

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F507223

JOHN SPRINGER, Employee	CLAIMANT
GEORGE'S, INC., Employer	RESPONDENT
CROCKETT ADJUSTMENT, TPA	RESPONDENT

OPINION FILED JANUARY 27, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by J. DAVID WALL, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On January 4, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 26, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on July 5, 2005.
3. The claimant injured his left leg on July 5, 2005 while working for respondent.
4. The claimant was earning sufficient wages to entitle him to compensation at the rate of \$247.00 per week for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Application of A.C.A. §11-9-102(4)(B)(iv).
2. Temporary total disability benefits from July 5, 2005.

3. Medical.
4. Attorney fee.

The claimant contends he was injured on July 5, 2005 when his lower left leg was injured when a large scale plate fell down on top of him. He requests temporary total disability, related medical, and an attorney fee.

The respondent contends that the claimant injured his left leg on July 5, 2005 while working for the respondent. However, a post-accident drug screen revealed that the claimant was under the influence of marijuana at the time of his accident. Under the circumstances, the respondent contends that the claimant's accident was substantially occasioned by the claimant's use of illegal drugs and he is therefore not entitled to workers' compensation benefits under Arkansas law.

From a review of 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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 26, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by his use of marijuana; therefore, he suffered a compensable injury to his left leg while employed by respondent on July 5, 2005.
3. Claimant is entitled to temporary total disability benefits beginning July 6, 2005 and continuing through November 23, 2005.
4. Respondent is liable for payment of all reasonable and necessary medical

treatment provided in connection with claimant's compensable injury.

5. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 45 year old man who was hired by the respondent on August 2, 2001 to be a maintenance technician. As a maintenance technician, the claimant was responsible for working on the respondent's computers and scales. One of these scales had a metal plate which was approximately five feet square and weighed in excess of 300 pounds. The plate was that portion of the scale where pallets of chicken are placed for weighing. Claimant was working on this scale on the date of his injury, July 5, 2005. In order to work on the components which were underneath the metal plate, it was necessary to remove the metal plate. Claimant testified that he and another individual removed the plate and leaned it against a wall. The plate was apparently placed in such a way that it sat above the area where claimant and other individuals were working.

After claimant had been working on the scale for several hours, the metal plate slipped and fell striking him in the left leg. Claimant was taken to the Lowell Clinic where he was evaluated by Dr. Berestnev and was diagnosed as suffering from a fracture of the left tibia and fibula. Claimant was given a splint, medication, and was referred to Dr. Benafield. Claimant was evaluated by Dr. Benafield the next day who recommended non-operative treatment in the form of a cast. According to claimant's testimony he continued to be treated by Dr. Benafield until he was released with no restrictions on November 23, 2005.

Claimant has filed this claim contending that he suffered a compensable injury and requesting temporary total disability benefits, medical benefits, and a controverted attorney fee. The respondents do not deny that claimant suffered an injury to his left leg on July

25, 2005, but contend that the claim is not compensable due to a post-accident drug test which revealed the presence of marijuana metabolites. Claimant does not dispute the drug test results. Claimant admitted that he had smoked a small amount of marijuana at approximately 7:00 or 8:00 p.m. the night before his accident.

ADJUDICATION

_____ Under Arkansas law the definition of a compensable injury excludes any injury which was “substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders.” A.C.A. §11-9-102(4)(B)(iv)(a). The presence of an illegal drug creates a “rebuttable presumption that the injury or accident was substantially occasioned by” their use. A.C.A. §11-9-102(4)(B)(iv)(b). Thus, the employee has the burden of proving by a preponderance of the evidence that the illegal drug did not substantially occasion the injury or accident. A.C.A. §11-9-102(4)(B)(iv)(d).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that his use of marijuana did not substantially occasion his injury on July 5, 2005.

It appears that this accident occurred through no fault of the claimant’s and it was not caused by or contributed to by his use of marijuana. First, with respect to the placement of the metal plate which was above the work area, claimant testified that during the time he worked for the respondent this was where the plate was always placed when work was performed on the scale. Claimant testified that he had never seen the plate placed any other way. Furthermore, claimant testified that Chris Siemans, his supervisor, was also working with him on the scale that day. Claimant testified that Siemans did not indicate that the metal plate had been improperly propped against the wall.

Second, the evidence does indicate that Siemans was able to get out of the way of

the metal plate when it fell while claimant was not. It might be argued that claimant's ability to react was impaired by his use of marijuana. However, according to claimant's testimony Siemans was able to get out of the way because he had a more direct route out of the work area. Claimant testified that he could not get out of the work area quick enough because the wall and computer were in his way.

In summary, claimant has the burden of proving by a preponderance of the evidence that his use of marijuana did not substantially occasion his injury. In this particular case, I find that claimant has met his burden of proof. The totality of the evidence indicates that this accident occurred when the steel plate fell onto his leg. There is no evidence that the plate was improperly positioned by the claimant; to the contrary, claimant testified that the plate was always placed in that area and his supervisor did not indicate that the plate was improperly propped against the wall. Furthermore, claimant was unable to get out of the way when the plate fell because the computer and wall were in his way. In short, I do not find that this accident or claimant's injury were caused by any lack of judgment, perception, lack of concentration, reaction time, or any other factor which is normally associated with impairment resulting from marijuana. Accordingly, I find that claimant has rebutted the presumption that the injury was substantially occasioned by his use of marijuana. Therefore, claimant suffered a compensable injury to his left leg while employed by respondent on July 5, 2005.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

With respect to claimant's request for temporary total disability benefits, I note that the injury to claimant's left leg is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). In this particular case, I find that

claimant is entitled to temporary total disability benefits beginning July 6, 2005, the day after his injury, and continuing until November 23, 2005, the day he was released by Dr. Benafield which constitutes the end of his healing period.

When claimant originally sought medical treatment on July 5, 2005, Dr. Berestnev indicated that claimant should remain off work until he was evaluated by Dr. Benafield. Claimant was evaluated by Dr. Benafield the next day on July 6, 2005. At that time Dr. Benafield did indicate that claimant could return to work at a sit-down job. However, due to the claimant's positive drug test the claimant was terminated by the respondent on July 12, 2005. Claimant did testify that he attempted to look for work through the state unemployment office but was unable to do so because of his orthopaedic boot.

Given this evidence, I find that claimant is entitled to temporary total disability benefits during his healing period which existed from July 6, 2005 through November 23, 2005.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of marijuana; therefore, he suffered a compensable injury to his left leg on July 5, 2005 when he suffered a fracture of his left

tibia and fibula. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning July 6, 2005 and continuing through November 23, 2005. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE