

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F710842

ROBERT SORRELLS, Employee	CLAIMANT
WIL SHAR ERECTORS, Employer	RESPONDENT #1
AIG CLAIM SERVICES, INC., Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED MAY 20, 2008

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

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by JARROD PARRISH, Attorney, Little Rock, Arkansas.

Respondent #2 excused from proceedings.

STATEMENT OF THE CASE

On April 30, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 13, 2007, and a pre-hearing order was filed on December 14, 2007. 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 between claimant and respondent #1 on October 11, 2007.
3. The claimant was earning sufficient wages to entitle him to compensation at the maximum compensation rate.

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

1. Compensability.

2. Temporary total disability benefits from October 11, 2007 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 period of October 11, 2007 through November 5, 2007.

The claimant contends that on October 11, 2007 he sustained multiple injuries from a fall including, but not limited to, injuries in the form of six broken ribs, punctured lung, back injury, and left foot injury. Claimant contends that he is entitled to temporary total disability benefits beginning October 11, 2007 through November 5, 2007, medical expenses, and a controverted attorney fee. Claimant contends he was not impaired at the time of the accident.

Respondent contends that claimant underwent two drug tests subsequent to his injury, both of which proved positive for marijuana. As such, it is respondent #1's position that claimant is not entitled to benefits under the Arkansas Workers' Compensation Act.

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 December 13, 2007, and contained in a pre-hearing order filed December 14, 2007 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 while employed by respondent on October 11, 2007.

Specifically, I find that claimant has met his burden of rebutting the 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 injury.

4. Claimant is entitled to temporary total disability benefits beginning October 12, 2007, the day after his compensable injury, and continuing through November 5, 2007.

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

FACTUAL BACKGROUND

_____ The claimant is a 53-year-old man who began working for the respondent in August 2007. The respondent is a company which erects steel, primarily for commercial buildings. In October 2007 the respondent was erecting steel on a commercial building in Mountain Home. On October 11, 2007 claimant and other employees were "bridging". Bridging involves welding or bolting bar joists to a beam. In this particular incident, the bridge was approximately 14 feet off the ground.

Claimant testified that he was working on the last section of a piece of bridging that was butted up against the lip on a joist. Claimant testified that he stepped on the bridging and braced himself putting his weight on it. When the bridging held he started to walk across the bridging to get to the next section and it gave way. As a result, claimant fell to the ground and suffered multiple injuries. Claimant was taken by ambulance to St. John's Hospital in Springfield, Missouri, where he was admitted and discharged six days later on October 17. Claimant was diagnosed as suffering multiple right-sided rib fractures, a right hemothorax, a right pulmonary contusion, and lumbar transverse process fractures. Claimant was released to return to work by his treating physician on November 5, 2007, with a weight restriction of 60 pounds for four weeks. Claimant returned to work for respondent on November 6.

Claimant has filed this claim contending that he suffered a compensable injury while working for respondent on October 11, 2007. Respondent contends that claimant did not suffer a compensable injury because after the accident claimant took a drug test which returned positive for marijuana.

ADJUDICATION

_____ Claimant contends that he suffered a compensable injury when he fell approximately fourteen feet to the ground while working for the respondent on October 11, 2007. 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.

A.C.A. 11-9-102(4)(B)(iv)(a) and (b) indicate that compensable injuries do not include accidents which were substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order. The presence of those substances creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of those substances. Thus, if those substances are present, claimant has the burden of rebutting the presumption that these substances substantially

occasioned his accident.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has rebutted the presumption that his accident was substantially occasioned by the use of an illegal substance.

Following claimant's injury he was given a drug test and tested positive for marijuana, Benzodiazepine, and opiates. Claimant admitted having smoked marijuana approximately three days before the accident. However, claimant denied having smoked marijuana the night before or the day of his accident. Testifying at the hearing on claimant's behalf was James Marcotte and Scott Sexton. Marcotte was claimant's foreman and Sexton was a lead man when Marcotte was not present. Both Marcotte and Sexton were claimant's supervisors. Both of those individuals testified that they were around claimant that morning and had the opportunity to observe him. Both Marcotte and Sexton testified that they did not observe anything that would lead them to believe that claimant was impaired. In fact, Marcotte was sharing a hotel room in Mountain Home with claimant and he testified that on the morning before work he did not observe the claimant smoking marijuana or taking any type of drugs.

Most significant in this case is the way the accident occurred. As previously noted, the accident occurred when claimant stepped on a piece of bridging which had not been welded for the purpose of moving from one joist to another. The consensus among the witnesses, including the claimant, is that stepping on bridging which has not been welded is not the smart or safe way of working. However, the evidence indicates that this is a common practice among steel erectors.

Claimant admitted that stepping on the bridging was unsafe. However, he testified that he had observed other people stepping on unwelded bridging and that he was instructed to perform the job by stepping on the bridging.

Marcotte has worked as a foreman for the respondent since June 2007. Prior to

that time he worked for Northwest Arkansas Steel as a foreman for approximately 10 to 11 years. Thus, Marcotte has extensive experience in the steel erection business. Marcotte admitted that common sense would indicate that it is not safe to step on unwelded metal, but he also testified that such a practice is normal in the steel erection business.

Q. And I believe he stepped on something and it gave way; is that - -

A. He stepped on a piece of bridging, yes, and it slipped out. As far as I could tell, it slipped out and he fell.

Q. Is that an appropriate way or a way that it is done in your business?

A. On that particular job, that was the only way because there was no concrete down there and no way to get a lift below. Normally, when available, we put lifts below.

Q. Okay.

A. But we've been doing this for centuries and that's how it's done.

Q. So the way you'd like to do it is to be in a bucket, basically, that's lifted up high. Is that what you're saying?

A. No. I said that's one way of doing it.

Q. Okay.

A. I didn't say that's the way I like to do it.

Q. How do you like to do it?

A. I like to do it just the way we was doing it.

Q. Which is actually to stand on the bridging?

A. It's to sit on the bridging.

Q. Okay.

A. To sit on the joists, hold the bridging up, and weld it.

Q. That's the way you like to do it?

A. That's the way it's normally done in the construction world, yes.

Q. Is that the way that Bob, or Robert, was taught to do it?

A. Yes.

Q. Is that the way that the other members of the crew were doing it?

A. Yes, sir.

Q. Why did the bridging give way?

A. Man, I really don't have an answer to that. It's just a freak deal.

Q. Okay. If you were up there doing the bridging instead of Bob, would you have been doing it the same way?

A. Yes.

Q. All right.

A. It could have happened to any one of us, man, you know.

The testimony of Sexton was similar. Sexton, as previously noted, was a lead person who was a supervisor when Marcotte was not present. Sexton saw the accident as it occurred. He testified that he would have performed the job the same way as the claimant. He also indicated that although walking on bridging in this manner is not safe or smart, it is not uncommon.

JUDGE STEWART: Let me ask a question. So as I understand your testimony - - I want to make sure I understand this. Up until this point he took this step, he did his job the same way you would have done it?

THE WITNESS: Yes, sir.

JUDGE STEWART: But that step is not something you would have done; is that right?

THE WITNESS: Honestly, I would have made that step because I've made it before just to get the job done, you know. It's not something I would recommend and it's not something I would do every day, but I'm telling you that I have done it, you know. But I'm a lot smaller than he is, you know. It's not a safe practice.

It's a quick practice. It's a quick to get to A to B, you know, get the job done. It's not something I would ask some to do, and if I seen someone else do it, I would tell them not to do it.

JUDGE STEWART: But you've done it before?

THE WITNESS: Yes, I have. I'm not going to - - I'm under testimony. I have to tell the truth. I have done it before.

JUDGE STEWART: Well, I guess what I'm trying to ask is, and I think that's what this case may come down to, how common is that? I mean, is he the first person that's ever stepped on a bridging that was not welded like that, or is that common that it does happen, even though it's not the safest way for it to occur?

THE WITNESS: With Wil Shar, they keep that equipment on the job to keep you off of it. You know, in the past, you know, the guys that I started with, the old-timers, yes, they did do it, you know. But now, you know, there's so many more laws now with OSHA, things you can and cannot do, and so you try to be as safe as you can.

JUDGE STEWART: But irregardless of that, there are people that still do it?

THE WITNESS: Oh, yeah. There's still people that do it, yeah. I know for a fact that there's still guys out there doing it.

In my opinion, the testimony of Marcotte and Sexton regarding the practice of stepping on unwelded bridging is significant. As previously noted, all the parties in this case recognize that the practice of stepping on unwelded bridging is not smart or safe. However, this is not an uncommon practice in the steel erection business. Obviously there are other ways to move from one joist to another but they are time consuming and require more effort. In essence, stepping on the bridging is a shortcut. If the claimant in this case had done something that was not performed or rarely performed by other employees, then one could certainly argue that claimant's judgement was impaired by the use of an illegal

substance. However, the evidence in this case indicates that this was not an uncommon practice. In other words, while claimant did exercise poor judgement, I do not find that his judgement was the result of impairment caused by the use of an illegal substance but rather poor judgement resulting from his training and the expediency and ease of stepping on the bridging as opposed to taking a longer and more time consuming route. Accordingly, I find that claimant has rebutted the presumption that his accident was substantially occasioned by his use of an illegal substance. Here, claimant was simply following a procedure which was not uncommon in the steel erection business. Sexton testified that he would have performed the job the same way as the claimant on that date.

In support of its contention, respondent cites the decision in *Powell v. Advanced Environmental*, Full Commission Opinion filed January 2, 2008 (F606305). In that particular case, the claimant was injured when he stuck his hand into a machine without shutting the machine off. As a result of that accident the tips of claimant's left index and middle fingers were amputated. A drug screen was taken which revealed the presence of cocaine and morphine. In that particular case, the Commission found that claimant had not rebutted the presumption that the accident was substantially occasioned by the use of illegal drugs. However, in doing so, the Commission noted that the claimant in *Powell* had been trained to safely operate the machine in question. In this particular case, claimant testified that he was specifically trained and instructed to step on bridging in order to perform his job. Furthermore, in *Powell* there was no evidence that any other employees engaged in the practice of sticking their hands in a machine without shutting the machine off. In this case, there was evidence that claimant was not the only employee who stepped on unwelded bridging. Both Marcotte and Sexton specifically testified that while this practice was not considered safe, it was not an uncommon practice in the steel erection business. In my opinion, these facts distinguish the present case from the facts in *Powell*.

Having found that claimant has rebutted the statutory presumption that his injury

was substantially occasioned by the use of an illegal substance, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury. Claimant suffered multiple injuries including fractured ribs, a pulmonary contusion, and lumbar transverse process fractures as a result of the fall on October 11. Claimant was hospitalized for approximately six days as a result of this accident.

Based upon the evidence presented, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with respondent as a result of a specific incident identifiable by time and place of occurrence. I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that he has offered medical evidence supported by objective findings establishing an injury.

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

After claimant's hospitalization, he was released to return to work by his treating physician with a weight restriction of 60 pounds for four weeks on November 5, 2007. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages from the day after his injury until he was released by his treating physician to return to work on November 5, 2007. Accordingly, claimant is entitled to temporary total disability benefits beginning October 12, 2007, and continuing through November 5, 2007.

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 while employed by respondent on October 11, 2007. 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 October 12, 2007, and continuing through November 5, 2007. Respondent has controverted claimant's entitlement to all 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.

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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$556.75.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE