

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513193

LEONARD TEAGUE, Employee	CLAIMANT
JOHNSON MECHANICAL, Employer	RESPONDENT
CROCKETT ADJUSTMENT, Carrier	RESPONDENT

OPINION FILED MAY 17, 2007

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

Claimant represented by REX W. CHRONISTER, Attorney, Fort Smith, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 25, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 29, 2006, and a pre-hearing order was filed on November 30, 2006. 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 December 10, 2005.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$466.00 for temporary total disability benefits and \$350.00 for permanent partial disability benefits.

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

1. Compensability.
2. Medical.

3. Temporary total disability benefits.
4. Attorney fee.

At the time of the hearing the claimant clarified his requested period of temporary total disability benefits to include December 10, 2005 through August 23, 2006. In addition, the parties also agreed to litigate claimant's entitlement to permanent partial disability benefits based upon a total 15% rating to the lower extremities.

The claimant contends he sustained a compensable injury on December 10, 2005 when a piece of pipe knocked him from a roof, breaking both heels. He requests temporary total disability benefits from December 10, 2005 through August 23, 2006, medical, permanent partial disability benefits in an amount equal to 15% to the lower extremity, and an attorney fee.

The respondents contend the claimant did not sustain a compensable injury. The accident was caused by the use of illegal drugs.

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 witnesses and to observe their 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 November 29, 2006, and contained in a pre-hearing order filed November 30, 2006, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lower extremities while employed by respondent on December 10, 2005. Claimant has met his burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use

of illegal drugs.

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

4. Claimant is entitled to temporary total disability benefits beginning December 11, 2005 and continuing through July 1, 2006.

5. As a result of his compensable injury claimant is entitled to permanent partial disability benefits in an amount equal to 15% to the lower extremities.

6. Respondent has controverted claimant's entitlement to all unpaid temporary total disability and permanent partial disability benefits.

#### FACTUAL BACKGROUND

The claimant is a 35-year-old man who was hired by the respondent in April 2005 as a journeyman plumber. On Friday, December 9, 2005, the claimant and other employees of the respondent attended a safety meeting at the respondent's place of business involving safety on roofs and the use of safety harnesses. After that meeting claimant, his supervisors, and other employees traveled to the Simmons Food plant in Siloam Springs. Over that weekend the respondent was to install a new eight-inch water main. The water main would partially run over the flat roof of a building. This building was inside another building which had been built around it. In other words, it was essentially a building inside a building.

The pipe respondent was installing was in 20-foot sections and weighed approximately 200 pounds. The pipe sat on four-by-four blocks on top of the roof. One 20-foot section of pipe was attached to another 20-foot section of pipe with glue and a coupling. In order to perform this job at least three people were required. One of these people was the claimant who was a journeyman plumber. Also working with claimant was Thomas McKenzie and James Hamilton, both of whom were apprentice plumbers.

Testimony at the hearing indicated that glue was placed in the coupling and on the outside of a piece of pipe. The person putting the glue on the pipe and coupling would stand over the piece of pipe and coupling which had already been laid and help another individual guide the 20-foot pipe into the coupling. A second individual, in this case the claimant, had to straddle the pipe in order to guide it into the coupling. Finally, a third individual would stand at the far end of the 20-foot pipe and push the pipe into the coupling.

After some preliminary work on December 9, 2005, the claimant and the other employees returned to install the pipe on December 10, 2005. After installing several pieces of pipe, the claimant, McKenzie, and Hamilton were in the process of coupling together another piece of pipe when claimant's injury occurred. According to claimant's testimony he was straddling a piece of pipe while he was waiting for McKenzie to walk to the other end of the pipe to push it. According to testimony, the pipe being used on this day was bowed due to its sitting out in the sun. While claimant was straddling the pipe and waiting for McKenzie to walk to the other end, the pipe rolled over and fell off the roof of the building. As the pipe fell off the roof of the building, it catapulted the claimant off as well. As a result, claimant landed on a concrete floor and suffered fractures to both of his heels. Claimant was taken to the hospital and underwent surgery on his left heel by Dr. Pleimann. Dr. Pleimann eventually released claimant from his care and assigned impairment ratings of 10 percent to the left lower extremity and 5 percent to the right lower extremity. When claimant was taken to the hospital, a drug test was performed which returned positive for marijuana.

Claimant has filed this claim contending that he suffered a compensable injury to both of his feet while employed by respondent on December 10, 2005. He requests temporary total disability benefits, medical treatment, permanent partial disability benefits, and a controverted attorney fee.

### ADJUDICATION

Claimant contends that he suffered a compensable injury to both of his feet when he was knocked off the roof of a building by a falling pipe while working for respondent on December 10, 2005. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 injury;
- (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.

According to A.C.A. §11-9-102(4)(B)(iv), a compensable injury does not include an accident which was substantially occasioned by the use of illegal drugs. The presence of illegal drugs creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of those illegal drugs.

Accordingly, a claimant is not entitled to compensation unless it is proven by a preponderance of the evidence that illegal drugs did not substantially occasion the accident. A.C.A. §11-9-102(4)(B)(iv)(d). Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission. *Woodall v. Hunnicutt Construction*, 340 Ark. 377, 12 S.W. 3d 630 (2000). In this particular case, there is no

question that claimant suffered an injury when he was knocked off the roof by the falling pipe on December 10, 2005. Claimant also acknowledges testing positive for marijuana on that date.

Based upon the evidence presented, I find that claimant has met his burden of proving by a preponderance of the evidence that his accident was not substantially occasioned by the use of marijuana.

There is no question that the respondent had a safety meeting on December 9, 2005 at which time the use of safety harnesses on roofs higher than six feet was discussed. There is also no question that claimant was not using a safety harness at the time of his accident or that claimant tested positive for marijuana. However, I do not find based upon the evidence presented that claimant's judgment involving his failure to use a safety harness or the way he was performing the job was impaired by marijuana on December 10, 2005.

Even though the respondent had a safety meeting involving the use of safety harnesses, and claimant did not use a safety harness, the evidence presented at the hearing indicates that not a single employee of the respondent used a safety harness prior to the claimant's accident. Testimony was presented indicating that on Friday, December 9, and Saturday, December 10, there were anywhere from eight to ten people on the roof at various points in time during the day. The evidence indicates that not one of those people used a safety harness. In fact, testimony at the hearing from the witnesses indicates that safety harnesses were not even present on the job site. Also testifying at the hearing was Maeva Mayes, the controller and safety director for the respondent. According to her testimony she checked the respondent's shop the day after the accident and there were only three safety harnesses available. Given the number of employees working at the job site in Siloam Springs, respondent did not even have enough safety harnesses for its employees.

Further, and perhaps most importantly, I note that the wearing of a safety harness by the claimant was not something as simple as putting on a life preserver. Claimant testified that in order to use safety harnesses on the job at Simmons it would have been necessary to drill anchors into the concrete roof above their heads and attach safety lines with the use of eye bolts. Claimant testified that because of the distances involved on the roof they would have had to set anchors every six to eight feet. A ladder would have been required to reach the roof above them and it would have taken some two to three hours to set up this system for the use of safety harnesses. Claimant also noted that there was no equipment at the job site such as the concrete anchors or eye bolts to even use to set up this system.

In short, I do not find that claimant's failure to use a safety harness was the result of impaired judgment caused by his use of marijuana. Instead, it appears that the failure to use safety harnesses was a decision made by every employee at the Simmons' job site. Claimant's supervisors never instructed him or other employees to wear safety harnesses while they were performing their job. One of the supervisors, Steve Drain, was present on both December 9 and December 10 prior to the claimant's injury. Thus, I do not find claimant's failure to use a safety harness to be the result of impaired judgment caused by the use of marijuana, but rather a decision made by all employees working for the respondent at the Simmons' plant, including claimant's supervisor. Evidence indicated that harnesses were not present at the job site and the fact that it would have taken some two to three hours to set up a system for using safety harnesses indicates that this was not an individual decision made solely by the claimant, but rather a decision made by claimant, other employees, supervisors, and the respondent.

I also find that claimant's injury was not caused by any impaired judgment regarding the way he was performing his job at the time the accident occurred. Claimant and two other witnesses testified that in order to perform the job claimant was performing it was

necessary for him to straddle the pipe in order to guide it into the coupling. Claimant testified that he was holding the pipe to stabilize it while McKenzie walked to the other end of the pipe to push. It was while claimant was holding the pipe to stabilize it that the bow in the pipe apparently caused it to move and fall off the building which resulted in the claimant being knocked off the building. According to claimant's testimony he was performing the job of installing this pipe as he had been trained and there was no evidence to the contrary. It appears from my review of the evidence that this incident was unavoidable and in no way resulted from the claimant's use of illegal drugs.

In summary, I find that claimant has proven by a preponderance of the evidence that his use of illegal drugs did not substantially occasion the accident which occurred on December 10, 2005. I do not find that claimant's failure to wear a safety harness was the result of impaired judgment, nor do I find that claimant failed to properly perform his job because of the use of illegal drugs. Instead, I find that claimant's accident was unavoidable.

Having found that claimant has overcome the rebuttable presumption that his accident was caused by the use of illegal drugs, I find based upon the remaining evidence presented that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury while employed by respondent on December 10, 2005. The evidence indicates that claimant was thrown off the roof of the building by a pipe and landed on his heels which resulted in fractures to both of them. Claimant was taken to the hospital where he underwent surgery on his left foot. I find that the evidence presented indicates that the claimant's injury arose out of a specific incident identifiable by time and place of occurrence and that the injury arose out of and in the course of employment with respondent. I also find that claimant has offered medical evidence supported by objective findings establishing an injury and that the injury caused internal physical harm to his body which required medical services and resulted in disability.

Having found that claimant suffered a compensable injury, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

In connection with his compensable injury, claimant contends that he is entitled to temporary total disability benefits. The injury to claimant's feet involves a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total or temporary partial 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). Claimant has requested temporary total disability benefits beginning December 10, 2005 and continuing through August 23, 2006, the date Dr. Pleimann released him to return as needed. While I do find that claimant remained within his healing period throughout the requested period of time, I find that claimant returned to work before his healing period ended. On cross-examination, claimant was asked if he had worked for money prior to his release by Dr. Pleimann in August 2006. In response, claimant indicated that he umpired some baseball games and mowed some yards. Claimant indicated that he started performing some type of work in July 2006. Since claimant had returned to work, he was ineligible for temporary total disability benefits. Accordingly, based upon the evidence presented, I find that claimant is entitled to temporary total disability benefits beginning December 11, 2005, the day after his compensable injury, and continuing through July 1, 2006, when claimant indicated he began performing some type of work.

Finally, Dr. Pleimann in a report dated February 12, 2007 assigned the claimant a permanent physical impairment rating in an amount equal to 10% to the left lower extremity and 5% to the right lower extremity. I find that claimant is entitled to permanent partial disability benefits in an amount equal to 15% to the lower extremity as a result of his compensable injuries.

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 indemnity 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 he suffered a compensable injury to both lower extremities while employed by respondent on December 10, 2005. He is entitled to payment of all reasonable and necessary medical treatment, temporary total disability benefits from December 11, 2005 through July 1, 2006, and permanent partial disability benefits in an amount equal to 15% to the lower extremity. Respondent has controverted claimant's entitlement to all temporary total and permanent partial disability 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 indemnity 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