with his left hand, to hit the shut off with his left hand. His hand was "kind of wrapped around the bit." When he got his hand out of the bit, he realized how bad the injury was. He described the injury as "gruesome." His right hand and thumb looked like "raw meat," and he was bleeding profusely.

The claimant explained that no one could observe him from their work station because of the way the machines were positioned, and that no one was standing around close to him. After he disengaged from the machine, he wrapped his hand in a rag and went to the restroom. Bobby saw him, and the claimant told him to get Woolsey, who came quickly with paper towels and took a look at his hand. He was taken to Cooper Clinic by the safety person.

The claimant testified that he saw Dr. Holder at Cooper Clinic in Fort Smith. He put in sutures. He had an IV and a local anesthetic, Novacaine. By that time, he was in a great deal of pain. He was sent to Dr. Heim the next day. He had a drug test on the day of the injury, per company policy. It was a urine test. He had to take two. The first one he dropped, because his hand was injured and bandaged. He did not have help with the first specimen. It took a while for him to get undressed, produce the sample,

dressed again, and then to find the person to whom to give the sample, and during that time, he dropped it. He was asked to do it again, with someone watching. The second test was positive for marijuana. The claimant testified that "I smoked it at a party roughly a week before that. I'm not a habitual smoker. It's usually a party situation." He had been at a birthday party on a Saturday night, the weekend before the weekend immediately preceding Monday, March 16. He was not under the influence when it happened, "not at all."

The claimant explained that the drug policy at the respondent-employer was that there was no use of drugs on the premises, and if there was an injury, there would be a drug test. There were no random drug tests. He had a test once for the temp agency and once when he hired on full time. It was several months before the injury. He was aware that he would be tested. He did not take that lightly.

The claimant stated that he received one check after about two weeks when he was off work, but then, at the end of March, he found out he would not receive any more because of the positive drug test.

The claimant went to see Dr. Heim a week after they took the sutures out, when they released him to one-handed duty on March 30, 2009. There was no one-handed duty, and he was sent home. He never received any document or information that he was released to full duty on April 21 by Dr. Heim. He did not recall seeing Dr. Heim on April 21. He has not seen him for anything since then. He has not been able to see any doctor. The claimant did not have surgery or physical therapy.

The claimant described his condition at the time of the hearing. His right thumb was "basically ... not right." The knuckle of his right thumb was fused. He could not bend it. It looked like a banana, and he could not bend it down. He only had the use of his proximal knuckle and not his distal knuckle on his thumb. From the end of the knuckle to the tip of his thumb, there was no feeling, and it felt several degrees cooler than the rest of his hand. He tried to get further medical attention. The main reason he was unable to get into the free clinic was the litigation.

The claimant had not worked since his injury. He looked for work around Greenwood, "and really there's not much to be had." He went to Yeager's Ace Hardware. He was

in kitchen management for over 20 years, and so he checked with restaurants in Greenwood. He talked to his contracting friends about painting. He had not been drawing unemployment.

The claimant explained that he had worked on the mill machine several times over three weeks. He also watched others operate the machine. Just a few weeks before the claimant was injured, a man named Everett, who was the main operator of that machine when the claimant started there, was injured in a similar fashion. The bit grabbed his glove, causing a similar injury to his right hand in the area between his thumb and forefinger. It was not as serious as the injury to the claimant's hand. This was between two and four weeks prior to the claimant's injury. The claimant felt sure that Everett had a drug test.

The claimant testified that he was in arrears for child support.

Nancy Llewellyn testified that she had been employed by the respondent employer for five years. She was subpoenaed by the claimant's attorney. She was upset that she had to be at the hearing, because she was losing a lot of overtime and had a lot of work to do. She was not there voluntarily, and she did not want to get involved. She was

familiar with the claimant. They were acquaintances at work. She had never been to his house or out to eat with him or visited with him. She did not know where he lived.

Llewellyn testified that she did not remember specifically the day he was injured, but she remembered the circumstances. She did not notice anything out of ordinary about him on that day. She remembered him smoking that morning before work. Everyone did. She could not recall whether he was injured in the morning or afternoon. She saw him at the smoke breaks at 9:30 and 2:30, and at lunch. The claimant did not look any different to her that day than any other day. If she thought he was impaired and he had been acting weird and stumbling around, she would have reported it. She was familiar with Everett, and she heard that he was hurt on the same machine.

Llewellyn testified that on the date of the claimant's injury, she did not have any lengthy conversations with him. There was not time in a ten-minute smoke break for a lengthy conversation. Everybody talked to everybody. There was a smoke hole for smoke breaks, and they were four or five feet apart. She was not looking for signs of drunkenness or intoxication. They worked in different departments, seventy-five feet apart. She would

not have observed him except on breaks. She had no knowledge of the claimant's personal activities outside of work. She could not remember when it happened, or what day of the week.

Toby Amos testified that he had worked for the respondent employer for five years and he knew the claimant because he worked for Glen. The claimant's attorney subpoenaed him to be there. He was not happy about it.

Amos testified that he vaguely remembered the day that the claimant was injured. Amos worked that day, and he was sure he had contact with the claimant. He did not smoke. He did not go out with smokers on break. He worked within 50 feet of the claimant. He was the weld shop supervisor. There was a little joke about the claimant always talking to himself and answering back, but other than that, he never noticed any out-of-the-ordinary behavior or intoxicated behavior. The claimant talked to himself frequently, the whole time he was employed. He answered himself sometimes. Amos really was not around the claimant that much.

Glen Woolsey testified that he had worked for the respondent-employer for six years. He was familiar with the claimant, whom he supervised. On the day the claimant was

injured, Woolsey was his supervisor. When the claimant worked the mill, Woolsey had to check his parts. Any time a part was run, he had to check it. Sometimes he would smoke with the claimant and others outside. On the day he was injured, Woolsey smoked at the side of the building, and the claimant smoked out front.

Woolsey testified that the claimant had started on the parts he was working on the day before the injury, and that he did not have to check, because he should know what he was doing by then, because he had run them all day long. He may or may not have checked the claimant's parts that morning: "I mean, I look at parts. I walk by everyday and look at everybody's parts. Whether I signed the paper or not."

Woolsey testified that his desk was ten feet from where the claimant worked. He would have been in the claimant's area and would have seen him throughout the day. He would have spoken to him. Woolsey did not notice anything that made him think the claimant was impaired.

Woolsey testified that, on the date of the injury, he did notice that the claimant was wearing gloves. He had told him a few days before not to be wearing them. The claimant had said that his hands were cold all the time.

Woolsey did not remind him again that particular day. He continued to wear the gloves, for which Woolsey was not going to terminate him. Woolsey told the claimant not to wear the gloves, a couple times. The drill could grab the glove and pull one's hand into the machine. Woolsey testified that he was familiar with Everett, who was hurt in a similar fashion on that particular machine. It caught his glove and pulled it in. Everett passed his drug test. That was when Woolsey decided it was better not to wear gloves. There were different types of gloves in the facility. There were regular leather gloves and thin fiber gloves that were used on the saw. The grinders used the leather ones. Saw operators used the thin fiber ones. The claimant had on the thin fiber ones, "so he could work better it seemed like I guess."

Woolsey testified that the claimant was a good employee. He worked every day. He came to work on time. He wanted to do a good job. Woolsey never had problems with the parts that he ran. The claimant had a good personality. Woolsey heard him talking to himself a lot and sometimes answering too, on a daily basis.

Woolsey explained that he did not recall the date and time of the accident. The claimant walked by Woolsey and

said, "it got me." Woolsey "didn't think what he was talking about." Then Bobby told me to check on his hand. When Woolsey went in the bathroom, the claimant was washing his hand. Woolsey helped him get it wrapped, took him to the office, where Mike took him to the doctor. While Woolsey was helping tend to the injury, the claimant did not seem to be impaired, he was just nervous "because I guess it hurt so bad." Woolsey testified that he did not ask how the injury occurred. He saw the glove and "figured that's what happened."

Woolsey explained that the drug policy was that if there was an injury, there would be a drug test. If the injured employee failed the test, the employee lost his job. The claimant did not dispute the test.

Woolsey stated that the drill machine was a dangerous machine, which required a clear head to operate.

The claimant was seen on March 16, 2009 at Cooper Clinic for a right hand laceration and open fracture. He was unable to return to work until released by doctor. On that date, he underwent a drug screen. The first test, number 5169339, was rejected as diluted due to an abnormal specimen temperature. The second test, number 5169338, was positive for marijuana metabolites. The collection of the

sample was observed, and the temperature of the specimen was acceptable.

The claimant saw Dr. Heim on March 17, 2009. He had lacerations around the base of the thumb and over the interphalangeal joint and was quite tender and swollen. X-rays showed some fractures of the proximal portion of the distal phalanx, near the interphalangeal joint. Dr. Heim splinted the claimant's hand and scheduled him to return in one week.

The claimant received a check for \$432.00 for the period March 17 - 30, 2009, from the respondent-carrier.

The claimant returned to Dr. Heim on March 25, 2009. The diagnosis was a right thumb fracture and open wound with tendon involvement. The report noted that fracture management was performed on March 17, 2009, and that he was released to light duty with temporary restriction to one-handed duty. On March 25, his dressing was changed, his wound rechecked, and a new splint applied. Dr. Heim noted that he was healing well and that no intervention was necessary.

On April 7, 2009, the claimant saw Dr. Heim, who noted that he was healing and did not need the splint. He planned physical therapy for flexion and extension. On

April 21, 2009, Dr. Heim released the claimant from treatment with no permanent impairment. He was returned to work with no restrictions.

Proof of the claimant's child support obligations was contained in the record.

There is no question that the claimant's injury satisfies the elements of a compensable injury. He was engaged in employment services during regular working hours when he suffered a specific incident. There was objective evidence of the claimant's fracture and lacerations to his hand, which was clearly related to the work incident, causing temporary disability. The issue in this claim is whether the claimant rebutted the presumption that the presence of the illicit drug in his system was the cause of his injury, and I find that he has rebutted the presumption.

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).

The claimant in Ward, supra, offered testimony of his co-workers and supervisors that they did not suspect him of being under the influence of any drug and never appeared intoxicated. In that case, the Commission gave "significant weight" to that testimony. The Court of Appeals noted that "it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony," and found that the reasonable minds could find that evidence to have successfully rebutted the presumption. Ward, ___ Ark. App. at ____.

Likewise in this claim, the claimant presented testimony that he did not exhibit any signs of intoxication,

similarly to the Ward, supra, case. Nancy Llewellyn testified that she remembered the day the claimant was injured, but not the exact date. She stated that she did not observe anything out of the ordinary about the claimant and that he did not appear intoxicated. Llewellyn stated that she would have reported him if he did exhibit signs of intoxication. Toby Amos also testified that, on the day of the accident, the claimant behaved in the same manner he normally did, and he did not appear out-of-the-ordinary or intoxicated. Glen Woolsey stated that the claimant did not appear to be impaired when he was helping him with the injury.

The claimant freely admitted that he had smoked marijuana approximately a week before the incident. He stated that he was not under the influence at the time of the hearing. The claimant also explained that the machine he was using required the use of both hands doing different tasks, and while he watched both of those tasks, he also had to watch a digital readout. There was further evidence that another employee suffered a similar injury on the same machine. That employee passed his drug test.

The majority found that the claimant's injury was evidence that he was unable to concentrate on his job

sufficiently to prevent injury, which showed his impairment. This is not a logical conclusion, because witnesses on behalf of both parties testified that another employee, who tested negative for drugs, suffered the same injury on the same machine.

No one testified that the claimant behaved as if he were under the influence of an intoxicant. All the witnesses testified that the claimant did not behave as if he was under the influence of drugs or alcohol, including the respondents' witness. I find that these facts, coupled with the evidence of the previous and similar injury, are sufficient to rebut the presumption of intoxication.

I note that the fact that the claimant wore gloves was an issue at the hearing. The claimant testified that he wore a thin, sensitive glove with a rubberized palm which helped him grip, especially when dealing with all the oil he used. He also testified that Woolsey had suggested, but not directed, that he not use the gloves. Woolsey was aware that the claimant was wearing gloves on the day of his injury, and that the claimant wore gloves to maintain his grip. If the claimant's use of gloves was poor judgment, it was no more poor than Woolsey's judgment in not requiring the claimant to forego the gloves. I find that the use of

gloves was not poor judgment, especially not in light of the amount of oiling necessary in the job, and was certainly not sufficient to show impairment.

I find that the claimant suffered a compensable injury to his hand, for which he is entitled to benefits. Clearly, the claimant's medical treatment up to the date of the hearing was reasonable and necessary medical treatment of his compensable injury. The claimant also testified and demonstrated at the hearing that he continued to suffer difficulties, including the loss of flexion of his thumb and loss of feeling in his thumb, and, to the extent that treatment is necessary and related to his injury, continuing medical treatment is warranted.

The claimant is entitled to temporary total disability benefits from March 30, 2009 until April 21, 2009, during which time he was off work on doctor's orders and within his healing period. The claimant did not refuse employment, and he would have continued to work for the respondent-employer but for his termination. See Superior Industries v. Thomaston, 72 Ark. App. 7, 32 S.W.3d 52 (2000). Any indemnity benefits would be subject to his child support arrears.

The respondents' controverted this claim from the date of receipt of the drug test results, and thus the claimant's attorney is entitled to an attorney's fee.

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the injury to the claimant's right hand is compensable, that he successful rebutted the presumption of intoxication, and that he is entitled to temporary total disability benefits from March 30, 2009 until April 21, 2009, and attorney's fees.

PHILIP A. HOOD, Commissioner