

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G002142

RICKY TOWNLEY,
EMPLOYEE

CLAIMANT

GEORGIA-PACIFIC CORP.,
EMPLOYER

RESPONDENT

INDEMNITY INS. CO. OF NORTH AMERICA/
SEDGWICK CLAIMS MGMT SERVICES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED MAY 27, 2011

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE BETTY J. HARDY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an administrative law judge's opinion filed December 29,
2010. The administrative law judge found that the claimant
"rebutted the presumption that he was impaired on the date
of injury." After reviewing the entire record *de novo*, the
Full Commission reverses the administrative law judge's
opinion. The Full Commission finds that the claimant's

accident was substantially occasioned by the use of an illegal drug.

I. HISTORY

Ricky Lane Townley, age 53, testified that he became a full-time employee with Georgia-Pacific in 1976. The record contains a four-page Job Safety Analysis for the job "Twist and Tuck Winder," dated October 2007. The Job Safety Analysis included "Existing and Potential Hazards" of "Nip points" for Job Steps such as "8. Thread up winder. 9. Adjust embossing roll. 10. Clear roll wrap-ups." Safe Work Practices included "10a4. Keep hands clear while jogging winder." The Job Safety Analysis additionally provided, "13a1 Keep hands clear while jogging. 13a2 Let paper fall from nip."

The claimant testified on direct examination:

Q. Now, had you smoked marijuana in the recent past before?

A. I - I made a mistake. On Thanksgiving, I'm usually not off. We was - had a little get-together. We was fixing to eat turkey and so Mike passed one around. I took a couple of hits off of it - off of some pot.

Q. Okay.

A. I was drinking a beer....We went in and ate turkey....

Q. On Saturday when you got to work, were you feeling any effects from that?

A. No.

The parties stipulated that an employment relationship existed on Saturday, November 28, 2009. The claimant testified that he attended a safety meeting that day at 7 a.m. and then began working with a "Twist and tuck winder, B-03." The claimant testified that he was "very familiar" with this machine, and "I've been around it all my life."

The claimant testified on direct examination:

Q. Well, let's talk about November 28, 2009. Now, at that point, what was your job title?

A. Winder operator.

Q. Okay. And how long had you had that position?

A. On and off probably about 20 years, but I just really wasn't permanent winder operator, but I was borrow up (phonetic) set up running them, but I've been running that winder for over 20 years....

Q. Was you having any trouble with the machine that morning?

A. Yes....it was out of time, it was blowing out. I mean, it wouldn't consistently run a log....I had to, you know, you've got to get up there and work it and watch it like a hawk, you know, it's like here's about how far you're sitting from the winder (indicating)....they made a jog - a jog system is simply a button you push to make the machine run slow....they made it where you put an extra switch there where you had to engage that

switch before you could jog it. It really wouldn't run that way, because you've really got to put your hands on it to tell you the truth. I've been running it for 20 something years and that's about the way you have to do. Well, it hung up back in the middle, but they didn't put one of them switches back there in the middle like that. It was still just one switch jog it. Well, it hung up on the roll before it goes to the perf head, and I was getting the paper. And about that time, Mike Cain pulls up about here to that right there (indicating), and that opening where I walked up in, I seen him there, and I was trying - I jogged - I got the paper off and I hit the jog button, and when I hit the jog button, it did like that and my hand went up in it, and I doubt that it's nine-sixteenths gap, a little over half an inch gap, and I was hung up to right there and a little over a half inch gap....

Q. You pushed the jog with your left hand.

A. Right.

Q. And did the machine move faster that you expected?

A. Yes, sir, it got me by surprise. It just - my hand went up in there....It surprised me because I'd been over there working on that one. It was real slow and then when I went to that one, as soon as I touched it, you know, I got the paper and it just went like that, and my hand went up in there. Luckily, Mike Cain had pulled up there and he knew what to do and he reacted very prompt, and he opened the cage and backed it up and I come out of there. Because I was fixing to pass out....

Q. On this day before or at this point, were you in any way impaired or intoxicated?

A. That day? No, sir.

Q. All right. So you knew what was going on?

A. All the time....

Q. Why is your right hand up there at all?

A. Because the paper was wrapped up around the rollers, because it was out of time, and it was wrapping up.

Q. Were you trying to get the paper out?

A. Yeah, you cut it with a knife and you grab it, you pull it down.

Q. And you had done that before?

A. Thousands of times....

Mike Cain testified that he had worked at Georgia-Pacific for 45 years. The claimant's attorney examined Mr. Cain:

Q. Tell the judge what you remember about him getting injured on November the 28th of last year.

A. Okay. I'm what you call an operating mechanic. I answer calls from a radio, and they were having trouble with the winder and another mechanic was working on it, and I just went over to see if I could give him a hand. And right after I rode up, we have little scooters we - right after I rode up, the winder blew out and wrapped up, and I was around front, and, Jeff Murphy and I, and all of a sudden, you know, Ricky hollered, and I ran around, and we have a hand wheel on a winder, so I reversed the winder, backed it out by hand, he had his hand hung.... I knew he was hung and reversing the winder would get him out. So he came out....

Q. Did you have enough contact with Mr. Townley on the 28th to have an opinion about whether or not he was intoxicated, appeared intoxicated?

A. No, I didn't. I'd just rode up when the winder blew out and, then, of course, Ricky went around to straighten it out and then got hung up. No, I couldn't make an opinion on that.

Gillespie Shawn Meeks testified that he was the claimant's Shift Supervisor on the date of the accident.

The claimant's attorney examined Mr. Meeks:

Q. On the 28th, was there a safety meeting that morning before he -

A. Yes, there was.

Q. All right. And did you have a chance to see Mr. Townley?

A. Yes, I seen him.

Q. All right. From your recollection, did he seem impaired in any way that morning?

A. I couldn't really tell, no, sir.

Q. All right. But if any of your employees that you supervise did seem impaired, would you send them home or let them work?

A. I'd send them home....Or I'd call HR and they would make that decision.

The respondents' attorney cross-examined Mr. Meeks:

Q. Had you ever instructed the employees not to put their hands in machines -

A. Yes, ma'am.

Q. - when they're jogging them?

A. Yes, ma'am.

Q. Okay. What is the procedure when someone is jogging the machine, where are their hands supposed to be?

A. Away from the nip points.

Q. Okay. And a nip point is just a point on a machine that could either pinch or grab -

A. Right.

Q. - a body part?

A. That's right....

Q. Is it poor judgment if an employee puts a hand in a machine when they know it's moving regardless of what speed it's moving?

A. Yes, ma'am.

A Medical Response/Treatment Report dated November 28, 2009 indicated that the claimant's "Current Meds" were Nexium and Vicodin. It was written on the Treatment Report, "Responded to Safety office for report of a hand injury. Pt R hand is swollen & contusion over back side of hand. Pt has small lac to index finger also. Area is painful to touch. Pt states he has good range of motion & doesn't think it is broken. First Responder had applied cold pack to area today. Pt speech seems slurred."

Robert Lee Odum testified that he was Human Resources Manager on the date of the accident. The claimant's attorney examined Robert Odum:

Q. What do you - tell the judge what you remember that day when Ricky Townley was brought in to safety or do you recall?

A. Well, I was called - I think I was called by the front gate security because I was on call this weekend, and I was out at the mill, anyway. When I went to the safety office, which is next door to the building where I normally worked, I went in there and Ricky was being treated by EMT Charlie Cummings, and he was working on his hand....I began to notice at one point where Charlie was working on his hand and it was - looked pretty painful, and I just happened to notice that Ricky looked very sleepy, and he was, you know, his eyes were kind of like he was about to nod off. And he just struck me as a little bit odd, because, I mean, I wouldn't think he'd be very sleepy, or else, he was in a lot of pain one. But struck me that he was just acting very sleepy, so I just observed that he continued to, you know, act in the manner like that. He was speaking and he wasn't quite as coherent as Ricky normally is, I mean, he's, you know, speaks very well....So, based on those observations, when he got through treating him and he was going to let him go, and Ricky wanted to go home, he asked to go home, if he could, when we got through, and I decided it would be the better thing to do to have him drug tested. So I told Ricky I wanted to have - go ahead and do a drug test, and he come in there and we did the drug test, and when we got through, in the course of it, he mentioned that he was taking - also taking some prescription medicines, which kind of made me think, well, maybe that was the issue making him sleepy, but, you know, we were already doing the drug test....

Q. Did you see Ricky prior to him getting his hand injured?

A. No.

The respondents' attorney cross-examined Robert Odum:

Q. Now, you indicated earlier that you administered the test because he had some slurred speech and seemed to be a little incoherent?

A. Yeah. The sleepiness is what caught my eye.

The record contains a document entitled "Medical Review Officer Drug Test Results." The document indicated that the "Reason for test" was "reasonable suspicion" and the Date/Time collected was "11/28/2009 9:49:00 a.m." The Drug Test Results indicated that Ricky Townley was Positive for Marijuana. A Medical Review Officer verified the Drug Test Results on December 7, 2009.

The record indicates that the claimant did not seek medical treatment until December 11, 2009: "Pt says he needs refill on Nexium. Pt R hand is very swollen d/t injury at Paper Mill 1 week ago. Has been taking Aleve but doing no good." An x-ray of the claimant's right hand was done on December 11, 2009, with the following impression: "Fractures proximal portions of the proximal phalanges of the 2nd and 3rd fingers distal to the articular surface."

Dr. C. Dwayne Daniels saw the claimant on December 21, 2009:

Ricky Townley is a 52-year-old right-hand dominant white male who reports that he caught his right

hand in a winder mechanism at Georgia-Pacific on 11/20/2009. For reasons that he cannot explain, it has not been currently handled as a workmen's compensation case. He states that he has become disgruntled with his employer over the handling of the situation. He states he feels he has been denied adequate access to health care for a work-related injury. He states that he has resigned from Georgia-Pacific and will be obtaining the services of a lawyer. He does have evidence of displaced fractures of the proximal phalanges of the right index and long finger on x-rays at Ashley County Medical Center dated 12/11/2009.

PLAN: I recommend he have open reduction and internal fixation of these two fractures. We are going to do this for him on 12/23/2009. History and physical is on a separate dictation.

Dr. Daniels performed surgery on December 23, 2009:

"Open reduction and internal fixation of left index finger proximal phalanx fracture and left long finger proximal phalanx fracture." The pre- and post-operative diagnosis was "Right index and long finger proximal phalanx fractures."

Dr. Daniels noted on January 4, 2010, "He did not go to occupational therapy. He refused to have an x-ray of his right hand today. His wound is healed....He still has significant swelling and ecchymosis throughout his right hand. PLAN: I have encouraged him to manipulate and move his interphalangeal joints as much as possible. He needs to go back to therapy. I will see him back in a month for

repeat clinical and radiographic evaluation of his right hand."

Dr. Daniels reported on February 15, 2010:

Ricky Townley returns in followup after his 12/23/2009 open reduction and internal fixation of his right index and his right long finger proximal phalangeal fractures, both with T-plates and screws. X-rays at Ashley County Medical Center show that he has healed his fracture with anatomic alignment and hardware remains in good position. Clinically, he seems to refuse to go to therapy due to financial concerns. He is stiff at the PIP and MP joints. I have instructed him in passive range of motion exercises. I told him to be aggressive; I have given him Nucynta for pain control. I will see him back as needed or if he desires.

Dr. Daniels provided additional follow-up treatment on March 15, 2010.

A pre-hearing order was filed on August 24, 2010. The claimant contended that he "injured his right hand because of defective equipment at work. He seeks payment of medical expenses and temporary total disability benefits from November 29, 2009 to a date yet to be determined." The respondents contended, "this claim is barred as the claimant tested positive for THC immediately following the accident."

The parties agreed to litigate the following issues:
"Compensability, medical expenses, temporary total

disability benefits, and attorney's fees. All other issues are reserved."

A hearing was held on September 30, 2010. Bradley Stevens Cahn testified that he became the respondent-employer's production leader for tissue converting in February 2008. The respondents' attorney examined Bradley Cahn:

Q. Can you - can you enlighten us on jog speeds and what that really means?

A. The jog speeds I think it was mentioned earlier are used primarily to thread a winder up. It goes at a very slow speed. And once the winder is fully threaded up and you've got the tissue encircling the core that you're winding it on, that little cardboard core, then an operator would press the run button and it would operate it at a much higher speed....

Q. So are you familiar with what an operator is supposed to do when they are working on this machine as Mr. Townley was back on November the 28th, 2009 in order to run it through the process to get it up to run speed?

A. Yes.

Q. And what would that be?

A. Well, if the - if the perf roll is wrapped, the operator must cut - cut the paper. We require our operators to use gloves when using knives so he would have had to have cut the wrap-up off the perf roll and then he would jog the machine and allow that wrap-up to fall off the roll onto the floor. And then while the machine is stopped, the operator would then take the sheet and put it onto

a thread-up rope which is designed to carry that - that web up to the front of the machine, and that's what the procedure would call for.

Q. Okay. Does that procedure call for at any point in time putting your hand anywhere close to the machine or rollers to where it can catch up in there?

A. No. Actually, the procedure calls for quite the opposite, keep the hands away from nips....

Q. Did you have any contact with Mr. Townley after November the 28th of 2009?

A. Yes. I asked Mr. Townley to come back into the facility, and I believe it was on the following day, on the 29th, I believe....

Q. What do you recall Mr. Townley indicating in that meeting as to what led up to his accident?

A. Well, he had described that the winder was apparently out of time. He had called maintenance support and he had experienced a perf roll wrap-up that, again, he felt was probably caused by the winder being out of time, and he described that he was in the process of cutting that wrap-up off, and somehow, you know, his hand - he was pulling - I think he said that he was pulling the paper off the perf roll and somehow his hand got too close to that nip point.

Q. Was there anything in what he described occurring that morning that would require him to pull the paper with his hand?

A. No. Typically, if you allow, you know, if you've cut it all the way off, if you allow the roll to rotate, it should fall by gravity right down to the floor....

Q. Do you feel it was a poor judgment on Mr. Townley's part to put his hand in a machine when he was jogging it forward or jogging it?

A. I feel it was poor judgment.

An administrative law judge filed an opinion on December 29, 2010. The administrative law judge found that the claimant "rebutted the presumption that he was impaired on the date of injury. His injury was substantially occasioned by the lack of safety features on the machine he was operating." The administrative law judge directed the respondents to pay medical expenses and a period of temporary total disability benefits. The respondents appeal to the Full Commission. The claimant cross-appeals on the issue of temporary total disability benefits.

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.

The claimant must prove by a preponderance of the evidence that he sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i)(Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the Full Commission finds that the claimant did not prove by a preponderance of the evidence that he sustained a compensable injury. The claimant's testimony indicated that he smoked marijuana while he was off work on Thanksgiving day, November 26,

2009. The claimant returned to work for the respondents on Saturday, November 28, 2009. The claimant attended a safety meeting at approximately 7 a.m. before beginning his employment duties as a winder operator. The claimant testified that the machine on which he was working was malfunctioning, stating, "it was out of time, it was blowing out....it wouldn't consistently run a log." The claimant testified that he hit a "jog button" to slow the machine down, and "when I hit the jog button, it did like that and my hand went up in it....I was hung up to right there and a little over a half inch gap." The claimant denied that he was impaired or intoxicated at the time of the accident. Mike Cain testified that he saw the claimant's hand caught in the winding machine and that Mr. Cain reversed the winder so that the claimant could remove his hand.

The claimant received on-site emergency treatment for his injured right hand following the accident. Robert Lee Odum, the Human Resources Manager, testified that he observed the claimant receiving medical treatment and also testified that the claimant "looked very sleepy" and did not seem to be coherent. The individual providing medical treatment noted that the claimant's speech appeared to be

"slurred." A drug test was administered to the claimant at 9:49 a.m. on November 28, 2009. The drug test indicated that the claimant was "Positive for Marijuana." The Arkansas Court of Appeals has held that a positive test for marijuana metabolites is sufficient to establish a rebuttable presumption that an employee's injury was substantially occasioned by the use of marijuana. See *Wood v. West Tree Serv.*, 70 Ark. App. 29, 14 S.W.3d 883 (2000). In the present matter, the Full Commission finds that the positive test for marijuana was sufficient to create a rebuttable presumption that the injury or accident was substantially occasioned by the use of the illegal drug marijuana. See Ark. Code Ann. §11-9-102(4)(B)(iv)(b)(Repl. 2002). There is no probative evidence demonstrating that the claimant's injury or accident was substantially occasioned by alcohol or prescription drugs used in contravention of a physician's orders.

In accordance with Ark. Code Ann. §11-9-102(4)(B)(iv)(d)(Repl. 2002), therefore, the instant claimant must prove by a preponderance of the evidence that the illegal drug marijuana did not substantially occasion the injury or accident. Whether a rebuttable presumption is

overcome by the evidence is a question of fact for the Commission to determine. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996), citing *Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992). The Full Commission finds that the instant claimant did not overcome the presumption that his use of marijuana did not substantially occasion the injury or accident. The claimant contends that the accidental injury on November 28, 2009 was caused by a malfunctioning machine. Even if the "winder" machine the claimant was operating on November 28, 2009 was malfunctioning or not working properly, the evidence before the Commission demonstrates that the claimant's injury was caused by poor safety judgment on the claimant's part. A Job Safety Analysis included in the record plainly instructed employees to "Keep hands clear while jogging." The claimant testified that his hand became caught in the machine after he improperly touched the winder with his hand. Shawn Meeks and Bradley Cahn both testified that the claimant's injury was caused by the claimant's poor judgment, not a malfunctioning winder. The credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission.

Weaver, supra, citing *James River Corp. v. Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996). In the present matter, the Full Commission finds that the testimony of Shawn Meeks and Bradley Cahn are entitled to significant evidentiary weight. The evidence in the present matter demonstrates that the claimant's accidental injury on November 28, 2009 was caused by carelessness and poor judgment on the claimant's part rather than a malfunctioning industrial winder.

Based on our *de novo* review of the entire record, the Full Commission finds that the accidental injury was substantially occasioned by the claimant's use of the illegal drug marijuana. The claimant did not prove by a preponderance of the evidence that his use of marijuana did not substantially occasion the injury or accident. Therefore, the claimant did not prove by a preponderance of the evidence that he sustained a compensable injury on November 28, 2009. The Full Commission therefore reverses the administrative law judge's opinion, and this claim is 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. I find that the claimant has successfully rebutted the presumption that his accident was caused by the presence of marijuana in his system, and I would award benefits accordingly. Ark. Code Ann. §11-9-102 provides:

- (1) Any amount of an intoxicating or illegal substance invokes the presumption that the injury or accident was substantially occasioned by the use of the intoxicant or illegal substance.
- (2) Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine.
- (3) The phrase, "substantially occasioned by" requires that there be a direct causal link between the use of an intoxicant or illegal substance and the injury.

In pertinent part, Commission Rule 36, A Voluntary Program for a Drug Free Workplace, provides:

Presence of drugs or alcohol means levels of drug, alcohol, or metabolites in the body at or above the cutoff levels established by the Department of Transportation (DOT) as published in 49CFR Part 40 and elsewhere.

The claimant's drug test was well below the DOT levels for impairment.

Given the small amount of drugs in the claimant's system, I find that it is improbable that he was impaired by an illegal substance on the day of the injury. If the safety features had been installed on the machine, the accident could not have happened.

The majority appears to deny this claim because the claimant exercised poor judgment by allowing his hand to get too close to a defective machine. I would remind the majority that workers' compensation is a no-fault system. Even prudent claimants can make stupid mistakes. Same for respondents. Stupid mistakes are covered. Here, the claimant has proved, by the low levels of marijuana (according to the Commission's own Rule), that he was a prudent claimant. The stupid mistake was not the presence

of marijuana in the claimant's system. The stupid mistake was the respondent having a defective machine.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner