

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. H002850**

**JAMES HOOD, EMPLOYEE**

**CLAIMANT**

**vs.**

**NORFORK GENERAL INDUSTRIES INC,  
EMPLOYER**

**RESPONDENT**

**CINCINNATI INSURANCE, INC.,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED JUNE 14, 2022**

Hearing before Administrative Law Judge, James D. Kennedy, on the 18<sup>th</sup> day of May, 2022, in Mountain Home, Baxter County, Arkansas.

Claimant is represented by Mr. Frederick S. "Rick" Spencer, Attorney-at-Law, Mountain Home, Arkansas.

Respondents are represented by Ms. Lauren A. Spencer, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted on the 18<sup>th</sup> day of May, 2022, to determine the issues of compensability for an alleged work-related injury to the claimant's right heel and foot and attorney fees, with all other issues reserved. The parties stipulated at the time of the hearing that the claimant earned an average weekly wage of \$663.00 with a temporary total disability rate of \$442.00 per week. A copy of the Prehearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim and that an employer/employee relationship existed on April 21, 2020, the date of the claimed injury in question. There was no objection to these stipulations and the Prehearing Order was admitted.

The claimant contended he sustained a compensable injury to his right heel and foot while performing employment services for the respondent employer and that he was not under the influence of any illegal substance which caused or contributed to the accident.

The respondents contended compensability for any injury the claimant may have sustained was barred under Ark. Code Ann. §11-9-102(B)(iv) because the accident was substantially occasioned by the use of illegal drugs.

The claimant's and respondent's contentions are all set out in their respective responses to the prehearing questionnaire and made a part of the record without objection. The witnesses consisted of Kenny Tyrone, the claimant's supervisor at the time of the injury and who was still employed by the respondents at the time of the hearing, and James Hood, the claimant. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on April 21, 2020, the date of the claimed injury. At the time, the claimant earned an average weekly wage of \$663.00 a week, sufficient for a temporary total disability rate of \$442.00 per week.
3. That the claimant satisfied the burden of proof to overcome the rebuttable presumption of Ark. Code Ann. §11-9-102(4)(B)(iv).
4. That the claimant has satisfied the burden of proof, by a preponderance of the evidence, that he suffered a compensable right heel and foot injury on May 21, 2020.

5. The claimant is entitled to attorney fees pursuant to Ark. Code Ann. §11-9-715. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809.
6. That all other issues are reserved.
7. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

### **REVIEW OF TESTIMONY AND EVIDENCE**

The Prehearing Order along with the prehearing questionnaires of the parties were admitted into the record without objection. The claimant submitted two (2) exhibits that were admitted without objection: (1) Photos of the accident scene; and (2) Medical Records. The respondents also submitted medical records along with a report by Doctor Henry Simmons, Jr., which were admitted into the record without objection. In addition, respondents also submitted a transcript of claimant's recorded statement and his response to interrogatories that were admitted into the record without objection.

The first witness to testify was Kenny Tyrone, who was working for respondent, Norfolk General Industries, at the time of the accident and was the claimant's supervisor. He testified he had been working with the claimant for about ten (10) years and during that time, there was never any evidence of the claimant being intoxicated. He further stated that the claimant was a good worker. (Tr.8) Mr. Tyrone had worked for the respondents for nineteen (19) years and was still working there. At the time of the accident, they were loading a semi-truck with a shipping container going to Guam. He stated they were using a pallet jack to load the box and, "I guess maybe there was too much weight in the box and it was pressing down on the forks of the pallet jack. And it was one of the last ones to go into the trailer, and James gave it the old heave-ho and it popped loose, and out of the back he went." He probably fell four and a half to five feet.

(Tr.9-10) Mr. Tyrone stated that he had temporarily left the trailer to get a camera, because they were required to take a picture of the loads shipped, and as he was coming back around the corner on his return, the claimant had just hit the ground. He also stated that the work-place was not that big and he had been around the claimant all day, when the accident happened about 2:00 o'clock or so. Mr. Tyrone agreed the claimant did not show by his actions or his speech that he was intoxicated. (Tr.12-13)

In regard to smelling marijuana smoke, he testified, "You know, it's like I said, it's not a big place. You wouldn't be able to really smoke marijuana without everybody knowing it, and the kids down at the school, you know, it'd be smelly." In regard to the claimant possibly being impaired, he stated, "He was the same old James. The only thing was he might have been in a hurry, you know, cause it was getting close towards the end of the day and we had to get this truck out." (Tr.14)

Under cross-examination, Mr. Tyrone admitted he did not have any certification or training in drug recognition. He also admitted they had a handbook and he believed they had a policy against coming to work with alcohol or drugs in the system. (Tr.15) He agreed that the claimant was at the very back of the trailer and that although he would not encourage an employee to stand there at the edge of an open trailer, he might do it. (Tr.16)

On re-direct, Mr. Tyrone stated the claimant told him to call 9-1-1 after his fall from the trailer. The "boss man" John Davis, the owner of the company, came out and looked at the claimant. Mr. Tyrone admitted he had been around people who were intoxicated, and he did not think that it required any expertise to determine if someone was intoxicated or drunk. (Tr.19)

The claimant was then called to the witness stand. He testified that he had never been intoxicated at work for the ten (10) years or so that he had worked there. (Tr.21) He denied that

he smoked pot before or during work, but admitted he had a marijuana card, which helped with his arthritis. He had worked as a roofer for fifteen (15) years prior to working for the respondent, where he carried shingles weighing over one hundred (100) pounds up and down ladders. (Tr.22) The claimant admitted he used marijuana to help him sleep but that he did not feel intoxicated when he woke up. As a forty-four (44) year old, he admitted to using marijuana for a long time. (Tr.23)

In regard to the accident, the claimant testified that he realized that he was coming out of the trailer as well as the two hundred (200) pound pallet jack and he tried to jump out and do a 180, but he did not get his left foot stuck out to catch his weight and his right heel caught all of the weight. (Tr.26) He had surgery the day after the accident and was off work for about four (4) months and received \$844.00 a week until September 8<sup>th</sup>, a period of a little over four (4) months, when the doctor stated that he needed to go back to work. The claimant denied being intoxicated at the time of the injury. (Tr.27) He admitted to using marijuana nearly every night prior to going to bed. (Tr.28)

Under cross-examination, the claimant admitted he did not have a medical marijuana card at the time of the accident and that he had obtained one in February of last year. His diagnosis for the card was irretractable pain. He felt that he had arthritis for a long time but had just been diagnosed a year ago. He admitted the marijuana he smoked the night before the work-related incident was not from a licensed dispensary. (Tr.29) He also admitted that he was familiar with the policy of his employer against having drugs in his system. (Tr.30)

In regard to smoking tobacco, the claimant denied that he smoked it and stated his medical record was incorrect in regard to smoking tobacco every day. He also stated he did not drink and denied drinking the three to five (3-5) beers a week, which was in a medical record.

He went on to state that he had not drank in years. He admitted that he had used marijuana for thirty (30) years, more or less. (Tr.32)

The claimants first exhibit consisted of thirty-four (34) pages of medical records. The records provided that the claimant presented to Baxter County Regional by ambulance on April 21, 2020, for a right ankle injury. The report provided that the claimant had fallen out of the back of the trailer and that he was alert and oriented. (Cl.Ex.1, PP. 1-7) The Baxter Regional Medical Center Admission Summary provided that the patient presents following a fall an hour ago, where he fell out of a truck bed onto his right heel, stating that all of the weight came down on the heel. He denied the use of tobacco and alcohol and was alert, with his pupils equal, round, and reactive to light. The report provided for a comminuted fragmented distracted posterior calcaneus fracture, and a marginal extension into the calcaneus/posterior talus junction, with the tarsal bones and ankle joint otherwise spared normal. (Cl.Ex.1, PP. 8-16) The final report of the same date provided that the claimant was alert, with mild distress. (Cl.Ex.1, PP. 17-20) A lab report dated June 16, 2020, in regard to urine collected on April 21, 2020, provided a drug abuse screen that was negative for all substances, with the exception of marijuana which had a positive test. (Cl.Ex.1,PP.21-22) The claimant presented to Doctor Russ Rauls, with the report dated April 22, 2020. The report provided the claimant had fallen out of a truck while at work the day before and recommended a CRPP of a light Calcaneus Fracture. (Cl.Ex.1,PP.23-24) The claimant was admitted for surgery on April 23, 2020, for a closed reduction and a percutaneous pinning of the lower extremity. (Cl.Ex.1,PP.25-31) A follow up occurred on May 27, 2020, which provided for a boot walker, and for the claimant being off work for another four (4) weeks. (Cl.Ex.1,PP.32-33) A return to work slip was issued for the date of

June 24, 2020. (Cl.Ex.1,P.34) The claimant's second exhibit consisted of photos of the accident scene that corresponded to the testimony of the two (2) witnesses.

Respondents also submitted the Laboratory Report that was collected on April 21, 2020, as mentioned above, which was positive for marijuana and negative for all other substances. (Resp.Ex.1) In addition, the respondents submitted a medical report by Dr. Henry Simmons dated September 1, 2019, that provided that he was a toxicologist and physician who served as the medical director for the Arkansas Poison and Drug Information Center and also the medical director for the Evidence Based Prescription Drug Program at U.A.M.S. He stated that he had provided the report at the request of one of the attorneys for the respondents, after reviewing the claimant's medical records at Baxter Regional Medical Center, claimant's recorded statement of August 12, 2020, the Medtox Laboratory Report of April 21, 2020, (mentioned above), the Norfolk General Industries Drug Policy, a review of part of Ark. Code Ann. §11-9-102, and technical literature for the purpose of advising respondents attorney if "one can exclude that Mr. Hood's (claimant) accident was substantially occasioned by the use of drugs without medical supervision." "In brief, one cannot do so within reasonable medical certainty or probability."

Under impression, Doctor Simmons opined that several things about urine drug testing must be kept in mind. "It's a technique designed to identify substance abusers, not a test for impairment like a field sobriety test." "Mr. Hood's isolated test result does support the conclusion that he was under the influence of marijuana at the time of the accident at work." He goes on to state that although residual subtle impairments last as long as twenty-four (24) hours after the last use of marijuana have been demonstrated with special testing, the bulk of the acute effects would be expected to have dissipated within the last use. "In summary, one cannot exclude

within reasonable medical and toxicological certainty or probability that Mr. Hood (claimant) was under the influence of marijuana at the time of the injury, and that it caused or contributed to the accident.” (Resp.Ex.2, PP. 1-12)

Respondents non-medical evidence consisted of a transcript of claimant’s recorded statement, dated May 1, 2020, where the claimant provided that he was injured while loading a truck, and the pallet jack got stuck, and he was attempting to “yank” the pallet jack and lost his balance and fell out of the truck landing on one foot. He denied ever having a previous workers’ compensation claim and using alcohol, but admitted to smoking marijuana after hours. (Resp.Ex.3, PP.1-7) The claimant’s response to interrogatories dated February 8, 2021, were also made part of the record. The claimant again admitted to the use of marijuana the night before the injury. (Resp.Ex.3, PP.8-24)

### **DISCUSSION AND ADJUDICATION OF ISSUES**

In regard to the primary issue of compensability, the claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to compensation benefits for the injury of his right heel and foot under the Arkansas Workers’ Compensation Law. In determining whether the claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704. *Wade v. Mr. Cavanaugh’s*, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. *Weldon v. Pierce Brothers Construction Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

From the testimony and the medical reports, there is little to no disagreement that the claimant fell off the back of a trailer while attempting to dislodge a pallet jack and suffered injuries to his right heel and foot which required surgery.



A compensable injury must be established by medical evidence supported by objective findings and medical opinions addressing compensability and must be stated within a degree of medical certainty. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Liaromatis v. Baxter County Regional Hospital*, 95 Ark. App. 296, 236 S.W.3d 524 (2006). More specifically, to prove a compensable injury, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that 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, as defined in Ark. Code Ann. §11-9-102 (16) establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. If the claimant fails to establish any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). In the present matter, the testimony of the claimant and his supervisor, as well as the medical records from Baxter Regional Medical Center the day of the incident, and medical records of the surgery following the incident, satisfied these requirements.

However, the ultimate issue that must be determined in the present matter is the application of Ark. Code Ann. §11-9-102 (B) (iv) as raised by the respondents. Ark. Code Ann. §11-9-102 provides, in pertinent part:

(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 proven, by a preponderance of the evidence, that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's order did not substantially occasion the injury or accident.

Ark. Code Ann. §11-9-102(4)(B)(iv) governs the compensability of the claimant's injury under the facts of this case. Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Woodal v. Hunnicut Construction*, 340 Ark. 377, 12 S.W.3d 630 (2000). Here, the claimant admitted to using marijuana at night for approximately thirty (30) years. He did not deny this fact when he gave a telephone interview nor in his response to interrogatories propounded by the respondent. The lab report at Baxter Regional Medical Center confirmed the claimant's use of the drug.

However with that said, the claimant denied ever smoking marijuana at work or the morning of work and denied that his marijuana use the evening before had any effect on his work. That a claimant's testimony is self-serving is not, for that reason alone, insufficient to support a finding in his or her favor. *Brantley v. Tyson Foods, Inc.*, 48 Ark. App. 27, 31, 887

S.W. 2d 543, 545 (1994). More importantly, in the present matter, the claimant's supervisor, who still was employed by the respondent at the time of the hearing, and who testified that he had worked with the claimant for approximately ten (10) years, testified the claimant did not show by his actions or his speech that he was intoxicated. Based upon the claimant's own testimony and the testimony of the supervisor, the claimant had been reporting to work for the last ten (10) years after smoking marijuana the evening before, and no one had ever made a comment about his abilities or intoxication. There had never been a previous workers' compensation claim. Additionally, the supervisor stated that the work area was relatively small and smoking marijuana at work and keeping it a secret would have been difficult. There was no testimony to rebut the testimony of the supervisor. The report from Baxter County Regional Ambulance and from Baxter County Regional Hospital provided that the claimant was alert and oriented and his pupils were equal, round, reactive to light. No report mentioned that the claimant was unresponsive or that he appeared to be intoxicated, an issue that is commonly observed in an emergency room.

The report by Doctor Henry F. Simmons, a toxicologist and physician, opined several things about urine drug testing that must be kept in mind. One of the points he provided about urine drug testing was as follows: "It is a technique designed to identify substance abuse, not a test for impairment like a field sobriety test."

The claimant admitted to using marijuana for approximately thirty (30) years. The supervisor who had worked with the claimant for approximately ten (10) years and was consequently familiar with his actions, stated the claimant did not show that he was impaired or intoxicated. Additionally, the ambulance crew and the emergency room personal made no mention of intoxication. Based upon the above evidence, there is no alternative but to find that the claimant has successfully satisfied the burden of proof to rebut the presumption that the

work-related injury of April 20, 2020, was substantially occasioned by the use of illegal drugs. Consequently, the claimant has satisfied the burden of proof, by a preponderance of the evidence, that he suffered a compensable right heel and foot injury on May 21, 2020.

The claimant and his attorney are entitled to the appropriate legal fees as spelled out in Ark. Code Ann. §11-9-715.

After weighing the evidence impartially, without giving the benefit of the doubt to either party, it is found that the claimant has satisfied his burden of proof that his claim for the injury to his right heel and foot is compensable. The claimant is also entitled to attorney fees as spelled by the Arkansas Workers' Compensation Act. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith. All other issues are reserved.

IT IS SO ORDERED.

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JAMES D. KENNEDY  
Administrative Law Judge