

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H401302

SEAN P. HOGAN, Employee	CLAIMANT
KRAMER & COMPANY MECHANICAL, Employer	RESPONDENT
AMTRUST NORTH AMERICA, Carrier/TPA	RESPONDENT

OPINION FILED JULY 16, 2024

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

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 19, 2024, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 24, 2024 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 employe/employer/carrier relationship existed among the parties on February 8, 2024.
3. The claimant was earning an average weekly wage of \$1,350.00 which would entitle him to compensation at the weekly rates of \$876.00 for total disability benefits and

\$657.00 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 head, left elbow, left forearm, and left hand on February 8, 2024.
2. Related medical.
3. Temporary total disability benefits from date last paid through April 11, 2024.
4. Attorney's fee.

At the time of the hearing claimant noted that no compensation benefits had been paid in this claim; therefore, he is requesting temporary total disability benefits from the date of the injury through April 11, 2024, the date he returned to work for respondent.

The claimant contends he suffered compensable injuries to his head, left elbow, left forearm, and left hand on February 8, 2024. He contends he is entitled to temporary total disability benefits, medical, and an attorney's fee. Claimant reserves all other issues.

The respondents contend the claimant fell off a ladder on February 8, 2024. He underwent a drug screen that confirmed the presence of THC due to marijuana use. Under A.C.A. §11-9-102, the claimant cannot overcome the presumption that the injury was caused by drug use. The claimant did return to work on April 11, 2024 at regular duty.

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 a pre-hearing conference conducted on April 24, 2024 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 upper extremity and his head on February 8, 2024.

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 February 9, 2024 and continuing through April 10, 2024.

5. Claimant's attorney is entitled to a controverted attorney fee on all unpaid indemnity benefits.

FACTUAL BACKGROUND

Claimant is a 49-year-old man who began performing HVAC work for respondent in 2021. On February 8, 2024, he was on a ladder working on a piece of return duct that was going through a brick wall in a restaurant. While performing this activity claimant fell off his ladder, breaking his arm and hitting his head. Claimant testified that he momentarily lost consciousness and upon waking he was taken to the emergency room at Northwest Medical Center in Springdale by Matt, his supervisor.

At the emergency room claimant underwent a procedure to set his broken arm which was then placed in a splint. The discharge diagnosis indicates that claimant was

diagnosed with a closed extra-articulated fracture of distal end of left radius; closed non-displaced fracture of the left frontal skull; closed traumatic minimally displaced fracture of the distal end of the left ulna; lamina papyracea fracture; and nasal bone fracture. While at the hospital claimant underwent a urine test which was positive for THC.

Claimant subsequently came under the care of Dr. Henley who recommended surgery with metal hardware to treat claimant's arm fracture. This surgery was performed by Dr. Henley on February 22, 2024. On March 25, 2024, Dr. Henley indicated that claimant could return to work without restrictions in 10 days and claimant returned to work for respondent on April 11, 2024.

Claimant has filed this claim contending that he suffered a compensable injury to his head, left elbow, left forearm, and left hand on February 8, 2024. He requests payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

### ADJUDICATION

Claimant contends that he suffered a compensable injury to his head, left elbow, left forearm, and left hand when he fell off a ladder on February 8, 2024. Claimant's claim is for a specific injury identifiable by time and place of occurrence. 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.

While receiving medical treatment at the emergency room on February 8, claimant underwent a urine drug screen test and according to the toxicology report the test was positive for THC (marijuana). As a result, respondent contends that claimant's claim for compensation benefits is barred by the provisions set forth in A.C.A. §11-9-102(4)(B)(iv) which provides:

(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 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.

(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 utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

It is undisputed that claimant tested positive for marijuana metabolites in the

emergency room immediately after his accident. Therefore, a rebuttable presumption has been created pursuant to Arkansas workers' compensation law that the injury was substantially occasioned by the use of illegal drugs or prescription drugs used in contravention of a physician's orders. The burden of proof requires claimant to prove that the accident was not substantially occasioned by the use of marijuana.

At the hearing claimant did not deny his use of marijuana, but contends that he has a medical marijuana card which he uses for pain associated with a prior accident involving his back, head, and neck. Claimant testified that he only uses marijuana in the evening and normally takes only one or two puffs. He testified that the marijuana does not intoxicate him, and that when he wakes up the next morning he does not feel any effects of the marijuana he smoked the night before.

Also testifying at the hearing was Sherry King, claimant's mother, who testified that she and claimant lived together and that claimant normally takes one or two puffs in the evening some two or three days a week. She also testified that she had not observed claimant being intoxicated from marijuana.

Specifically, with respect to the fall on February 8, 2024, claimant testified that he probably smoked marijuana the night before his fall. He also testified that he was not affected by marijuana on the date of the accident and that he did not use marijuana in the morning before going to work and has never used it on the job.

In support of his contention that the injury was not substantially occasioned by his use of marijuana, claimant has offered the testimony of Bryan Mendoza who also works for respondent as an HVAC technician. Mendoza testified that on February 8 he had been working in close proximity with claimant for five or six hours before claimant fell from

the ladder. Mendoza testified that he was working within a couple of feet of claimant during this period of time and that he did not notice anything unusual about claimant's behavior or think that claimant was engaging in risky behavior. Mendoza testified that he did not see the claimant fall, but did see claimant as he was falling.

Also testifying at the hearing was Michael Kramer. Kramer and his wife are co-owners of the respondent. Kramer testified that while on a ladder you were not supposed to lean from one side to the other more than two or three feet and that you are supposed to keep your body within the frame of the ladder itself and if you cannot reach something you are supposed to move the ladder. Nevertheless, Kramer also admitted that at times he had used poor judgement and had simply gotten lucky with respect to falling off a ladder:

You know, I was blessed with pretty good balance, I guess, so I always kind of knew I had that, but you know you take that for granted. But I would say probably every once in a while, anyone who is good at their job has probably cheated it. I am one of the fortunate ones that has never gotten hurt from it. But like I said, I am sure I have cheated it myself.

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THE COURT: You said you had cheated, but got lucky in the past. What you meant was you leaned out further than you really should have, but hadn't fallen over?

A. Yes. And I mean I have never even come close. But, yes, I have. I mean I am from the field.

Based upon the foregoing evidence, I find that claimant has overcome the presumption that his injury was substantially occasioned by the use of marijuana. As previously noted, claimant testified that he only took one or two puffs of marijuana at night

for pain. He testified that this did not cause him to become intoxicated and that he did not feel any effects of marijuana the following morning. Likewise, claimant's mother also testified that claimant only took one or two puffs per evening, and that this occurred only two or three evenings per week. With respect to February 8 in particular, claimant testified that while he had probably smoked marijuana the night before his fall, he also testified that he was not affected by it on the date of the accident and that he had not used it in the morning and had never used it on the job. More importantly, Bryan Mendoza, a co-worker of the claimant who worked in close proximity with claimant for some five to six hours that day testified that he did not notice anything unusual about the claimant's behavior or notice that claimant was engaging in risky behavior. Finally, even according to Michael Kramer, one of the co-owners of the respondent, he has been lucky in the past in cheating while leaning out over a ladder but fortunately had not been hurt. Based on the foregoing evidence, particularly the testimony of the claimant, his mother, Mendoza, and Kramer, whose testimony I find to be credible, I find that claimant has rebutted the presumption that his injury or accident was substantially occasioned by the use of marijuana. Therefore, it is not a bar to his claim.

I do find that claimant has satisfied the remaining elements of compensability. Specifically, I find that claimant has met his burden of proving that his injury arose out of and in the course of his employment with respondent and that it was caused by a specific incident identifiable by time and place of occurrence. Here, there is no question that while performing HVAC work for the respondent claimant fell off a ladder on February 8, 2024. I also find that claimant's injury caused internal harm to his body that required medical services or resulted in disability and that he has offered medical evidence supported by



objective findings. Testing at the emergency room in the form of a CT scan of claimant's brain and head revealed a fracture and bruising to claimant's forehead was noted as well as blood from his nose. Finally, radiographic testing revealed a fractured left forearm which resulted in the arm being set and placed in a sling. Claimant subsequently underwent surgery by Dr. Henley to repair the arm fracture with the installation of metal hardware. This surgery occurred on February 22, 2024.

Accordingly, 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 upper extremity including his forearm, wrist, and hand as well as to his head on February 8.

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

The final issue for consideration involves claimant's request for temporary total disability benefits. The injury to claimant's left arm is a scheduled injury. An employee who has suffered a scheduled injury is entitled to receive temporary total disability benefits during their healing period or until they return to work regardless of whether they are totally incapacitated from earning wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). Here, claimant did not return to work the day after his fall and did not return to work for respondent until April 11, 2024, after he was released by Dr. Henley. Accordingly, I find that claimant is entitled to temporary total disability benefits beginning February 9, 2024, and continuing through April 10, 2024.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that

he suffered a compensable injury to his left upper extremity including his forearm, wrist, and hand. He also suffered a compensable injury to his head. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injuries. Claimant is entitled to temporary total disability benefits beginning February 9, 2024 and continuing through April 10, 2024.

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.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$532.45.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE