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ARKANSAS COURT OF APPEALS

DIVISION III

No. CA09-851

CARL JOHNSON, APPELLANT	**Opinion Delivered** 6 JANUARY 2010
V.	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F711461]
U.S. FOOD SERVICE, INC., INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and SECOND INJURY FUND, APPELLEES	AFFIRMED

D.P. MARSHALL JR., Judge

This workers' compensation case is about the rebuttable presumption that arises when an injured worker tests positive for an illegal drug. Ark. Code Ann. § 11-9-102(4)(B)(iv)(*b*) & (*d*) (Supp. 2009). Carl Johnson was a long-time delivery truck driver at U.S. Food Service. While unloading eighty- or ninety- pound boxes of meat, Johnson felt a "sharp pain" in his shoulder and lower back. Despite this pain, Johnson finished unloading, reported the injury to U.S. Food by telephone, and completed his next stop. He was drug tested that same day. Johnson tested positive for "phencyclidine"—commonly known as angel dust or PCP—a veterinary anesthetic sometimes abused by humans for its hallucinogenic properties. Merriam-Webster's

Medical Dictionary, http://www.merriam-webster.com/medical/phencyclidine. PCP is a schedule II controlled substance. 007-07-002 Ark. Code R. (Weil 2006).

The presence of an illegal drug in an employee's system raises a rebuttable presumption that an on-the-job injury was "substantially occasioned" by the employee's drug use. Ark. Code Ann. § 11-9-102(4)(B)(iv)(*b*). Both the ALJ and the Commission (in a 2-1 opinion) found that an illegal drug was present at the time of injury. Johnson, appearing pro se, argued to the ALJ and now presses on appeal that his drug test was suspect because the results were "non-contact positive."

> ALJ: Can you tell me—do you have any testimony at all about how that drug did or did not end up in your body?
>
> JOHNSON: I really could not tell you, Sir, to be honest. On that statement [the drug test] it said "non-contact positive," and I'm still trying to understand that. I don't know how it could have.

Substantial evidence supports the Commission's conclusion about the presence of PCP in Johnson's system at the time of injury. *Flowers v. Norman Oaks Construction Co.*, 341 Ark. 474, 479–82, 17 S.W.3d 472, 475–77 (2000). As best we can discern, under Department of Transportation lingo, a "non-contact positive" drug test is one where the reviewing medical professional was unable to contact the employee for an explanation about the drug's presence; this descriptive phrase does not indicate uncertainty about the result. 66 Fed. Reg. 41,946 (August 9, 2001); 61 Fed. Reg.

37,697 (July 19, 1996). In any event, the Commission ruled correctly: the results of this drug test triggered the statutory presumption.

To prevail on his benefits claim, Johnson had to prove by a preponderance of the evidence that his drug use "did not substantially occasion the injury or accident." Ark. Code Ann. § 11-9-102(4)(B)(iv)(*d*). The ALJ found that he did. "[T]here was no evidence presented into the record that Mr. Johnson appeared impaired in any way, hallucinogenic or otherwise . . . [or] that Mr. Johnson failed to follow any safety procedures or any standard procedures . . .." The Commission disagreed. It found that Johnson "did not offer any testimony or other evidence" rebutting the presumption.

Whether Johnson overcame this presumption was a question of fact for the Commission. *Woodall v. Hunnicutt Construction*, 340 Ark. 377, 380, 12 S.W.3d 630, 632 (2000). Viewing the facts in the light most favorable to the Commission's decision, and deferring to its credibility determinations, the Commission's decision displays a substantial basis for denying relief. *Woodall*, 340 Ark. at 379–82, 12 S.W.3d at 631–33. Johnson did not offer any evidence that his injury was inevitable, and therefore not substantially occasioned by the PCP. *Cf. Apple Tree Serv., Inc. v. Grimes*, 94 Ark. App. 190, 191–92, 228 S.W.3d 515, 516–17 (2006). He offered no testimony from co-workers or customers that he was not impaired at the time of the injury. *Cf.*

Ward v. Hickory Springs Manufacturing Co., 97 Ark. App. 311, 315–36, 248 S.W.3d 482, 486–87 (2007).

To rebut the statutory presumption, Johnson had to prove a negative by a preponderance of the evidence: that the PCP in his system did not substantially occasion his injury. Ark. Code Ann. § 11-9-102(B)(iv)(*d*). While Johnson's testimony about his lifting injury might begin to carry this burden if credited 100%, the Commission was not required to believe him. And he offered no other evidence to rebut the statutory presumption. The presumption's evidentiary weight requires that we affirm the Commission's decision that Johnson's injury was not compensable on this record. Ark. Code Ann. § 11-9-102(B)(iv)*(a)*.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.