

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602056

ANTHONY FLINT, EMPLOYEE	CLAIMANT
TEMP SERVICES OF ARKANSAS, LLC, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CORP., CARRIER	RESPONDENT

OPINION FILED AUGUST 3, 2006

Hearing before Administrative Law Judge J. Mark White on July 12, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 12, 2006, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on June 5, 2006, and a Prehearing Order was entered that same day. A copy of the June 5, 2006, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including February 21, 2006; that the claimant earned an average weekly wage of \$240, entitling him to a compensation rate of \$160 for temporary total disability benefits and \$154 for permanent partial disability benefits; and that respondents have controverted this claim in its entirety. At the hearing, the parties further stipulated that the claimant reached the end of his healing period on June 12, 2006.

The issues to be presented were defined as follows: whether the claimant sustained a compensable injury; and whether the claimant is entitled to temporary total disability benefits and medical treatment.

The claimant contends that he sustained a compensable injury to his left leg; that he is entitled to medical treatment; and that he is entitled to temporary total disability benefits from February 21, 2006 through a date yet to be determined.

The respondents contend that the claimant tested positive for opiates and cocaine on the date of the accident; and that the accident was caused by the use of illegal drugs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an

opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The respondents have proven by a preponderance of the evidence that illegal drugs were present in the claimant's body at the time of his work injury.
4. The claimant has proven by a preponderance of the evidence that his injury was not substantially occasioned by the use of illegal drugs.
5. The claimant has proven by a preponderance of the evidence that he sustained an injury to his leg arising out of and in the course of his employment; that his injury was caused by a specific incident identifiable by time and place of occurrence; that his injury caused internal physical harm to the body requiring medical services; and that the existence and extent of his injury is established by medical evidence supported by objective findings.
6. The claimant has therefore proven by a preponderance of the evidence that he sustained a compensable injury to his leg.

7. The claimant has proven by a preponderance of the evidence that the medical treatment he has undergone for his compensable leg injury has been reasonably necessary.
8. The claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from February 21, 2006, through June 12, 2006.
9. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from February 21, 2006, through June 12, 2006.
10. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a construction laborer. On February 21, 2006, he was installing insulation in the walls of a dormitory under construction. He testified that at about 11 a.m. that day, he was in a hallway stuffing insulation between the wall studs. There were several dozen large pieces of sheetrock stacked on their ends on the floor, leaning against the hallway wall. The claimant testified that as he reached down to pick up more insulation, he saw out

of the corner of his eye the closest piece of sheetrock start to fall towards him. He testified that he stepped back in between the wall studs to escape the falling sheetrock, but his left foot was caught by a six-inch pipe laying in the floor. Before he could free his foot, the sheetrock struck his leg, fracturing his tibia and fibula.

The claimant was taken to the hospital, and surgery to repair the fractures was performed that day by Dr. D. Gordon Newbern. A drug test was also administered that day, and the results revealed the presence of cocaine and opiates in the claimant's system. On the basis of the drug test results, the respondents controverted the claimant's injury. The claimant was released from care by Dr. Newbern on June 12, 2006, and he started work at a new job the following week.

II. Adjudication

A. Intoxication

The definition of a compensable injury under the Workers' Compensation Act excludes any injury "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)(a). The presence of any such intoxicant creates a "rebuttable presumption that the injury or accident was substantially occasioned by" their use. Ark. Code Ann. § 11-9-102 (4)(B)(iv)(b). The statutory presumption set

forth does not quantify the term “presence”; therefore, an intoxicant is present whenever any amount of the intoxicant is revealed, no matter how small. *Flowers v. Norman Oaks Construction Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000).

The respondents have introduced into evidence the report of a drug test performed on the claimant the day of his injury revealing the presence of cocaine and opiates. Nothing in the record challenges the reliability of the test results. I find that the respondents have proven by a preponderance of the evidence that cocaine was present in the claimant’s body at the time of his work injury, and I thus conclude that the statutory presumption has been raised.

The question, then, is whether the claimant has successfully rebutted that presumption. A statutory presumption is a rule of law by which the finding of a basic fact gives rise to the existence of a presumed fact, unless sufficient evidence to the contrary is presented to rebut the presumption. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). If evidence that is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. *Id.* Therefore, if a claimant is found to have drugs in his body after an injury, he must prove by a preponderance of the evidence that his injury was not substantially occasioned by the alcohol or drugs. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). The plain

and ordinary meaning of the statutory phrase “substantially occasioned” is that there is a direct causal link between the use of illegal drugs and the injury. *Id.*

The claimant admitted that he has used cocaine in the past, though he denied using it in the weeks and months prior to his injury. He alleged that he was in the presence of others who were using cocaine at a party on the weekend prior to his injury, and he suggested this exposure – he compared it to second-hand smoke – was the cause of the positive drug test.

The drug test report submitted by the respondents states only that illegal drugs were present in the claimant’s system; it does not identify the quantity of drugs found. Thus, one can only speculate as to whether the cocaine in the claimant’s system at the time of his injury was sufficient to impair him. It is well established that conjecture and speculation, 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).

Though the claimant’s denial of cocaine use is lacking in plausibility, I found his description of the accident itself to be credible. There is nothing in the record to contradict his account of the accident, and his account was both plausible and internally consistent. If the accident occurred as the claimant described it – and I believe it did – then it appears likely the accident and resulting injury would have happened regardless of whether the claimant was under the influence of illegal

drugs. I find that the claimant has proven by a preponderance of the evidence that his injury was not substantially occasioned by the use of illegal drugs. The claimant has therefore successfully rebutted the statutory presumption.

B. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

Given the claimant's testimony and the medical records herein, I find that the

claimant has proven by a preponderance of the evidence that he sustained an injury to his leg arising out of and in the course of his employment; that his injury was caused by a specific incident identifiable by time and place of occurrence; that his injury caused internal physical harm to the body requiring medical services; and that the existence and extent of his injury is established by medical evidence supported by objective findings. The claimant has proven every element of a compensable injury; I therefore conclude that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his leg.

C. Benefits

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Nothing in the record contradicts the treatment recommendations made by the claimant's physicians. I find that the claimant has proven by a preponderance of the evidence that the medical treatment he has undergone for his compensable leg injury has been reasonably necessary.

An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, whichever occurs first. Ark. Code Ann. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

The claimant was admitted to the hospital the day of his injury, and he testified that he never returned to work for the respondent-employer. The parties agree his healing period ended on June 12, 2006, and the claimant returned to work for a different employer the following week. I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from February 21, 2006, through June 12, 2006. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from February 21, 2006, through June 12, 2006.

AWARD

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his leg; that he is entitled to medical treatment; and that he is entitled to temporary total disability benefits from February 21, 2006, through June 12, 2006. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge