

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506113

CHARLIE L. JACKSON, EMPLOYEE	CLAIMANT
SMITH BLAIR, INC., EMPLOYER	RESPONDENT
TRAVELERS INDEMNITY COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 30, 2010

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

Claimant represented by the HONORABLE GREGORY R. GILES,
Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE NELSON V. SHAW,
Attorney at Law, Texarkana, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed December 18, 2009. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties at the full hearing and recited herein are hereby accepted as fact.
3. Any injuries sustained by the claimant, as a result of the specific incident or accident on

September 24, 2003, are expressly precluded from constituting "compensable injury" by provisions of A.C.A. § 11-9-102(4)(B)(iv). Specifically, the greater weight of the credible evidence establishes the presence of the illegal drug, marijuana, in the claimant's body at the time of the alleged incident on September 24, 2003. Thus, raising the rebuttable presumption that the claimant's accident and resulting injuries were substantially occasioned by his use of this illegal drug.

4. The claimant has failed to prove by a preponderance of the credible evidence that his use of illegal drugs caused no causal role or only an insubstantial causal role that occasioned the alleged accident or resulting injuries. Therefore, the claimant has failed to overcome the rebuttable presumption and I find that the claimant has failed to prove by a preponderance of the evidence that he sustained any compensable injuries on September 24, 2003.
5. Based upon the findings outlined above, the other issues outlined herein are rendered moot.

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.

The claimant alleges that he sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the December 18, 2009 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

I must respectfully dissent from the majority opinion. The majority has affirmed and adopted the Administrative Law Judge's opinion. In this opinion, the Administrative Law Judge finds that the claimant has failed to "rebut the presumption" that the illegal drug,

marijuana, substantially occasioned the accident wherein the claimant sustained a back injury. I disagree. After a de novo review of the record, I find that the claimant has rebutted the presumption contained in Ark. Code Ann. §11-9-102(4)(B)(iv), and would award the claimant benefits related to his compensable back injury.

Ark. Code Ann. §11-9-102(4)(B)(iv) states:

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.

For the aforementioned reasons I must respectfully dissent.

Here, a hair follicle test taken five days after the claimant's accident showed the presence of marijuana metabolites in the claimant's hair follicle, indicating that marijuana may have been ingested by the claimant within the 90 days before the test was administered. The claimant testified that he had ingested marijuana brownies three weeks before the accident at work. Although I find that these facts are

sufficient to raise the presumption of Ark. Code Ann. §11-9-102(4)(B)(iv), the facts of this case so clearly rebut the presumption, I am highly perplexed by the majority's decision to affirm and adopt the Administrative Law Judge's decision.

On September 24, 2003 the claimant was working with a large part. The claimant testified as to the occurrence of the injury:

...I had put the part in once and then I brought it back out, but when I brought it back out to turn it, because the shot blast would damage the part if you didn't handle it correctly, so I brought it back out and when I brought the part out of the machine to turn it, the shot, those little b-b's that I was saying about, that shot blast that cleans the parts, well, the parts holds those b-b's themselves, so when you pull that part out of the machine, b-b's is just all over the floor. And most of the time we will be kind of careful because we know that, you know, you can slip, and when I pulled the part out and turned it and then when I was pushing it back in, the jack that it was hanging on, it kind of stalemated itself, like I had to adjust it or shake it to get it back on track to push it in. I was pushing it and it stalemated itself, and in the process of pushing the part back in I slipped and I did kind of a split type slip and I fell back.

The claimant reported the injury the next day, and on September 26, 2003, the claimant was sent to a doctor and was instructed to give a urine sample for drug testing. The claimant was unable to produce a urine sample and was sent home when the clinic closed for the day. On September 29, 2003, the claimant again reported to a doctor, and submitted to a hair follicle drug screen. The drug screen came .1 pg/mg positive for marijuana metabolites, and this claim was denied pursuant to Ark. Code Ann. §11-9-102(4)(B)(iv).

The claimant testified as to whether he had been using marijuana on the date of the accident:

Q: Let me ask you, the day that you had this incident occur, where you slipped on the shot as you described to us, on September 24, 2003, were you- had you been using marijuana that day?

A: No, sir.

Q: Were you under the influence of any substance, cannabis substance that you knew of at that time?

A: No, sir. I ate some brownies probably three or four weeks prior to that that was laced with marijuana but when I told them that, I think that they thought it was a joke.

The claimant brought a co-worker to the hearing to testify on his behalf. Before the witness could testify, the respondent volunteered to stipulate that the witness will testify that the claimant was not intoxicated or did not appear to be intoxicated at the time of the injury. The claimant agreed to the stipulation and the witness was not called to testify. The respondent called Mr. John Silvey, the human resource manager for the respondent. Mr. Silvey testified on cross examination:

Q: Okay. You have heard him testify about a particular job, well, one of the jobs that he told us about that he did, the job that he was describing when this accident occurred, as a shot glass machine operator?

A: Yes.

Q: Was that a fair description that he gave as to what that job requires?

A: Yes.

Q: And these little bb's that come out on the floor as he described it, it sounded like he was putting in a pretty big piece and it got caught and he had to twist it and some of the bb's come out on the floor. Is that something that could happen in the way that he described it happening?

A: Yes, it could happen that way.

Q: Do you also agree that you didn't have any supervisors or co-employees come to you after he reported this accident and indicate that they thought that he had been inebriated or intoxicated or acting in some unusual fashion?

A: No.

Q: Didn't have any of that happen, did you?

A: No.

Due to the respondent's stipulation as to the claimant's witness's testimony that the claimant was not intoxicated or did not appear to be intoxicated, and the testimony of the respondent witness that the accident could have occurred as the claimant testified and that no co-workers had come forward to indicate that the claimant appeared to be intoxicated on the date of injury, I find that the claimant has successfully rebutted the presumption contained in Ark. Code Ann. §11-9-102(4) (B) (iv).

The only evidence in the record that could possibly support a conclusion that the accident was substantially occasioned by the use of marijuana is the .1 pg/mg hair follicle test, which only shows that the claimant may have had marijuana in his system sometime in the ninety days prior to September 29, 2003. I do

not believe a .1 pg/mg hair follicle test that only indicates the claimant may have had marijuana in his system sometime in the 90 days prior to testing outweighs the stipulated testimony of the claimant's coworker and the testimony of the respondent's witness. The claimant's testimony that he ate marijuana brownies three weeks before the accident also clearly does not support the conclusion that the accident was substantially occasioned by the use of marijuana.

Basing a conclusion on the hair follicle test alone is sheer conjecture and speculation, which, 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).

In conclusion, I find that the stipulated testimony of the claimant's witness and the testimony of the respondent's witness, Mr. John Silvey, clearly rebuts the presumption contained in Ark. Code Ann. §11-9-102(4)(B)(iv). For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner
