

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708525

BRENDA HUGHEY, EMPLOYEE	CLAIMANT
MCDONALDS 10146, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

**OPINION FILED MARCH 2, 2009**

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE MARK FREEMAN, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed July 1, 2008.

The Administrative Law Judge entered the following findings:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 23, 2008 (sic), and contained in a pre-hearing ordered filed October 24, 2008 (sic), are hereby accepted as fact.

2. The claimant has failed to meet her burden of proving by a preponderance of the evidence that marijuana did not substantially occasion her injury. Therefore, she has failed to prove that she suffered a compensable injury.

The claimant alleges that she sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and

conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion in this claim. After my de novo review of the entire record, I find that the claimant sustained a compensable injury, a broken elbow and back pain, on August 12, 2007 when she slipped and fell at work, that the treatment she received for the injury to her left elbow and lower back was reasonable and necessary and the responsibility of the respondents, that the claimant is entitled to temporary total disability benefits from August 13, 2007 to

December 13, 2007, and that the claimant's attorney is entitled to an attorney's fee on this controverted claim.

An injury is not compensable where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. Ark. Code Ann. Sec.

11-9-102(4)(B)(iv)(a). "The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). Once a positive drug test has shown the presence of illegal drugs after an accident, in this case marijuana, the burden shifts to the claimant to show that the drug use did not substantially occasion the injury. Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Arkansas Elec. Coop. v. Ramsey, 87 Ark. App. 254, 190 S.W.3d 287 (2004).

In Arkansas Elec. Coop., supra, the Court of Appeals affirmed the Commission's reliance upon the evidence of several witnesses that the claimant did not appear to be intoxicated on the date of the injury in support of its finding that the claimant's death was not substantially occasioned by the presence of any drug in his system.

The claimant tested positive for marijuana metabolites on the day after her work-related injury, and therefore the rebuttable presumption that the injury was substantially occasioned by the use of marijuana was triggered. Much attention has been given in this claim to the claimant's explanation of how she came to have the substance in her system, but the relevant issue is not how she came to have marijuana metabolites in her system. The relevant issue is whether that presence substantially occasioned her slip and fall. I find that the claimant successfully rebutted the presumption with the testimony of her mother, her supervisor and herself that she was not impaired on the date of the injury, that she did not appear to be under the influence of marijuana, that she successfully drove herself to work and performed her duties

the morning of the accident, that her workload was heavy that morning and that her supervisor had also slipped and fell in the same location despite being aware of the risk. Furthermore, the medical records do not reflect any observation on the part of her care givers that she was under the influence of any drug or that she appeared impaired.

Having found that the claimant has successfully rebutted the presumption, the question becomes whether the claimant's injury was compensable. For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of 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 (4) (D), establishing the injury; and (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. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

First, the parties stipulated that the claimant fell at work on August 12, 2007, satisfying the specific incident requirement. Second, the claimant credibly testified that one of her job responsibilities was to retrieve food items from the freezer and cooler throughout her shift, and that between five and nine a.m. she would go in and out of the freezer ten times. This testimony was corroborated by her supervisor, and there is no evidence to contradict it. The claimant credibly testified that at the time of the injury, she had entered the freezer to retrieve food items to be cooked and sold. I find that the claimant was performing employment services at the time of her injury, satisfying the "arising out of and in the course of employment" requirement. Third, the claimant presented proof that her slip and fall caused physical harm to her body. She credibly testified to the mechanism of injury, striking her elbow on the door as she fell and landed on her left side,

and the medical records from the date of injury show that the claimant suffered a broken elbow and back pain. Lastly, the injury to her elbow was established by objective evidence by the observation of swelling and x-rays showing the broken elbow. I find that the claimant has proven by a preponderance of the evidence that she suffered a compensable injury on August 12, 2007.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). There is no question that the emergency medical care and the care and surgery by Dr. Ricciardi was directly related to the compensable injury. I find that the treatment was reasonable and necessary and the responsibility of the respondents.

Temporary total disability is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing

the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant seeks temporary total disability benefits from August 13, 2007 until December 13, 2007 when she was released to work. Dr. Dougherty excused claimant from work on August 12, 2007, and she was not released to work until December 13, 2007 by Dr. Ricciardi with restrictions and an impairment rating. The claimant testified that, during that period, she was unable to work, she did not work, and she did not receive unemployment benefits. The claimant has proven that she is entitled to temporary total disability benefits from August 13, 2007 to December 13, 2007.

In conclusion, I find that the claimant has met her burden of proof by a preponderance of the evidence that she sustained a compensable injury on August 12, 2007, that the treatment she received for the injury to her left elbow and lower back was reasonable and necessary and the responsibility of the respondents, that the claimant is entitled to temporary total disability benefits from

August 13, 2007 to December 13, 2007, and that the claimant's attorney is entitled to an attorney's fee for his successful prosecution of the claim before the administrative law judge. For the aforementioned reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner