

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H101077

RODNEY R. CHEWEY, Employee

CLAIMANT

APPLE CREEK CONSTRUCTION, LLC, Uninsured Employer

RESPONDENT

OPINION FILED JUNE 24, 2021

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

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondent represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On May 19, 2021, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 31, 2021 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as 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 29, 2020.
3. Respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$650.00.

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

1. Compensability of injury to claimant's cervical and thoracic spine, left chest, sacrum and left hip on December 29, 2020.
2. Medical.
3. Temporary total disability benefits from December 30, 2020 through a date yet to be determined.
4. Attorney fee.

At the time of the hearing claimant amended the issues to include an injury to his left knee, and also clarified that he was requesting temporary total disability benefits from December 30, 2020 through March 13, 2021, and temporary partial disability benefits from March 14, 2021 through May 3, 2021.

The claimant contends that he was an employee of the uninsured employer at the time of his accidental fall on December 29, 2020, and that such accident and injuries arose out of and in the course of his employment. He sustained physical injuries to his neck, thoracic spine, chest, ribs, sacrum, left knee and left hip for which he has reasonably required medical services, and has been rendered temporarily totally disabled from December 30, 2020 through March 13, 2021, and temporarily partially disabled from March 14, 2021 through May 3, 2021. Finally, he contends that this claim has been controverted in its entirety and his attorney is entitled to the appropriate attorney's fee.

The respondent contends the claimant did not sustain an injury arising out of and in the course of his employment. Within this defense the respondent contends the claimant was intoxicated and that said intoxication was the substantial cause of his own injuries.

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 witness and to observe his 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 a pre-hearing conference conducted on March 31, 2021 and contained in a pre-hearing order filed that same date 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 left chest in the form of rib fractures and to his pelvic area in the form of a fracture of his left acetabulum. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his cervical or thoracic spine, or to his left knee.
3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injuries.
4. Claimant is entitled to payment of temporary total disability benefits beginning December 30, 2020 and continuing through March 9, 2021.
5. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 49-year-old high school graduate who has primarily performed construction work throughout his working life. Claimant began working for respondent in

February 2018 as a foreman. Claimant testified that his job duties included: “anything from remodels to a little plumbing here, electric there, whatever, you know. A little job pad, building decks, repairing decks. Just basically construction. Shingling, metal building.”

Claimant testified that on December 29, 2020 he went to the house of the respondent’s owner, Joseph Norsworthy, arriving at 7:00 a.m. and leaving at approximately 7:30. Claimant was instructed to determine the number of shingles needed for a job they were performing that day and to pick up those shingles at a location in Lowell. Claimant testified that the shingles could not be delivered and as a result he had the shingles loaded into the back of his truck. He then drove to Garfield where he ate lunch before driving to Sugar Creek, which is north of Pea Ridge, where they were performing some roofing work. Claimant testified that he arrived at approximately 12:00 p.m. and they proceeded to perform roofing work for approximately two hours. At approximately 2:00 p.m. the claimant went down his ladder in order to get a new blade for his knife to cut the roofing felt paper. Claimant described what occurred as follows:

I got the bottom and one gable end and then the bottom. And then once I got about five shingles up, enough space for Reno to be out of the way - - you know, I wasn’t in his way, I run the whole bottom strip, and then I turned the corner to run the gable end and I sat my ladder up.

And Reno had my knife, so I went up there without a knife and then I come back down and I found a knife. And I went up to cut the felt paper because it was sticking over the edge of the roof and the blade was just bad. It wouldn’t even cut it. So I climbed back down again and changed my blade, went back up and whenever I started cutting it, my ladder shifted and it went one way and I went the other and I couldn’t catch myself.

Claimant testified that he lost consciousness when he fell and that when he awoke he had excruciating pain. Reno, a co-employee, drove him home and claimant's wife in turn took claimant to the emergency room at Northwest Hospital, Bentonville.

Medical records from the emergency room dated December 29, 2020 indicate that claimant was diagnosed as suffering a non-displaced fracture of the left fourth, fifth ribs as well as mildly displaced fractures of the left sixth and seventh ribs. Claimant was also diagnosed as suffering from a minimally displaced fracture of the anterior wall, left acetabulum. Claimant was hospitalized until December 31, 2020.

Following the emergency room treatment, claimant came under the care of Dr. Michael Maline. In a report dated February 2, 2021, Dr. Maline noted that claimant was using a walker and taking oxycodone for pain. Dr. Maline indicated that claimant could progress with weight bearing as tolerated and diagnosed his condition as a fracture of the pelvis with routine healing.

On February 24, 2021, claimant was evaluated by Dr. Dougherty for low back pain and left knee pain. Dr. Dougherty gave claimant an injection in his left knee and prescribed physical therapy. Dr. Dougherty diagnosed claimant's condition as a tear of the medial meniscus of the left knee.

Claimant's final visit with Dr. Maline occurred on March 9, 2021, at which time he indicated that claimant could return to work with respect to his pelvis with a lifting restriction of no more than 25 pounds. He further noted that claimant should continue to receive follow-up treatment with Dr. Dougherty with respect to his back.

In a report dated March 31, 2021, Dr. Dougherty noted that MRI scans of the claimant's lumbar, thoracic and cervical spine showed only disc degeneration and he

noted that claimant's pain was not explained by those findings. As a result, Dr. Dougherty ordered blood work to determine whether claimant suffered from rheumatoid arthritis. In a report dated April 12, 2021, Dr. Dougherty noted that claimant's pain was not explained by the lab work and he indicated that claimant would be tested for COVID to determine whether it would explain some of his symptoms.

Claimant has filed this claim contending that he suffered various injuries to his body as a result of the fall from a ladder on December 29, 2020. He seeks payment of medical treatment as well as temporary total or temporary partial disability benefits as well as a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered various injuries to his body as a result of falling from a ladder on December 29, 2020. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

In response to the claimant's contention, respondent has raised the presence of alcohol as an issue. A.C.A. §11-9-102(4) provides, in pertinent part:

(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]...

(B) “Compensable injury” does not include:

(iv(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of 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.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee’s body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs used in contravention of the physician’s orders did not substantially occasion the injury or accident.

Here, this statute is applicable because claimant testified that when he went to Garfield at 11:30 and ate lunch, he drank two 12-ounce beers that he had brought from home. After drinking those beers, claimant then drove to the work site and proceeded to work for approximately two hours before he fell from the ladder at approximately 2:00 p.m. Claimant’s admission that he drank alcohol two hours before his accident establishes the presence of alcohol at the time of the accident, and creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol. The question in this case is whether claimant has overcome the rebuttable presumption. The question of whether a rebuttable presumption is overcome is a question of fact for

the Commission to determine. *Ester v. National Home Centers, Inc.*, 335 Ark. 356, 981 S.W. 2d 91 (1998). I find that claimant has overcome the rebuttable presumption. First, as previously noted, claimant had two beers approximately two hours before he fell. Claimant testified that he had been up and down the ladders an estimated 12 to 15 times before he actually fell. Claimant also testified that due to the nature of the area, the ladder was on unlevel ground and he was forced to use blocks to level up the ladder. I also note that there is no indication in the emergency room records that claimant was intoxicated or suffering from any lack of judgement. To the contrary, the emergency room record indicates that claimant was alert and oriented to person, place, time and situation and that normal speech was observed. After consideration of this evidence, I find that claimant has overcome the rebuttable presumption and find that his accident was not substantially occasioned by the use of alcohol.

Having found that claimant's accident was not substantially occasioned by the use of alcohol, the issue of a compensable injury to various body parts as claimed by the claimant is at issue. First, I find that claimant has met his burden of proving by a preponderance of the evidence that his fall from the ladder arose out of and in the course of his employment with the respondent. Claimant was performing roofing work for the respondent when he fell from the ladder on December 29, 2020. I also find that his injury was caused by a specific incident identifiable by time and place of occurrence.

The claimant has alleged that he has suffered injuries to various body parts as a result of the fall on December 29, 2020. I find that claimant has proven by a preponderance of the evidence that he suffered compensable injuries which caused internal or external harm to the body which required medical services or resulted in

disability and that he has offered objective findings establishing an injury in the form of injuries to his left chest and his pelvic area.

Shortly after the claimant's fall he was taken to the emergency room by his wife. Claimant underwent diagnostic testing which revealed fractures of four ribs as well as a fracture of the anterior wall of the left acetabulum. Following claimant's hospitalization he continued to receive treatment from Dr. Maline for the fracture of his pelvis until he was released by Dr. Maline on March 9, 2021. Accordingly, based on the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left chest in the form of rib fractures and to his pelvis in the form of a fracture.

I do not find that claimant has proven by a preponderance of the evidence that he suffered any other compensable injuries as a result of the fall on December 29, 2020.

First, I do note that claimant underwent a CT scan of his cervical spine at the emergency room which did show straightening of the normal cervical lordosis. That finding is an objective finding. However, claimant did not receive any additional medical treatment for his cervical spine at that time. Claimant did come under the care of Dr. Dougherty for various back complaints involving his cervical, thoracic and lumbar spine. However, according to Dr. Dougherty's medical report of March 31, 2021, MRI scans of the claimant's lumbar, thoracic and cervical spine showed disc degeneration and he indicated that claimant's pain was not explained by the MRI findings. As a result, Dr. Dougherty ordered blood work to determine whether claimant suffered from rheumatoid arthritis. In his report of April 12, 2021, Dr. Dougherty indicated that claimant's blood work also did not explain claimant's symptoms and he recommended that claimant be tested

for COVID to determine whether it would explain claimant's symptoms.

In short, I do not find that claimant has met his burden of proving by a preponderance of the evidence that he suffered any compensable injury to his cervical or thoracic spine as a result of the December 29, 2020 fall. Based upon the medical opinion of Dr. Dougherty, it appears that claimant's complaints are related to some other condition.

Finally, I note that claimant contends that he suffered a compensable injury to his left knee as a result of the December 29 fall. The first mention of any left knee complaints is Dr. Dougherty's report of February 24, 2021. This is almost two months after the claimant's fall. Notably, the initial emergency room report does not mention any complaints of left knee pain. Furthermore, claimant's musculoskeletal exam from his emergency room visit states:

He is able to flex and extend ankle and toes without difficulty as well as his knee. (Emphasis added.)

While Dr. Dougherty has diagnosed claimant as suffering from a medial meniscus tear of the left knee, I find that claimant has failed to prove by a preponderance of the evidence that any left knee complaints are causally related to the December 29, 2020 fall.

In summary, claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left chest in the form of rib fractures and to his pelvic area. Claimant has failed to prove by a preponderance of the evidence that he suffered any other compensable injuries as a result of the December 29, 2020 accident.

Respondent is liable for payment of all reasonable and necessary treatment

provided in connection with claimant's compensable injuries.

The final issue for consideration involves claimant's contention that he is entitled to temporary total disability benefits or temporary partial disability benefits. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered 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 for his rib fractures and specifically for his pelvic fracture until he was released by Dr. Maline on March 9, 2021. On that date, Dr. Maline indicated that claimant could return to work with lifting no more than 25 pounds. I find based upon the evidence that prior to that date claimant remained within his healing period and that he suffered a total incapacity to earn wages.

Subsequent to March 9, 2021, claimant was under the care of Dr. Dougherty for his left knee as well as his back complaints. For reasons previously discussed, claimant has failed to prove by a preponderance of the evidence that those were compensable injuries. Therefore, claimant would not be entitled to either temporary total or temporary partial disability benefits while undergoing that treatment.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left chest in the form of rib fractures and to his pelvic area in the form of a fracture as a result of a work-related fall from a ladder on December 29, 2020. Claimant has failed to prove by a preponderance of the evidence

that he suffered compensable injuries to his cervical or thoracic spine or left knee as a result of that fall. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injuries. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning December 30, 2020 and continuing through March 9, 2021.

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 and without discount.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$275.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE