

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F904395

JEFF EASLEY, EMPLOYEE	CLAIMANT
ANCHOR PACKAGING, EMPLOYER	RESPONDENT
CANNON COCHRAN MANAGEMENT, CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 28, 2011

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

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, 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 August 18, 2011.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 17, 2009, the employment relationship existed between the claimant and respondent, during which time the claimant earned an average weekly wage of \$740.00, which generates compensation benefit rates of \$494.00/\$370.00, for temporary total/permanent partial disability.

3. On May 17, 2009, the claimant sustained an injury to his right hand which was substantially occasioned by the use of alcohol. The claimant failed to rebut the presumption that the injury was substantially occasioned by the use of alcohol, and, pursuant to Ark. Code Ann. 27 §11-9-102 (4) (B) (iv) (Repl. 2002) the May 17, 2009, right hand injury is not compensable.

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

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant, through the testimony of six co-workers, has successfully rebutted the presumption that his injury was substantially occasioned by the use of alcohol.

The claimant testified that he had approximately 6 to 7 beers while doing yard work between the hours of 4:00 p.m. and 6:00 p.m. On the date of the accident, the claimant arrived at the workplace at approximately 6:45 p.m. Prior to commencing work, the claimant talked briefly with two co-workers, Billy Loveless and Christopher West. These two co-workers testified that the claimant seemed like he did any other time. Christopher West stated that he talked to the claimant for approximately 20 minutes prior to the claimant's shift starting. Mr. West stated that he did not see any evidence of the claimant being under the influence of alcohol.

Billy Loveless stated that he talked to the claimant for approximately 10 minutes prior to starting the job on the day of the accident. He also stated that the claimant appeared normal and no different than any other occasion.

The shift supervisor, Mr. Gary Warner, testified that the claimant appeared the same as every other time when he comes to work, and that Mr. Warner didn't notice anything different

about the claimant; however, he was not close enough to the claimant to smell any alcohol.

The claimant's first task was to unclog his machine. The claimant first turned it off on the computer control panel. In addition, the claimant testified that the pneumatic part of the plunger that has an air valve was also turned off, although there was testimony that the pneumatic plunger would not have worked if the air valve was turned off. The plunger is the portion of the machine that cut off the claimant's hand.

In order to unclog the machine, the claimant had to lay on his back under the hole of the machine. Typically, the machine would be unclogged by using a rod of some variety; however, the rod was only two feet long. In this instance, the clog was approximately five feet up and the claimant used his hand to begin unclogging the machine. However, when the claimant reached his hand into the hole, the plunger device engaged and cut off the claimant's hand.

Although the machine has warning signs that warn against using your hand, the claimant testified that the clog was too high and that the use of the rod would not have unclogged the machine. Some of the workers who testified stated that they had used the rod to clean the machine, but that they would not put their hand in the machine. However, Elmer Glover, the lead operator of the machine, testified that, if a clog was too high,

you would have to put your hand in the machine in order to unclog it.

The claimant was eventually freed from the machine and transported to Arkansas Methodist Medical Center. Soon after, he was transported by helicopter to Barnes-Jewish Hospital in St. Louis, Missouri, where he underwent surgery to re-attach his right hand. The claimant has undergone a total of 11 surgeries on his hand.

An injury may not be compensable if it is substantially occasioned by the use of alcohol or illegal drugs. Ark. Code Ann. §11-9-102(B)(iv)(a). The presence of alcohol or drugs creates a rebuttable presumption that the injury was substantially occasioned by the use of the substance. Ark. Code Ann. §11-9-102(B)(iv)(b). I find, based on the testimonies of the claimant's co-workers, that the claimant has successfully rebutted the presumption that his injury was substantially occasioned by the use of alcohol.

In Ward v. Hickory Springs Manufacturing Company, a claimant tested positive for marijuana and morphine 72 hours following an on-the-job injury, but was able to rebut the presumption that the presence of drugs caused an injury through both the claimant's testimony and co-worker's testimony. 97 Ark. App. 311, 248 S.W.3d 482 (2007).

In that case, the claimant testified that he was

prescribed morphine while in the hospital for the work injury and had smoked marijuana 9 to 11 days prior to the accident. Id., at Ark. App. 312, Id., at S.W.3d 484. The Administrative Law Judge found that the injury was occasioned by the use of drugs based on the drug test. However, the Commission reversed, and the Court of Appeals affirmed the Administrative Law Judge's holding based on the testimony of the claimant's co-worker, supervisor, and plant manager.

The co-worker testified that he never had any reason to suspect that the claimant was on any sort of drug and that the claimant never appeared intoxicated. The claimant's supervisor testified that the claimant failed to operate the machine properly and that his failure to hit the kill switch resulted in his injury. However, despite this, the supervisor stated that he saw the claimant immediately after the accident and never suspected the claimant of being under the influence of drugs. Further, the supervisor testified that, if he did suspect the claimant of being under the influence, he would send the claimant home. Finally, the plant manager testified that he transported the claimant to the hospital immediately following the accident, but never suspected him of being under the influence.

In overturning the Administrative Law Judge, the Commission gave significant weight to the testimony of the claimant's co-workers, who testified that they never had any

reason to suspect the claimant was using illegal drugs. Id, at Ark. App. 315, Id, at S.W.3d 486. Most importantly, the supervisor and plant manager saw the claimant immediately after the accident and testified that nothing indicated he was under the influence. The Court of Appeals affirmed the Commission's holding.

Here, six co-workers of the claimant testified that the claimant never appeared under the influence of alcohol. Gary Warner, the shop supervisor, testified that he spoke with the claimant at the beginning of the work shift and instructed him on what needed to be done. Mr. Warner testified that when he spoke with the claimant, there was no evidence that the claimant was under the influence of alcohol, and that the claimant appeared the same way he did other times when he comes to work. In addition, Mr. Warner testified that he has a zero tolerance policy for alcohol and drug use, and if he suspected the claimant of being under the influence, he would have sent him home immediately.

Billy Loveless, a sheet line operator, and Christopher West, a fork lift driver, were both around the claimant prior to the shift starting on the evening of the accident. Mr. Loveless testified that he was around the claimant for approximately 10 minutes prior to work starting, and that the claimant appeared normal and did not appear to be under the influence of alcohol.

In addition, Mr. Loveless stated that there was nothing about the claimant's conduct, actions, talk, or anything at all to lead him to believe the claimant had been drinking alcohol.

Christopher West, the fork lift driver, testified that he was around the claimant for approximately 20 minutes before work began. He testified that, prior to work, he and the claimant were standing around talking, laughing, and "cutting up". Mr. West stated that he was standing about two feet from the claimant during this time, and that he never smelled alcohol on the claimant's breath and there was no evidence in his walk, talk, or demeanor during this period that made the claimant appear to be under the influence of alcohol.

Clint Pemberton, a maintenance employee, testified that he was with the claimant for 10 minutes after the accident while they waited on an ambulance to arrive. During that time period, Mr. Pemberton testified that the claimant did not appear to be under the influence of alcohol. In addition, Elmer Glover, the lead operator for the sheet line, testified that he went to the emergency room after the accident and the claimant did not appear to be under the influence of alcohol at the hospital.

A total of six employees saw the claimant either immediately before or immediately after the accident that cut off his hand. All of the employees testified that the claimant never appeared to be under the influence of alcohol and that he acted

completely normal. Based on the testimonies of the claimant's co-workers, I find that the claimant has successfully rebutted the presumption that his injury was substantially occasioned by the use of alcohol.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner