

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610383

KENNETH HONEY	CLAIMANT
FLEMING ELECTRIC	RESPONDENT
UNION INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 27, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by AARON MARTIN, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 23, 2007, in Springdale, Arkansas. The deposition of Peggy White, was taken on April 9, 2007, and has been admitted as Joint Exhibit No. 1.

A pre-hearing order was entered in this claim on February 27, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted as fact:

1. On September 18, 2006, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation benefits are \$488.00 for total disability and \$366.00 for permanent partial disability.
3. On September 18, 2006, the claimant fell while installing or repairing lighting fixtures, breaking his pelvis and injuring his hip.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether these injuries on September 18, 2006, are expressly prohibited from the category of compensable injuries by Ark. Code Ann. §11-9-102(4)(B)(iv).
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from September 19, 2006 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"First, the claimant will contend that the drug screen showing traces of THC did not come from reasonable and responsible testing and should be excluded. The claimant is aware of two drug screens that were positive for THC. The first positive screen comes from the ER records of Northwest Medical Center. The claimant will contend that the urine sample used for this test was taken by catheter while the claimant was unconscious. Also the results themselves clearly state that they are not to be used for legal purposes and that there was no chain of custody followed (pg. 12). This first test was not reasonable, responsible or legally reliable and should be excluded. Advanced Toxicology Network performed the second test on September 28, 2006. The Custody and Control form for this test says that the sample was collected on September 26, 2006 at ESM in Fayetteville and that the temperature of the sample was between 90 degrees to 100 degrees (pg. 19). However, records will show that the claimant was released from UAMS in Little Rock on September 26, 2006 and the claimant remained in Little Rock at his mother's

house the rest of the day. He did not give a sample in Fayetteville the same day. This test is clearly not reliable and should also be excluded. A third test was performed on September 28, 2006. Advanced Toxicology Network performed on this test was well. The claimant properly gave a sample at Concentra Medical Center as indicated. This test was negative for THC and the claimant has no disputes with these results (pg. 21). If the tests are admitted the claimant will contend that they are so unreliable that they do not give rise to the presumption that the claimant's accident was substantially occasioned by the presence of illegal drugs. If your Honor does find that the evidence is sufficient to give rise to the presumption, the claimant will contend that the claimant's accident was not substantially occasioned by the presence of illegal drugs. The claimant is seeking payment, reimbursement and satisfaction of medical bills in connection with his compensable injuries and temporary total disability benefits from the date of accident to a date yet to be determined. This claim was controverted in its entirety and the claimant also seeks attorney's fees for the indemnity benefits sought. The claimant reserves his rights to permanent benefits and all other benefits at this time."

In regard to these issues, the respondents contend:

"The respondents contend that his claim has been controverted in its entirety due to a positive drug screen. The respondents contend that their place of employment is a drug free work place. In fact, the claimant signed documentation agreeing that he understood that it was a drug free work place. On the date of the injury, the claimant was on a 10 foot ladder, and should have locked out the electrical circuit before working on the lights. However, the claimant failed to do so which resulted in him sustaining his injury. This is contrary to all safety regulations of Fleming Electric. In addition, the claimant was taken to the hospital where he underwent a drug screen which came back as being positive for THC. The respondents contend that the claimant's actions are evidence of his drug induced impairment."

DISCUSSION

_____The central issue in this case is the matter of compensability. There is no question that the claimant fell from a ladder while performing his regular employment duties for the

respondent on September 18, 2006. It is further undisputed that in this fall, he sustained objectively demonstratable physical injuries to his right hip, including a fracture of his pelvis. He also sustained a lesser injury to his right elbow, in the form of a laceration. These injuries would satisfy all the statutory requirements for a "compensable injury", unless expressly excluded from this category of injuries by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv)(a). This is where the actual dispute arises.

The only basis for imposition of the provisions of this subsection are two drug tests purportedly performed on the same urine sample. The first of these was a simple initial drug screen that was performed at Northwest Medical Center of Benton County on September 18, 2006. This initial drug screen test was interpreted as showing positive for miscellaneous opiates, benzodiazepines, and marijuana metabolites. The second and more thorough quantitative test was performed by Advanced Toxicology Network of Memphis, Tennessee, apparently on October 2, 2006. This test was interpreted as being positive for morphine and carboxy-THC or marijuana metabolite. Curiously, it was apparently negative for 6 monoacetyl morphine THC or cannabinoids, which is the actual impairing chemical or drug contained in marijuana. The carboxy-THC or marijuana metabolite was also at a relatively low level of 30 nanograms per milliliter. No benzodiazepines were recorded. The only substance relevant to the current dispute is the marijuana metabolites.

In his testimony, the claimant denied using marijuana at any time prior to his accident. The claimant had previously undergone drug screens, which had all been negative. Subsequent drug testing, on a sample collected September 28, 2006, was also negative for marijuana or marijuana metabolites.

The record further shows that the claimant had been at work for several hours prior to his employment related accident on September 18, 2006. There is no testimony or evidence that, during this period, the claimant appeared to be in any way intoxicated or under the influence of marijuana or any other drug. The initial medical records from the EMS and emergency room also failed to note any findings that would be indicative of marijuana or any other drug induced intoxication.

There is no doubt that the claimant's accident and injuries on September 18, 2006, were in substantial part caused by his own negligence or carelessness. However, as demonstrated by the testimony of claimant's witness, Kenny David Rakes, the claimant's actions were a common and usual practice among many electricians. His actions on September 18, 2006, would not be sufficiently reckless to in and of themselves, constitute proof of impaired mental functioning from marijuana or any other substance.

After consideration of all the evidence presented, it is my opinion that the results of the initial drug testing that was initially performed at the Northwest Medical Center of Benton County and the subsequent test by Advanced Toxicology Network are not sufficiently reliable to prove the presence of illegal drugs or

drugs used in contravention of a physician's orders in the claimant's body at the time of his employment related accident and injuries. Therefore, the presumption provided by Ark. Code Ann. §11-9-102(4)(B)(iv)(b) would not arise. Without this statutory presumption, the remaining evidence is not sufficient to prove that the claimant's employment related accident and injuries were substantially occasioned by his use of illegal drugs or prescription drugs used in contravention of physician's orders.

The initial testing on the urine sample, which was purportedly taken from the claimant on September 18, 2006, was performed by the Northwest Medical Center of Benton County. The written form generated by the initial testing expressly stated that the test results are not to be used for legal purposes and that no chain of custody has been followed. The laboratory director of the Northwest Medical Center of Benton County, Peggy White, testified that the regular procedure for a post-accident drug test was not followed in this case. She stated that she could not swear to the reliability of the process or that no mistake had been made. She stated that the identify of the individual collecting the sample and the method in which it was collected was unknown. She could not state with certainty how the sample was transported to the laboratory or even whether there was a lid on top of the sample when it was received. She was certain that the container for the sample was not "sealed" at any time from the time it was collected until it was taken from the hospital, Southwest Pipie and Supply v. Hoover, 13 Ark. App. 144, 680 S.W. 2d 723 (1984). She testified

that after testing the sample was placed with various other samples for storage into the hospital's freezer. Finally, she testified that the only testing performed at the Northwest Medical Center of Benton County was an initial drug screen which was susceptible to false positives.

Subsequently, the chain of custody of this sample gets even more confusing. According to documents from Employee Screening Management (Claimant's Exhibit No. 1, pages 50-51), the sample was picked up from the hospital by one of its employees on September 26, 2006. This report indicated that the sample picked up bore the Northwest Medical Center i.d. number of 0000370211. However, the records of Northwest Medical Center would indicate that the appropriate sample number was 0000170211. At the time of the pick up, the sample was purportedly sealed and given the number 312593462. Curiously, the custody and control form that was completed on September 28, 2006, by the employee of Employee Screening Management, indicated that the temperature of the specimen received was between 90 and 100 degrees Fahrenheit (Respondents' Exhibit No.1, page 4).

The records of Advanced Toxicology Network and Global Lab Solutions indicate that subsequent testing was performed on specimen i.d. 312593462. However, it is somewhat curious that the marijuana metabolite testing showed only 30 nanograms per milliliter, which would be well below the cut off for a positive result on initial screen testing (such as that performed at the Northwest Medical Center of Benton County). There was also no

benzodiazepines detected. The subsequent test by Advanced Toxicology Network also erroneously noted a collection date and time for taking the urine sample of September 26, 2006, at 16:15 hours.

In summary, I find that the respondents have failed to present sufficient credible evidence to give rise to the statutory presumption provided by Ark. Code Ann. §11-9-102(4)(B)(iv)(b). The respondents have also failed to prove by the greater weight of the credible evidence that the claimant's employment related accident and injuries on September 18, 2006, were substantially occasioned by his use of illegal drugs or prescription drugs used in contravention of physician's orders. Therefore, the claimant's accidental injuries on September 18, 2006, are not expressly excluded from the category of "compensable injuries" by Ark. Code Ann. §11-9-102(4)(B). The evidence presented is sufficient to prove that the claimant's accidental injuries on September 18, 2006, satisfy all of the statutory requirements for a "compensable injury" imposed by the Act.

Next, it is necessary to determine the nature and extent of benefits to which the claimant is entitled, as a result of his compensable injuries. Clearly, he would be entitled to reasonably necessary medical services for these compensable injuries. Medical services are "reasonably necessary" when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

In the present claim, the evidence shows that the medical services provided the claimant by personnel at the Rogers Fire Department EMS unit, personnel at the emergency room of the Northwest Medical Center of Benton County, and by and at the direction of medical personnel at the University of Arkansas School for Medical Sciences were all necessitated by the claimant's compensable injuries. These medical services were also of a type and nature recognized by the general medical community as being appropriate for the diagnosis and treatment of injuries such as those experienced by the claimant.

Therefore, these medical services constitute "reasonably necessary medical services" under the provisions of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the Commission's medical fee schedule.

Next, is the matter of the claimant's entitlement to temporary total disability benefits from September 19, 2006 through a date yet to be determined. In order to be entitled to such benefits, the claimant must prove by the greater weight of the credible evidence that during this time he continued to be within his healing period from the effects of his compensable injury and also rendered totally disabled as a result of the effects of his compensable injury.

The duration of the healing period is a medical question, which must be resolved on the basis of the medical evidence presented. The healing period continues until the claimant has

achieved the maximum benefit of time and medical treatment in regard to the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms, once this has occurred, is not sufficient to extend the healing period.

In the present case, the medical evidence is somewhat sketchy. This would appear to be based in large part upon the fact that the respondents refused to provide any medical services for the claimant's rather significant injuries and the claimant's inability to obtain these services through other means. The last medical report concerns treatment for the compensable injury on October 6, 2006. At that time, the stitches were removed from the claimant's elbow. At the time of this visit, it was emphasized that the claimant needed to consult with a local orthopaedic surgeon. Clearly, the claimant's compensable injuries had not reached the maximum benefit of time and medical treatment when this report was made.

In regard to the matter of actual disability it is apparent that the claimant's compensable injuries still rendered him totally disabled from any regular employment, at the time of the last medical record. No evidence was presented to indicate when or if the claimant subsequently returned to employment.

After consideration of the evidence presented, it is my opinion that the current record is insufficiently developed to allow a determination in regard to the duration of the period of temporary total disability that would be fair and equitable to all parties concerned. Therefore, I find that this issue should be reserved for future determination, pending a more complete development of the record. However, it is obvious that the claimant is entitled to temporary total disability benefits for some period after September 19, 2006.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On September 18, 2006, the relationship of employee-employer existed between the parties.

3. On September 18, 2006, the appropriate weekly compensation rates were \$488.00 for total disability and \$366.00 for permanent partial disability.

4. On September 18, 2006, the claimant sustained compensable injuries to his right hip or pelvic area and his right elbow. Specifically, the claimant has proven the occurrence of physical injuries to these portions of his body that are established by medical evidence and supported by objective findings, that arose out of and occurred in the course of his employment with the respondent, that were caused by a specific incident, that are identifiable by time and place of occurrence, that caused internal

and external physical harm to his body, that required medical services, and that resulted in disability.

5. The greater weight of the credible evidence fails to prove the presence in the claimant's body of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders at the time of his employment related accident and injury. Therefore, there is no rebuttable presumption raised that the claimant's injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. Absent this presumption, the evidence presented fails to prove that the claimant's accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

6. The medical services provided to the claimant for his compensable injuries by and at the direction of EMS personnel from the Rogers Fire Department, by and at the direction of medical personnel from the Northwest Medical Center of Benton County, and medical personnel at the University of Arkansas School for Medical Sciences, all constitute reasonably necessary medical services for the claimant's compensable injuries. Therefore, the expense of such services are the liability of the respondents herein, subject to the medical fee schedule established by this Commission. The greater weight of the credible evidence further shows that the claimant continued to be in need of reasonably necessary medical services for his compensable injury at the time of the last medical record on October 6, 2006. Thus, the respondents' responsibility

for reasonably necessary medical services has continued after October 6, 2006.

7. The greater weight of the credible evidence establishes that the claimant was rendered temporary totally disabled by his compensable injuries on September 18, 2006 and continued to be so disabled through some time after October 6, 2006. However, the current record is insufficient to determine with any reasonable accuracy the exact duration of this period of temporary total disability. Therefore, the end of this period of temporary total disability is reserved for future determination, if necessary.

8. The respondents have denied the occurrence of any compensable injuries and have controverted this claim in its entirety.

9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all indemnity benefits herein and hereafter awarded to the claimant.

ORDER

The respondents shall be liable to the claimant for temporary total disability benefits commencing on September 19, 2006 and continuing through a date yet to be determined.

The respondents shall be liable for the medical expense incurred by the claimant as a result of reasonably necessary medical services provided him for his compensable injuries by and at the direction of EMS personnel from the Rogers Fire Department, medical personnel from the Northwest Medical Center of Benton County, medical personnel at the University of Arkansas School for

Medical Sciences, and any further reasonably necessary medical services the claimant may require for his compensable injuries. Such liability is subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE