

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F609988/F612976

DAVID HICKEY, Employee	CLAIMANT
GARDISSER CONSTRUCTION, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JULY 21, 2008

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

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by RANDY MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 25, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 5, 2008, and a pre-hearing order was filed on March 6, 2008. 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/carrier relationship existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his left wrist on September 5, 2006.
4. The claimant was earning an average weekly wage of \$304.00 which would entitle him to compensation at the weekly rates of \$203.00 for total disability and \$154.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's ankle in November 22, 2006.

2. Temporary total disability benefits from November 23, 2006 through a date yet to be determined.

3. Medical.

4. Attorney fee.

At the time of the hearing the claimant modified his request for temporary total disability benefits to include the periods of November 22, 2006 through July 5, 2007, and December 1, 2007 through April 16, 2008. In addition, the claimant reserved as an issue his entitlement to permanent disability benefits for his compensable injuries.

The claimant contends he suffered a compensable injury to his ankle on November 22, 2006. He requests temporary total disability benefits to include the periods of November 22, 2006 through July 5, 2007, and December 1, 2007 through April 16, 2008; medical benefits; and a controverted attorney fee.

The respondents contend that in accordance with A.C.A. §11-9-102(5)(B)(iv), claimant's November 22, 2006 ankle injury is not compensable. Claimant tested positive for amphetamines at the hospital following the injury. Respondents also contend that claimant's June 5, 2006 wrist injury has not rendered him totally disabled and that the claimant has continued to work within the restrictions provided by his treating physician.

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 March 5, 2008, and contained in a pre-hearing order filed March 6, 2008, 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 right ankle while employed by respondent on November 22, 2006. Specifically, I find that claimant has overcome the statutory presumption that his injury was 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 right ankle injury. This includes the hospitalization, surgery, and medical treatment provided by Dr. Pleimann.

4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from November 22, 2006 through July 5, 2007, and again from December 1, 2007 through April 16, 2008. Pursuant to A.C.A. §11-9-506, claimant is only entitled to the amount the temporary total disability benefits exceeds benefits he received for unemployment compensation.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits for the periods of November 22, 2006 through July 5, 2007, and December 1, 2007 through April 16, 2008.

FACTUAL BACKGROUND

_____The claimant began working for the respondent in July 2006 and he suffered a compensable injury to his left wrist when he fell off a ladder on September 5, 2006. This injury resulted in a fracture to claimant's left wrist and he received medical treatment from Dr. Benafield. On November 16, 2006, Dr. Benafield noted that claimant's fracture was healing in a malunited position and he recommended surgery to correct that condition. That surgery was postponed until July 3, 2007 due to the claimant's accident on November 22, 2006. Following claimant's surgery to correct the non-union in his left wrist in July 2007, claimant continued to have problems with growth of new bone formation. As a result, Dr. Benafield ordered a bone stimulator and when that did not resolve claimant's

condition Dr. Benafield performed a bone graft surgery on claimant's left wrist on January 10, 2008. Dr. Benafield eventually released claimant as having reached maximum medical improvement for his left wrist injury on April 16, 2008.

Claimant also contends that he suffered a second compensable injury while working for respondent on November 22, 2006. On that particular date the respondent was installing a metal roof on a building. Claimant testified that the roof was slippery because of dust. Claimant testified that the roof of the building was so slippery that other employees were pouring water and soda on the roof to create some grip. Claimant testified that he arrived at the job site at approximately 7:00 a.m. that day, worked that morning, ate lunch, and at approximately 3:00 p.m. was in the process of walking to a scissor lift to get more screws for his screw gun. As he was walking, another employee asked him to put a drill in the scissor lift. The employee slid the drill across the roof, claimant bent down and picked up the drill, started walking again and after taking two or three steps lost his balance and fell. Claimant landed on the roof and slid off of it landing on the ground on his right ankle.

Claimant was taken to the hospital and underwent surgery to repair right distal tibial and fibular fractures by Dr. Allard. The claimant's fall occurred on a Wednesday and he was released from the hospital on Friday. Before claimant's release from the hospital a urine sample was taken for a drug screen test. The drug screen test returned positive for methamphetamine.

Claimant underwent a second surgery on his right ankle which was performed by Dr. Pleimann on December 15, 2006. Claimant continued to be evaluated by Dr. Pleimann with his last visit occurring on June 26, 2007.

Although the respondent accepted as compensable the claimant's left wrist injury, it did not accept as compensable claimant's right ankle injury due to the presence of methamphetamine. As a result, claimant has filed this claim contending that he suffered

a compensable injury to his right ankle. In addition, he seeks payment of medical benefits relating to his right ankle as well as temporary total disability benefits relating to either the left wrist or right ankle injuries.____

ADJUDICATION

____ The first issue for consideration involves whether claimant suffered a compensable injury to his right ankle on November 22, 2006. There seems to be no question that claimant fell off the roof of a building while working for respondent that day, landing on his right ankle and fracturing it. The issue is whether this injury is compensable due to the presence of illegal drugs in the form of methamphetamine.

A.C.A. §11-9-102(4)(B)(iv)(a-d) provides that a compensable injury does not include an injury where the accident 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. An employee is not entitled to compensation benefits unless they can prove by a preponderance of the evidence that the illegal drugs did not substantially occasion the injury or accident.

Here, a urine sample was taken from the claimant while he was hospitalized following the fall on November 22, 2006. That sample returned positive for the presence of methamphetamine. Claimant acknowledged during his testimony that he took one-eighth of a gram of methamphetamine at approximately 6:00 p.m. on the night before his fall on November 22. Testifying at the hearing was Dr. Henry Simmons, Jr. Simmons is the medical director for the Arkansas Poison Center and also an Associate Professor of Toxicology and Emergency Medicine at UAMS. Dr. Simmons is board certified in medical toxicology, emergency medicine, and family medicine. In addition, he has a Ph.D. in toxicology. Based upon claimant's testimony regarding the time the methamphetamine was taken as well as the test results, Dr. Simmons testified that within a reasonable

medical and toxicological probability the claimant would have had methamphetamine circulating in his system at the time of the accident.

Based upon this evidence, I find that illegal drugs were present in the claimant's body at the time of his accident on November 22, 2006. Therefore, a rebuttable presumption is raised that the injury was substantially occasioned by the use of those illegal drugs and claimant is not entitled to compensation benefits unless he can prove by a preponderance of the evidence that the use of illegal drugs did not substantially occasion his injury or accident.

After reviewing the evidence in this case impartially, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of the methamphetamine.

First, claimant testified at the hearing that the metal roof was slippery because it was dry and was coated with dust. Claimant testified that other employees had been slipping on the roof that day. In fact, claimant testified that the roof of the building was so slippery that other employees were pouring water and soda on the roof to create more grip. According to claimant's testimony he was simply walking across the roof after picking up a drill which had been slid to him by another employee when he lost his balance and fell, sliding off the roof, landing on his right foot and fracturing his ankle.

Testifying at the hearing was Dr. Simmons. Dr. Simmons is an expert and he has had the opportunity to review the test results, portions of claimant's deposition testimony, and he was also present during the claimant's testimony at the hearing. Dr. Simmons testified that the dose taken by the claimant on the night before his injury was a significant dose and that there was a pharmacologically significant amount of methamphetamine circulating in the claimant's body at the time of the accident. According to Dr. Simmons, this could lead to an impairment in judgment and/or behavior. However, I believe it is significant that Dr. Simmons went on to testify that he did not hear any testimony which

would lead him to conclude that the claimant's judgment was impaired at the time of the accident.

Q. Okay. With regard to what you mentioned about it circulating in his system and the possibility that it could affect his judgment, did you hear him testify to anything that suggested that his judgment was impaired?

A. No, sir, I did not.

In summary, claimant has the burden of proving by a preponderance of the evidence that his injury was not substantially occasioned by the use of methamphetamine which was present in his body at the time of his injury. Here, the evidence indicates that the roof on which claimant was working on November 22, 2006 was slippery because of dust on its surface. This had resulted in other employees slipping and other employees pouring liquids on the roof in order to obtain more grip. Claimant's testimony regarding the slipperiness of the roof was not rebutted by any witnesses from respondent. Although Dr. Simmons testified that the amount of methamphetamine in claimant's system could have affected his judgment, he was not aware of any evidence which would indicate that claimant's judgment was actually impaired at the time of the fall. In other words, it appears that this accident was the result of claimant's falling on a slippery roof and not the result of impaired judgement caused by the use of methamphetamine. Accordingly, I find that claimant has rebutted the presumption that his injury was substantially occasioned by the use of illegal drugs. Therefore, I find that claimant suffered a compensable injury to his right ankle in the form of a fracture when he fell off the roof while working for respondent on November 22, 2006.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right ankle injury. This includes the hospitalization, surgery, and medical treatment provided by Dr. Pleimann.

The next issue for consideration involves claimant's request for additional temporary

total disability benefits. The injury to claimant's left wrist and the injury to claimant's right ankle are both scheduled injuries. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. Claimant does not have to prove that he suffered a total incapacity to earn wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

Initially, I find that claimant is entitled to additional temporary total disability benefits for the requested period of November 22, 2006 through July 5, 2007. Claimant suffered the compensable injury to his right ankle on November 22, 2006 and was hospitalized with surgery performed on that date. The medical evidence indicates that claimant continued to receive medical treatment for his right ankle injury through his visit with Dr. Pleimann on June 26, 2007. As of that date claimant remained within his healing period and he had not returned to work as a result of his right ankle injury. In addition, it is important to note that Dr. Benafield had indicated on November 16, 2006 that claimant would need additional surgery on his left wrist. That surgery was postponed while claimant underwent medical treatment for his right ankle. However, Dr. Benafield in a report dated April 26, 2007 indicated that surgery was planned for claimant's left wrist. This surgery was eventually performed on July 3, 2007 and respondent apparently paid temporary total disability benefits for a period of time after that surgery.

In short, during the period of time from November 22, 2006 through July 5, 2007, claimant was within his healing period for his right ankle injury. In addition, claimant was also within his healing period for his left wrist injury because additional surgery had been recommended and scheduled by Dr. Benafield. Claimant had not returned to work for the respondent or any other employer during this period of time. Therefore, claimant would be entitled to temporary total disability benefits.

As previously noted, respondent apparently began paying claimant temporary total disability benefits after the left wrist surgery on July 3, 2007. However, by December 1, 2007, respondent had ceased paying temporary total disability benefits. I find based on the evidence presented that claimant was entitled to continued temporary total disability benefits from December 1, 2007 through April 16, 2008. Initially, I note that claimant remained within his healing period for his left wrist injury throughout the requested period of time. Although claimant had undergone surgery on the left wrist in July 2007, claimant continued to receive medical treatment from Dr. Benafield. In fact, x-rays taken by Dr. Benafield indicated that claimant was not growing new bone formation as necessary for repair of the fracture. As a result, Dr. Benafield in his report of September 27, 2007 ordered a bone stimulator. In his report of November 27, 2007, Dr. Benafield indicated that x-rays still showed no new bone growth and he indicated that a bone graft procedure would be performed once it was approved by the carrier. This procedure was performed on January 10, 2008. Following that procedure the claimant continued to be evaluated and treated by Dr. Benafield for his left wrist until he was released at maximum medical improvement by Dr. Benafield on April 16, 2008. Based upon this evidence, I find that claimant remained within his healing period during the period of December 1, 2007 through April 16, 2008. I also note that claimant had not returned to work for the respondent or any other employer during this period of time. Therefore, he is entitled to temporary total disability benefits.

Claimant testified at the hearing that he received unemployment compensation benefits from the State of Missouri from February 3, 2007 through July 3, 2007 at the rate of \$259.00 per week. Pursuant to A.C.A. §11-9-506(b), an injured employee who receives unemployment compensation benefits is only entitled to the amount the temporary total disability benefits exceeds the unemployment benefits. Claimant's temporary total disability rate equals \$203.00 per week. For the period of February 3, 2007 through July

3, 2007, claimant received unemployment compensation benefits at the rate of \$259.00 per week. Accordingly, even though I have awarded claimant temporary total disability benefits for the period of time of November 22, 2006 through July 5, 2007, claimant would not be entitled to any temporary total disability benefits from February 3, 2007 through July 3, 2007 because his unemployment benefits exceeded the temporary total disability benefits.

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 his right ankle while employed by respondent on November 22, 2006. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right ankle injury. Claimant is entitled to temporary total disability benefits beginning November 22, 2006 through July 5, 2007, and again from December 1, 2007 through April 16, 2008. Because claimant received unemployment compensation benefits at a rate greater than his temporary total disability rate, claimant is not entitled to temporary total disability benefits from February 3, 2007 through July 3, 2007. 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 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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$387.00.

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